Abortion Politics and the Rise of Movement Jurists

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This Article employs the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization *and litigation in its wake as the jumping off point to reconsider the connections between judges, the Constitution, and social movements. That movements influence constitutional law, and that judicial pronouncements in turn are reshaped by politics, is well-established. But, while these accounts of legal change depend upon judges to embrace movement ideas, less has been written about the conditions under which judicial entrenchment can be expected to take place. There may, in fact, be different types of judicial dispositions towards external political phenomena.*

In this Article, we focus on one type of judge ascendant in the current constitutional moment: the movement jurist. Although movement judges are not new, they are more visible and influential today than in recent years. In fact, identifying this kind of figure — who is already shaped by movement beliefs or shares social experiences making such a person open to non-establishment constitutional perspectives — has emerged as a potent

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supplement to older methods of entrenching mobilized legal knowledge and political beliefs. By peering behind the Dobbs *decision and offering fresh context, we present a new set of analytical terminology for understanding the touchpoints between law, institutions, and politics. Along the way, we offer a corrective to what are often uncritical calls for more movement jurists.*

Judging involves its own institutional imperatives and purposes, many of which are at odds with social activism. There are reasons why we might want judges under certain circumstances to pay attention to movements, and we discuss what some of those institution-enhancing and constitution-interpreting reasons might be. But there are risks as well. Movement judges need not be committed to any particular vision of justice or democracy or even interpretive methodology — as Dobbs *plainly shows, it is more accurate to identify movement judges by their constitutional politics and social networks rather than by party affiliation.*

We describe the characteristics of movement judges so their legal output can be evaluated with this crucial context in mind. Adopting a historical and institutional perspective, we point to some benefits that can come from having the occasional movement figure join the judiciary. But we also offer some words of caution about corresponding tradeoffs when too many movement figures appear within a single organization like the Supreme Court.

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PRELUDE

The influence of social movements on the Constitution has inspired a rich body of interdisciplinary scholarship. Some academics have focused on a President's management of relationships with social movements, noting that, until recently, institutional proximity has been seen as risky.[1] Other scholars have studied how constitutional law incorporates both claims made by movements and compromises forged in conflicts between them. Recently, some scholars have suggested that judges should more deliberately strengthen their bonds to grassroots movements. For example, Brandon Hasbrouck has defended the need for "movement judges" who would "seek consensus for decisions that protect marginalized communities and affirm democratic principles, relying on a variety of jurisprudential bases from equitable principles to critical originalism."[2] Amna Akbar, Sameer Ashar, and Jocelyn Simonson likewise defend the idea of "movement law," a jurisprudential project that addresses "the increasingly clear failures of neoliberal law and politics and the surge of social movement activity and grassroots organizing."[3] And while he has some reservations as to whether judges

[1] *See, e.g.*, SIDNEY M. MILKIS & DANIEL J. TICHENOR, RIVALRY AND REFORM: PRESIDENTS, SOCIAL MOVEMENTS, AND THE TRANSFORMATION OF AMERICAN POLITICS 6-7 (2019) (tracing recent historical developments that "made modern presidents a more prominent and regular target of insurgents and, in turn, gave the White House fresh incentives to stay on top of potent social movements"). While FDR kept civil rights leaders at arm's length, Truman took a major step toward closer ties with movement figures when he delivered a major speech on June 29, 1947, on civil rights at the Lincoln Memorial, standing next to the president of the NAACP. DAVID MCCULLOUGH, TRUMAN 569-70 (1992). Today, more presidents and even some judges give speeches before advocacy groups.

[2] Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 635 (2022).

[3] Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 847-48 (2021). To the extent that such efforts are grounded in robust conceptions of democracy and praxis, they are interested in studies "with social movements" rather than "of social movements." *Id.* at 825. We are after the latter: an

can be true allies of social movements, Dan Farbman has called for a vision of adjudication in which "judges in particular can be participants, allies, and fellow-travelers in movements demanding fundamental changes to the legal order."[4] It is a given in such accounts that judges are influenced by movements, but those writing in this vein contend that judges *should* understand themselves to be part of a movement project, one, as Hasbrouck writes, to "realize the abolitionist and democracy-affirming potential of the Constitution."[5]

A careful historical reading of *Dobbs* reveals it to be the work of movement judges — albeit not the kind that progressives and abolitionists would prefer. We think it better to start descriptively with a thinner conception of movement judging that can capture more of what is going on within the constitutional order. Once we do so, we also believe that consideration of conservative movement efforts to capture institutions like the presidency or the federal judiciary will help to complicate how we understand judicial proximity to movements is cultivated and whether movement jurists are a good idea for the constitutional order.

The *Dobbs* Court, of course, proclaims its distance from popular politics and social movements.[6] Writing for the majority, Justice Alito suggests that the *Dobbs* decision simply delivers what "the Constitution and the rule of law demand."[7] In his own concurring opinion, Justice Kavanaugh promises that, despite everything the average person knows

account of social movement dynamics in relation to formal apparatuses of power capacious enough to explain mobilizations on the Left and Right. Arriving at analytic terminology useful for our purposes requires definitions of movements, law, and judging that are initially less judgmental and ideologically thin as to these phenomena in order to capture more of what is taking place in the empirical world.

[4] Daniel Farbman, *Judicial Solidarity?*, 33 YALE J.L. & HUMANS. 1, 4 (2022).

[5] Hasbrouck, *supra* note 2, at 631-35 ("The movement judge must critique precedent and champion the dismantling of oppressive regimes for a better and just society."); *see also* Matthew Clair, *Getting Judges on the Side of Abolition*, BOS. REV. (July 1, 2020), https://www.bostonreview.net/articles/matthew-clair-getting-judges-side-abolition/ [https://perma.cc/H8XK-V6PX] (urging trial judges to "reduce police power through an abolitionist approach to court norms around policing — or, the way court officials interpret Fourth Amendment jurisprudence").

[6] *See infra* notes 7–8 and accompanying text.

[7] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

about judicial politics, the Court has been nothing but "scrupulously neutral."[8]

The Court's protestations aside, we think it is important to read *Dobbs* as a movement decision. Although movement judges of all stripes have been around long before *Roe* was reversed, conditions increasingly favor the consolidation of authority by movement judges. But that consolidation of factional power, even as it remains contested inside the institution and controversial outside of it, is obscured by the Justices' presentation of themselves and the practice of constitutional law as if both exist outside of politics. The appearance of detachment is also being manipulated to marginalize interpretive methodologies that embrace center-left activism and intellectual development.

We think something more complicated is (and has been) actually going on. In the past, the Supreme Court has engaged in what Reva Siegel and Robert Post call "democratic constitutionalism," picking up and often modifying middle-ground solutions that emerge from movement conflict while taking into account a majoritarian trend.[9] One of us has called this the "facilitative" approach to interpreting the Constitution.[10] While Justices may have aligned with movements or drawn on their arguments in the past, majoritarian preferences and electoral considerations have usually served as external constraints on the pace and sweep of constitutional change created by the Court.[11]

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[8] *Id.* at 2305 (Kavanaugh, J., concurring).

[9] *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379-85 (2007); *see also* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192-93 (2008) [hereinafter *Dead or Alive*] (exploring how Supreme Court decisions once "respect[ed] claims and compromises forged in social movement conflict").

[10] For an account of how legal disputes can lead to fresh convergences of constitutional language, see ROBERT L. TSAI, ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE 144-45 (2008) (adjudication as facilitation entails, among other things, "[h]armonizing popular discourses; [b]uilding a people's political vocabulary; [m]anaging and nurturing a society's organizing beliefs; and [e]nabling others to speak on behalf of the people's interests" (formatting altered from original)).

[11] *See* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE, at ix-xii (2012) [hereinafter FROM THE CLOSET TO THE ALTAR]; Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598-99 (2003) ("[O]ur system is one of popular constitutionalism, in that judicial interpretations of the Constitution reflect popular will over time.").

Given the enhanced power of movement jurists on the Court due to shifts within the two dominant national political parties and the emergence of social networks committed to transformative legal change, it is no longer clear that these traditional constraints (i.e., popular opinion and party disciplinary practices) will be effective.[12] The conditions have never been better for a marked increase in the number of movement judges making fundamental law, but we ought to think twice about why this might become the new normal and whether, on balance, it is a good thing.

Far from adopting any sort of compromise involving principle and popular sentiment, the Court's decision in *Dobbs* eschews the bargain struck in *Planned Parenthood v. Casey* and insists that both *Roe* and *Casey* were "egregiously wrong" — as poorly reasoned as the Court's anticanonical decision in *Plessy v. Ferguson*.[13] Any such compromises, Justice Alito's opinion tells us, are to be made purely by political actors and not judges.[14] Our point, of course, is that even such an outcome can reflect a particular way of facilitating political sentiment by endorsing some mobilized ideas and not others, and aiding some movements at the expense of others.

Thus, for our purposes, *Dobbs* presents a historical narrative that relies exclusively upon scholars aligned with the antiabortion movement, erasing the complexities of that history and the extent of its contestation — while denying that the decision is doing any such thing. *Dobbs* cites scholars aligned with the antiabortion movement and

[12] Hollis-Brusky uses the term, "political epistemic network" to describe the communities forged by conservative lawyers and judges "bound together by a shared set of normative and principled beliefs, shared causal beliefs, shared notions of validity, and a common policy enterprise, who actively work to translate these beliefs into policy." AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 10 (2015).

[13] On canon and anti-canon, see J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 963-975 (1998); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 379-425 (2011); Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 B.U. L. REV. 1083, 1083-1108 (2014); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 243-53 (1998).

[14] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (explaining that authority to regulate abortion must reside with "the people and their elected representatives").

consistently echoes arguments long made by antiabortion lawyers and activists.[15] *Dobbs* also not only seeks to declare a winner in the nation's conflict over reproductive rights and justice; the opinion attempts to foreclose future constitutional debate about abortion, rejecting sex-equality arguments that were not fully briefed by either party to the case and proclaiming the views of only one movement as consistent with a neutral reading of the Constitution.[16]

In context, it is also explicitly an anti-majoritarian ruling, both unpopular[17] and willfully uninterested in the degree to which its vision of women as citizens within the constitutional order aligns with contemporary practices or enjoys popular support.[18] In our view, *Dobbs* is a movement decision authored and supported by movement jurists.

By making sense of *Dobbs* through judicial politics over abortion, we offer a corrective to what are often unrestrained calls for more movement jurists. Judging involves its own institutional imperatives and purposes, some of which stand in tension with social activism. And movement judges need not be committed to a specific vision of justice or democracy. For this and other reasons, we think it best to identify movement judges by their out-of-court relationships, mindset, and habits of speech rather than by the party that appointed them, judicial philosophy,[19] or interpretive methodology alone.

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[15] Throughout this Article, we use the terms "antiabortion" and "pro-life" interchangeably. We do so to convey that we are interested in a holistic account of the constitutional process, one where political and legal actors contest the very meaning of "life," "liberty," and "equality."

[16] *See Dobbs*, 142 S. Ct. at 2245-46 (explaining that any equal protection argument is "squarely foreclosed by . . . precedents").

[17] *See* Philip Bump, *Overturning Roe Is Unpopular — and Viewed as Largely Political*, WASH. POST (June 27, 2022, 10:46 AM EDT), https://www.washingtonpost.com/politics/2022/06/27/overturning-roe-is-unpopular-and-viewed-largely-political/ [https://perma.cc/QZ34-T8PB]; *Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade*, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/ [https://perma.cc/6ZTD-R4RM].

[18] *See Dobbs*, 142 S. Ct. at 2276-79.

[19] For accounts of judicial decision-making that emphasize the role of ideology, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 433 (2002) ("What matters is that justices' ideology directly influences their decisions."); Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth,

We employ the transformation of abortion jurisprudence as a historical case study for understanding movement judges. After the Court defied expectations in *Casey* by preserving abortion rights, appointees with certain signifiers, such as Sandra Day O'Connor's support from Republican insiders, were no longer considered a reliable indicator without more evidence of other characteristics, such as ties to grassroots organizations, a grievance against elite institutions, and evidence of willingness to buck popular views.[20] Many of these are indicators of a jurist's likely "ideological receptivity" to movement arguments. We call this last trait — a willingness to put on blinders and ignore appeals to polls or consequentialist arguments about the effects of unpopular decisions — "imperviousness to backlash."

Part I of this Article proposes a definition of movement judges, using the *Dobbs* decision as an entry point into understanding what makes this approach to judging distinctive. We describe the characteristics of movement judges so their work can be evaluated with this crucial context in mind. Part II uses the years between *Roe* and *Dobbs* to historicize the project of identifying and elevating movement judges. Part III takes our inquiry in a normative direction, offering a way to evaluate both the benefits and drawbacks of movement judging.

Recognizing the rise of movement jurists helps us to understand how *Dobbs* happened. In our view, the decision represents the endorsement of movement ideology, goals, methods, and rhetoric by Justice Alito, himself an interesting wrinkle on movement judges as a phenomenon. Making sense of the ascendancy of movement judges in today's constitutional landscape contributes to broader debates about whether progressive rights-claiming should center on courts or on elected officials. It also raises questions about just how many resources should be put into political control of judges and how much into structural reforms that could reduce the power of judges in key respects. Finally, taking the phenomenon of movement judging seriously allows us a glimpse at what the world might look like with more movement jurists on the bench, something we should consider with eyes wide open.

Ideological Values and the Votes of U.S. Supreme Court Justices Revisited, 57 J. POL. 812, 812-816 (1995) (finding a correlation between judicial ideology and votes cast).

[20] *See infra* Part II.B.

I. WHAT IS A MOVEMENT JURIST?

A. A Definition

A social movement emerges when people "try to exert power by contentious means" and their efforts have matured to the point that they are "backed by well-structured social networks and galvanized by culturally resonant, action-oriented symbols."[21] While both social movements and political parties are forms of social organization, movements differ from parties in at least two major respects: (1) mission: a movement pursues broad-based cultural or legal changes in society, while a party seeks to amass formal power to govern through elections; (2) tactics: a movement may contemplate extra-legal and non-electoral approaches while parties are focused on creating durable coalitions.[22] While a movement and party might seek to form an alliance of convenience, each will seek to prevent the other from dictating priorities. At times, a movement has even anchored a new party or redefined an existing one.[23]

Every social movement is contingent and unique, and can be organized around a single issue or several.[24] Some, like the Black civil rights movement or the feminist movement(s), achieved national scope,[25] while others, like the Populist movement, enjoyed only regional

[21] SIDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 6 (2011).

[22] DANIEL SCHLOZMAN, WHEN MOVEMENTS ANCHOR PARTIES: ELECTORAL ALIGNMENTS IN AMERICAN HISTORY 4-7 (2015) (explaining the differences between movements and parties while noting that "[m]ovements for fundamental change in American society seek influence through alliance, by serving as anchoring groups to sympathetic parties").

[23] *Id.* at 3-15, 39-64 (explaining the transformational influence of the "durable partnerships of organized labor and the Democrats, or the Christian Right and the Republicans").

[24] What makes a social movement distinct from some other form of social organization is at least four characteristics: (1) spontaneous and collective insurgency; (2) group consciousness rooted in a sense of shared injustice; (3) some structure to mobilize resources; and (4) an ideology "that provides a vision of the future." HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960–1972, at 19 (1992).

[25] On the history of the Black civil rights movements and its impact on the law's development, see 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 5-36 (2014); TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65 (1998);

success (the Midwest and the South).[26] Even among national movements, some, like the reproductive rights movement or gay rights movement, have very defined legal goals, such as the codification of reproductive autonomy and equality in constitutions or judicial precedent, or the reversal of bans on same-sex marriage, or the passage of protections for sexual identity.[27] Movements can penetrate parts of the populace fairly deeply and broadly — as the antiabortion movement has among a committed minority in parts of the United States[28] — or remain mostly an elite phenomenon, like the conservative legal movement.[29]

By the same token, every judge is different, coming to the bench with their own formative political and professional experiences. Of course, judges are not blank slates. At times, a particular judge has become fond of a particular movement, and we focus on those instances of apparent

MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 123, 164-69 (2004) [hereinafter FROM JIM CROW TO CIVIL RIGHTS]; KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION, at xi-22 (2021).

[26] *See* RICHARD HOFSTADTER, THE AGE OF REFORM 1-28 (1955); NICHOLAS F. JACOBS & SIDNEY M. MILKIS, WHAT HAPPENED TO THE VITAL CENTER? PRESIDENTIALISM, POPULIST REVOLT, AND THE FRACTURING OF AMERICA 1-37 (2022).

[27] JO BECKER, FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY 437-43 (2014); Elizabeth Sepper & Deborah Dinner, *Shared Histories: The Feminist and Gay Liberation Movements for Freedom in Public*, 54 U. RICH. L. REV. 759, 764-90 (2020); Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 105-43 (2019).

[28] The pro-life movement in the early 1970s was overwhelmingly Catholic and divided on economic as well as social issues. By the 1980s, Protestants, especially conservative evangelicals, flocked to the antiabortion cause, opening the door to an alliance between the GOP and the antiabortion movement and empowering those activists in the movement who already held conservative preferences. Daniel K. Williams, *The Partisan Trajectory of the American Pro-Life Movement: How a Liberal Catholic Campaign Became a Conservative Evangelical Cause*, 6 RELIGIONS 451, 451-53 (2015).

[29] One might note that it's possible to engage in the work of academic originalism without participating in explicitly political activities. This is true, but the fact that different roles might exist within a movement does not undercut its existence. We believe that the conservative legal movement possesses sufficient ideological coherence, political organization, and cross-pollination to warrant labeling it as an intellectual movement. HOLLIS-BRUSKY, *supra* note 12, at 1-9; ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 2-12 (2008); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 265-82 (2008).

institutional and rhetorical proximity between jurist and movement.[30] For the moment, we defer consideration of the normative questions we think are most important to the emergence of movement judges. At this stage, our analysis is primarily descriptive, in an effort to get an accurate read on the rise of movement judging as a distinctive phenomenon within the American constitutional order.

Let's start with a working definition: a movement jurist is someone who is socially embedded in movement-aligned networks outside of the formal legal system and is willing to use a judge's tools of the trade in the service of a movement's goals.[31] Those tools encompass constitutional interpretation, statutory interpretation, and the creation and enforcement of procedural rules. The movement judge employs these tools to ease the path of success for a movement with which he or she may be sympathetic or to create legal impediments that raise the costs of advocacy by a movement's political enemies. Such a jurist need not fulfill this movement-enhancing function all of the time, or even perform this task successfully to qualify as a movement ally. Nor must a judge openly affiliate with a particular movement before it is possible to say they are building legal infrastructure desired by grassroots figures. We think it is possible for someone to be consistently sympathetic toward movement figures, ideas, or goals even when judges do not

[30] Empirical research has shown that background experiences, including a judge's social identity, powerfully drive outcomes. *See, e.g.*, Lee Epstein & Jack Knight, *How Social Identity and Social Diversity Affect Judging*, 35 LEIDEN J. INT'L L. 897, 899 (2022) (exploring how judges' "social identity (gender, race, nationality, and so on) tends to generate results in line with in-group bias: the tendency of individuals to favour members of their own group over outsiders"); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 J.L. & POL'Y 133, 181 (2009) ("Measurement of judicial ideology on an individualized basis may also be indispensable to successful empirical work when ideology has a subtle, nonlinear, or otherwise complex impact on outcomes."). Ours is a behavioral approach, though we do not yet offer a systematic one. We do invite systematic investigations of how movement judging differs from other forms of judicial decision-making.

[31] Judges who interpret fundamental law are not like academic theorists who might strive for coherence and consistency in all they do. Instead, judges use permissible methods instrumentally within existing webs of political and historical meaning.

perceive themselves as movement aligned and deny they are movement influenced.[32]

We define a movement judge by reference to a decisionmaker's apparent sense of role, their proximity to particular movements, and their rhetorical strategies rather than according to interpretive methodology or outcomes alone. The major reason is that no interpretive approach yields uniquely movement outcomes and few, if any judges can be ideologically consistent for their entire career when operating within a multi-member institution (rather than, say, writing as a solo academic). If anything, a movement judge is someone who prizes alignment with a movement's interests above other considerations, even methodological consistency or philosophical coherence. Such a figure, we predict, would use whatever persuasive methods are available at a particular historical moment to arrive at outcomes that are beneficial to a preferred movement.

For instance, a movement judge from the liberal side of the spectrum will employ living constitutionalism arguments of one sort or another but will also tend to apply precedent — especially Warren Court cases — expansively. And a liberal movement judge will also occasionally author or join opinions that employ tradition, especially where those arguments are potent and historical precedent is plentiful (e.g., the right of counsel or to a jury).[33] But the tricky thing is that a *non*-movement judge who falls on the liberal side of the spectrum will make similar kinds of moves.[34] By the same token, a conservative movement judge will

[32] We do not try to establish firm boundaries here when it comes to intentionality and identity. We expect every judge to assert their independence and neutrality (a move that is crucial to the exercise of judicial authority, see PAUL W. KAHN, THE REIGN OF LAW 1-22 (1997)), but think that what judges say must be evaluated along with what they do as evidence of their natural sympathy or hostility toward particular movements. For now, many, though not all, of our examples involve modern jurists who intentionally associate with movements on the Left and Right.

[33] A good example is *Gideon v. Wainwright*, 372 U.S. 335 (1963), which declared that the Fourteenth Amendment required the state to afford an indigent person the assistance of counsel in criminal proceedings. There, Justice Douglas, who became increasingly receptive to movement arguments, joined the opinion of Justice Black, a reliable New Deal partisan judge, in overruling *Betts v. Brady* and returning to "the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested." *Id.* at 345.

[34] Justice Sutherland, the author of *Powell v. Alabama*, 287 U.S. 45 (1932), was no one's vision of a movement jurist. In *Powell*, he assessed relevant history before

certainly favor traditionalism or originalism as interpretive methods, and read text in ways that tend to benefit movement goals. But they will also exploit precedent that might favor movement ends.[35] At the same time, because non-movement judges (liberal or conservative) will sometimes use the same constitutional arguments that movement judges do, it is not possible to detect who movement judges are through methodology alone.

The chief trait we associate with movement judging — which we term "ideological receptivity" to a particular movement's arguments and goals — is more than just a willingness to give all litigants a fair and polite hearing. Rather, it is a demonstrated openness to entrenching a movement's substantive understanding of what the Constitution means. In doing so, a movement judge will deploy legal rationales strategically. For instance, a conservative movement jurist will tend to read certain rights language broadly (say, the First and Second Amendments) when doing so empowers social movement advocacy on behalf of religious rights and gun rights.[36] Other times, these jurists will

declaring that "in at least twelve of the thirteen colonies . . . the right to counsel [was] fully recognized in all criminal prosecutions," *id.* at 64-65.

[35] Some lower court judges have pushed *Dobbs* into other contexts, raising the possibility that they may be engaged in movement-aligned adjudication. For instance, in *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1224, 1229 (11th Cir. 2023), Judge Lagoa, a Trump appointee to the Eleventh Circuit, cited *Dobbs* to reject a substantive constitutional right to gender-affirming care and sex-based discrimination argument. To reach a complete assessment as to whether Lagoa is a reliable movement jurist, we would need to know more because opposition to such medical care is both a priority of the GOP and some grassroots movements.

[36] Justice Thomas has done various movements that prioritize individual guns rights an enormous favor by purporting to rely on precedent but remaking the doctrinal infrastructure of *Heller* so that progressive gun regulations will not be sustained by judges unless policymakers can identify an analogous form of regulation at the time of the Fourteenth Amendment's ratification or earlier. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2125-34 (2022). A panel of Fifth Circuit judges, including Trump appointee James Ho, has drawn on *Bruen* to strike down a federal law that disarms individuals convicted of domestic violence. United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023). Ho has held various leadership positions within the Federalist Society and served as a volunteer attorney for the First Liberty Institute, a Texas-based nonprofit that litigates issues popular with the religious right. *See* Abbie VanSickle, *Abortion Pill Appeal to Be Heard by One of Nation's Most Conservative Courts*, N.Y. TIMES

read rights narrowly to block disfavored movements from protecting equality expansively (say, the Fourteenth Amendment's Equal Protection and Due Process Clauses or existing civil rights laws).[37] A liberal movement judge might read the Fourteenth Amendment capaciously, while favoring strict textualism in construing the Second Amendment.

A second defining trait of the movement jurist, one that is closely connected to ideological receptivity, is what we call "imperviousness to backlash." Reflecting some anxiety that porousness to one movement's goals and ways of thinking puts pressure on the rule of law, the tendency is to deny that this is taking place or to ritually reaffirm the boundary between law and politics. This attitude can show up, as it did in *Dobbs*, through jurists putting on blinders and ignoring appeals to contrary historical or political developments,[38] but it can also take the form of rejecting the relevance of consequentialist arguments.[39] Because movement judges are among the most ideologically committed of jurists, they will tend to insist that other sorts of considerations — such as appeals to stability or neutrality or institutionalism — are secondary.[40] It is common enough for judges to juxtapose political or

(May 16, 2023), https://www.nytimes.com/2023/05/16/us/politics/abortion-pill-fifth-circuit-appeals.html [https://perma.cc/XXL2-786L].

[37] Judge Lagoa had previously expressed opposition to any reading of Title IX that departed from "biological sex" and rejected the reasoning of *Bostock*. Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 809-10 (11th Cir. 2022). This we would also expect of a movement jurist.

[38] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2254-56, 2260 (2022) (relying on views of Hale, Coke, and existence of some early abortion regulations to assert that "by 1868 the vast majority of States criminalized abortion at all stages of pregnancy," and rejecting broad historical trends or historical arguments that take into account the nuances in those laws as well as legislative motives behind them).

[39] *See id.* at 2277 (refusing to assess the "effect of the abortion right on society and in particular on the lives of women," once required in the *Casey* plurality and subsequent cases).

[40] Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("In my view, if the Court encounters a decision that is demonstrably erroneous — i.e., one that is not a permissible interpretation of the text — the Court should correct the error, regardless of whether other factors support overruling the precedent."); *cf.* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 26-27 (1994).

institutionalist concerns with fidelity to interpretive method, but we mean to tease out a difference between the ordinary principle-based rhetoric typically used by non-movement jurists and the more anti-elite discourse and rallying effect we see in the language tactics of movement jurists. For a dramatic example of this sort of rhetoric, consider Justice Alito's 2020 speech at the annual meeting of the Federalist Society.[41] At the end of his talk, he warned against "bullying the court" through threats to restructure the Supreme Court, characterizing such reform efforts as anti-democratic and elitist.[42]

Justice Alito then told a story about a justice from an apex court in another country who "looked out the window, and saw a tank pull up and point it's [sic] gun toward the court."[43] Without noting differences in degree or context, Alito likened domestic criticisms of judicial review in the United States to the overt threats of violence faced by judges in other countries.[44] Alito then valorized "judges who [are] fearless in their dedication to principle," citing only Justice Scalia, a movement hero. Judges "cannot compromise principle or rationalize any departure from what they are obligated to do," he told the crowd.[45] The import was clear: doing the work of movement judging, consistently and without regard

[41] Principle under violence, or the threat of violence, is a classic movement trope. It is intended to steel the spine of grassroots figures against the wave of anticipated criticism of their efforts, a reminder to treat it as evidence of their righteousness. For instance, in Patrick Buchanan's famous oration at the 1992 GOP convention, he described a great "religious war going on in this country . . . a culture war . . . for the soul of America." He then invited the listeners to think of themselves like the troopers who restored order in South Los Angeles during the Rodney King riot, urging them to "take back our cities, and take back our culture, and take back our country." Patrick J. Buchanan, Former White House Commc'n Dir., Address to the Republican National Convention (Aug. 17, 1992), https://www.presidency.ucsb.edu/documents/address-the-republican-national-convention-houston [https://perma.cc/5CGQ-6HSR] (speech transcript).

[42] Samuel Alito, Assoc. Justice of the U.S. Sup. Ct., Address to the Federalist Society (Nov. 12, 2020), https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society [https://perma.cc/RMX9-MRNJ] [hereinafter Address to the Federalist Society] (speech transcript).

[43] *Id.*

[44] *Id.*

[45] *Id.*

to public denunciations or legislative criticism was both what the movement expected and what a good judge would provide.

Alito's remarks mirrored those made years earlier by Justice Thomas: "If you think you are right, there is nothing wrong with being the only one."[46] Thomas explained that he tried to instill this sense of one person against the masses in his own law clerks by showing them the movie *The Fountainhead*.[47] Based on a novel by Ayn Rand, the film extols the virtues of Objectivism.[48] Like the main character, Howard Roark, an architect described as someone who "stood alone against the men of his time," Justice Thomas said that he had "no problem being the only one."[49] This statement is telling as to his mindset: it wasn't enough to have the right values and methods — one had to become an immovable force for what is good. And what is good is often what key organizations associated with the conservative movement and grassroots conservatives believe. In fact, Justice Thomas has referred to those who support his work on the Court as "regular people" and "[our] angels."[50] At an event organized by the Manhattan Institute, American Enterprise Institute, and Hoover Institute, he struck a decidedly populist tone and insisted that "it was always us against the elites."[51]

We distinguish the movement judge, who is essentially a crusader, from three other kinds of judges based on mindset and orientation to

[46] David G. Savage, *Clarence Thomas Is His Own Man*, L.A. TIMES (July 3, 2011, 12:00 AM PDT), https://www.latimes.com/archives/la-xpm-2011-jul-02-la-na-clarence-thomas-20110703-story.html [https://perma.cc/RJ59-E3UZ].

[47] *Id.*

[48] Objectivism is a closed-system of thought that extols man as a heroic being and holds that an individual acts morally by pursuing reason and self-interest. On objectivism, see Jennifer Burns, *Was Ayn Rand Randian? She Couldn't Shrug Off Her Emotions*, WASH. POST, https://www.washingtonpost.com/wp-srv/special/opinions/outlook/whats-in-a-name/rand.html (last visited Nov. 16, 2023, 9:00 AM PST) [https://perma.cc/MH6D-VEU5].

[49] Savage, *supra* note 46; *see also* Burns, *supra* note 48.

[50] CREATED EQUAL: CLARENCE THOMAS IN HIS OWN WORDS (Manifold Productions 2020), https://subslikescript.com/movie/Created_Equal_Clarence_Thomas_in_His_Own_Words-10256238 [https://perma.cc/6HQ5-5CNU] (film transcript).

[51] *Justice Clarence Thomas on Racial Inequality and the Supreme Court*, C-SPAN (May 14, 2022), https://www.c-span.org/video/?c5015491/user-clip-justice-clarence-thomas-thomas-weaponized-leftist-political-disputes [https://perma.cc/HKR8-27T2].

the political world: the technocrat,[52] the preservationist,[53] and the partisan.[54] We offer these visions of judging as another set of criteria for evaluating the practice of adjudication. Indeed, we believe that the movement-aligned jurist behaves in ways that cut across other categories of analysis, such as formalism versus realism. A movement judge's rulings would be more or less formalistic depending on how doing so would serve movement needs or values.

The technocrat tends to value expertise and will prefer to associate with, and lean upon, others who possess relevant knowledge.[55] A technocrat will recoil from notions of loyalty and purity associated with a movement mindset and required to remain in good standing with such a community. The preservationist will care about safeguarding the reputation of the Court and tend to resist the more sweeping legal

[52] *See generally* FRANK FISCHER, TECHNOCRACY AND THE POLITICS OF EXPERTISE (1990) (offering a critique of the technocratic project).

[53] Other scholars have used the term "preservationist," so we want to clarify how we use it. Bruce Ackerman has described the Supreme Court as preservationist in nature, but his model of judging not only describes how he thinks judges actually behave, but also insists that judges must test the principles pressed by mobilized citizens at certain moments of higher lawmaking, synthesizing those major principles. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 10, 60-64, 72-86 (1991). James Fleming, too, has recently noted that some judges may be preservationist and others, "counterrevolutionary." JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS 39, 69 (2022). Our account of the preservationist judge is broader than Ackerman's and closer to Fleming's. Unlike both their accounts, however, our account is not tied to a single normative vision of adjudication. What we stress instead is that characterizations of juristic behavior as preservationist or counterrevolutionary are not fixed, but rather depend entirely upon a movement's orientation toward a body of law at a particular moment in time. Hence, while current conservative movement judges seem counterrevolutionary, in the 1930s progressive jurists were seen by many defenders of legal order as counterrevolutionary.

[54] These are ideal types of judging based on empirical observations. Most judges vacillate between these modes from dispute to dispute, depending on the degree of political salience of an issue, its importance to a movement, and a jurist's sense of identity.

[55] *See, e.g.*, CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990) (advancing a theory of judicial review of administrative decisions that promotes "sound governance"). Jurists inclined toward technocracy include Benjamin Cardozo and Stephen Breyer.

changes favored by a movement.[56] Finally, the partisan is most keenly interested in the needs of their political party and open to consequentialist appeals about how rulings would help or hamper the party's efforts. Certain long-term goals of the partisan and the crusader may align, while short-term goals may diverge sharply.[57]

Of the four types of judges, the crusader is closest to the partisan and furthest away from the technocrat.[58] The technocrat and the preservationist look askance at the movement jurist, fearing that open consideration of mobilized values will destroy empirically-based judgments and orderly processes and therefore impair the function of institutions.[59] By contrast, the movement judge will treat the technocrat

[56] Consider Chief Justice Roberts' dramatic decision to join the liberals in repudiating the Trump administration's effort to add a U.S. citizenship question to the census, which reflected preservationist instincts and went against clear partisan benefits to his party. *See* Robert L. Tsai, *Equality Is a Brokered Idea*, 88 GEO. WASH. L. REV. ARGUENDO 1 (2020) (analyzing Dep't of Com. v. New York, 139 S. Ct. 2551 (2019)). The plan to undercount or refuse to count undocumented immigrants was strongly favored by nativist movements. As Chief, Roberts toggles between partisan, preservationist, and movement approaches to judging.

[57] MILKIS & TICHENOR, *supra* note 1, at 10-11. We think intellectual movements, such as legal realism, operate in different ways than social movements. From an external perspective there certainly are orientations and approaches that, on the broadest level, might be shared. On the other hand, many intellectual trends lack sufficiently well-defined goals and resources aimed at disciplining adherents. We therefore think that intellectual movements do most of their work in the background of judicial reasoning, and act in less concrete ways upon the mind of a judge than a social movement, whose ideology and associations are typically stronger and better defined. The latter will press particularistic views, expect specific outcomes from adherents, and police its membership. How intellectual influences and the concrete demands of a particular movement actually affect each judge will depend on how the person relates to these competing identities and belief systems. On certain issues, there may be general alignment between intellectual influences and movement demands. At other times and with different issues, they may pull in different directions.

[58] It might be possible to break down the category of movement judges even further and recognize different kinds of movement judges, say those with a more doctrinaire or severe approach and those who are more flexible in key respects. For now, we will decline the invitation, presented in thoughtful correspondence by Dan Farbman, to one side and focus on the key traits we think all movement judges share.

[59] *See, e.g.*, FRANK FISCHER, DEMOCRACY AND EXPERTISE 176 (2009) (describing "technocratic form of consciousness" in which "knowledge . . . is seen to supply the only solid basis for solutions to many of our economic and social problems"); Cass R.

as an elitist and the preservationist as a ditherer, seeing both as impediments to legal transformation.[60] The crusader will be most open to value-based justifications and most suspicious of existing arcs of historical and institutional development. Yet out of necessity, even the movement judge usually must find ways to build alliances with others.

We think the original decision in *Roe* yokes together technocracy and "preservationism." Hewing closely to existing privacy precedent at the time, Justice Harry Blackmun sought to carve out a domain in which a doctor's medical expertise and private family decisions could be made relatively free from politics.[61] *Roe* also cabined the state's legitimate interests in part by describing early abortion laws as regulating "abortion as a medical procedure" once "hazardous" for women, noting that "[m]odern medical techniques have altered this situation."[62]

The Court deliberately framed *Roe* as a decision designed to lower the political temperature.[63] Blackmun noted "the sensitive and emotional nature of the abortion controversy" but promised that the Court would "resolve the issue by constitutional measurement, free of emotion and of predilection."[64] *Roe* did not venture out beyond material in a handful of constitutional privacy precedents or represent itself as a great achievement of moral philosophy.[65] Instead, Blackmun sought to

Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579, 580 (2014) (describing technocratic decision-making as performing a "cooling function": "Under favorable conditions, technocrats inform and discipline politicians and their constituents by clarifying the stakes").

[60] Such an attitude can be detected in Justice Thomas's impatience at legal rulings that tried to manage competing societal concerns and remain faithful to existing doctrine when it came to abortion. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents."); Box v. Planned Parenthood, 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring) ("Although the Court declines to wade into these issues today, we cannot avoid them forever.").

[61] *See* Roe v. Wade, 410 U.S. 113, 148-52, 153-54 (1973).

[62] *Id.* at 148-49.

[63] *See id.* at 116-18.

[64] *Id.* at 116.

[65] *See id.* at 152-53.

legitimize the Court's ruling by relying on the views of the medical profession.[66]

Together with this technocratic approach, the Court at times evinced a clear hostility to movement arguments. Blackmun rejected the position taken by civil libertarian and feminist amici that "the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."[67] There was also nothing akin to what feminists outside the courts were saying at the time about reproductive freedom — no powerful articulation of the values of autonomy or equality.[68] If anything, the Court made a point of juxtaposing its conception of abortion rights to the ones emerging in movement politics (even if movement-countermovement dialogue shaped the ruling less directly). The Court was even more skeptical of arguments for fetal personhood circulating in the antiabortion movement.[69] While abortion opponents treated the question of personhood as a matter of biological intent or original public meaning,[70] the *Roe* Court focused almost entirely on constitutional text and consequentialist concerns in rejecting the claim that the Fourteenth Amendment guaranteed fetal rights.[71]

That *Roe* was not the work of movement judges hardly meant that scholars — or movements — would view the decision as legitimate. As historians have documented (including one of us),[72] reaction to *Roe* was

[66] *See id.* at 166 ("The abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.").

[67] *Id.* at 153.

[68] For an overview of these arguments, see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 823-38 (2007).

[69] *See Roe*, 410 U.S. at 156-59.

[70] *See* Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 869-75 (2014).

[71] As Justice Blackmun put it, "[n]one" of the Constitution's many uses of the word "person" indicates "with any assurance, that it has any possible prenatal application." *Roe*, 410 U.S. at 157.

[72] *See* MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 3-18 (2015) [hereinafter AFTER *ROE*]; David J. Garrow, *Abortion Before and After* Roe v. Wade: *An Historical Perspective*, 62 ALB. L. REV. 833, 840-41 (1999) (rejecting the claim that *Roe* created backlash and noting that gradual legalization of abortion had already energized pro-life forces, while "non-judicial headway with abortion law liberalization looked very

complex, and much of the backlash attributed to it flowed from other developments in party politics, medical technology, and religious mobilization.[73] Nevertheless, it is clear that *Roe* helped to nationalize the antiabortion movement and engendered criticism across the ideological spectrum.[74]

As we recount below, the personnel on the Court changed over time as movements gained in strength over the abortion issue, novel restrictions were enacted,[75] and subsequent rulings became increasingly responsive to those developments.[76] As movement complaints, rhetoric, and methods were increasingly massaged into the High Court's jurisprudence, these judicial choices created contradictions in the law that invited future tinkering and further mobilization. Finally, the moment arrived that the Court contained a significant movement bloc, one that could act without the cooperation of any conservative preservationist, and it became a matter of when, and not whether, *Roe* would be overruled outright. And when that bloc decided to act, the only serious question involved what the ultimate decision would look like: would it resemble the work of partisan judges or read like a movement text?

bleak"); Linda Greenhouse & Reva B. Siegel, *Before* (*and After*) Roe v. Wade*: New Questions about Backlash*, 120 YALE L.J. 2028, 2080 (2011) ("There were, in short, several institutions engaged in conflict over abortion in the decade before *Roe* that had independent motives and independent pathways for conflict in the decades after *Roe*").

[73] *See supra* note 72 and accompanying text.

[74] *See* MARY ZIEGLER, BEYOND ABORTION: *ROE V. WADE* AND THE BATTLE FOR PRIVACY 26 (2018).

[75] *See, e.g.*, David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 4, 27-35 (2023) (studying the specter of "laws that criminalize in-state abortion but also attempt to impose civil or criminal liability on those who travel out of state for abortion care or on those who provide such care or facilitate its access"); Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 375-79 (2008) (discussing the enactment of ultrasound legislation as part of informed consent in the context of abortion).

[76] *See* Robert L. Tsai, *Supreme Court Precedent and the Politics of Repudiation*, *in* LAW'S INFAMY: UNDERSTANDING THE CANON OF BAD LAW 96, 107 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2021) [hereinafter *Supreme Court Precedent and the Politics of Repudiation*] ("[T]his see-saw quality of the Court's decision-making led to confusion over legal principles and methods. That sense of doctrinal haphazardness created new political possibilities and emboldened opponents by giving them fresh lines of attack.").

One might object that there is little difference between a partisan judge and a movement judge because they will often reach similar outcomes — at times, even working together to do so. We disagree. Historically, partisan judges go back to the very start of our country and are characterized by the peculiar nature of party politics. A partisan judge's overriding mindset is to entrench a party's agenda and facilitate the party's success.[77] Movement judges operate differently, often emerging from cultural environments where unhappiness with a two-party system and disillusionment with enduring features of normal politics are prevalent. Efforts to identify, train, and reward movement actors, including prospective judges, are part of increasingly sophisticated efforts to circumvent party hierarchy or capture its apparatus in the service of grassroots objectives. When a party's interests and an affiliated movement's interests collide during a concrete dispute, we expect that the movement judge will incline toward outcomes that benefit the movement, even if they must come at the expense of the party.

We also believe it is crucial to keep partisan judging and movement judging conceptually distinct for the purposes of articulating our theory of constitutional change. In this respect, we both build upon and distinguish our approach from the work of Jack Balkin and Sandy Levinson, whose account of partisan entrenchment highlights the importance of political parties as social organizations that enjoy immense power to influence the direction of democratic constitutionalism, including the exercise of judicial review.[78]

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[77] *See* GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S–1830S, at 84, 89-90 (2019).

[78] Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 490-91 (2006); Jack M. Balkin, Abortion, Partisan Entrenchment, and the Republican Party, at 3-9, 19 (Oct. 14, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4215863 [https://perma.cc/75ND-NLP7]; *see also* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512-524 (2002). Others have detected political polarization on the High Court in recent decades but attribute this development to "polarization of the parties [that] has spilled over to Supreme Court appointments." NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT, at xvi (2019).

But movements and parties are distinct phenomena; a party's interests are not the same as a movement's interests. Parties enlist the support of movements to turn out single-issue voters and energize donors but may seek to sideline that movement or shelve its priorities when doing so appears electorally advantageous. Historically, for example, Ronald Reagan embraced a "human life amendment" banning abortion, but he expended very little political capital otherwise in advancing the agenda of the antiabortion movement.[79] The same was true of George W. Bush, who almost sparked a rebellion when he refused to do more to back a constitutional amendment banning same-sex marriage.[80] Similarly, liberal politicians have courted voters of color aligned with the civil rights movement and then embraced popular goals out of step with that movement's agenda, refusing to back legislation banning lynching,[81] for example, or endorsing drug laws or other sentencing policies with racially devastating impacts.[82]

Political leaders have often been unwilling to damage their own careers by prioritizing movement objectives that diverge too far from popular preferences.[83] The same is often true of traditional party leaders, committeemen, and donors who are repeat players in nominating conventions and policy discussions.[84] While movements prize fidelity to their substantive goals, parties often shun candidates who appear likely to lose, regardless of their ideological bona fides.[85] At times, as a result, movement members have mutinied against the traditional party leadership. Such was the case in 2012 when Mitt Romney changed rules to give presidential candidates veto power over

[79] *See* ANDREW E. BUSCH, RONALD REAGAN AND THE POLITICS OF FREEDOM 174 (2001); CHARLES H. LIPPY & ERIC TRANBY, RELIGION IN CONTEMPORARY AMERICA 65 (2013).

[80] *See* DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 256-59 (2010); *cf.* KLARMAN, FROM THE CLOSET TO THE ALTAR, *supra* note 11, at 111-14.

[81] *See* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 25, at 164-69.

[82] *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 53-56, 130-45, 289-303 (2016).

[83] For examples of this focus on electability, see *supra* notes 72–74, 79–80 and accompanying text.

[84] On the role played by this loosely defined "establishment" in many primary contests, see MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 1-23 (2008).

[85] *See id.* at 178.

certain RNC delegates in a way that angered grassroots movements,[86] or in 1964 when grassroots conservatives turned the Republican National Convention into what biographer Robert Alan Ginsberg called "the conservatives' Woodstock."[87] On the Left, the 1968 Democratic National Convention exposed tensions between the party leaders who prized electability and the anti-war activists who demanded a candidate who would advance their goals.[88]

More recently, the rise of social media and influence of billionaire patrons have made it easier for movement figures to build their own relationships with Presidents, Senators, and sitting judges to circumvent the traditional disciplinary power a party's elites once exerted upon movements.[89] The proof of these new pathways of constitutional change can be seen in the conservative legal movement and the antiabortion movement working in tandem to erode the social foundations of *Roe*. Movement-driven projects of constitutional transformation entailed identifying movement jurists and altering the institutional climate in which movement lawyers made their legal arguments — and doing so even when party leaders stood to lose out at the polls. With the continued vitality of the movement jurist, we predict that parties will remain important as formal features of the constitutional order, but that movements will exert increased influence on the selection of judges and help police those relationships. We also expect that movements will create and maintain their own networks through which to pass valuable information back and forth between

[86] *See* MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT 183 (2022) [hereinafter DOLLARS FOR LIFE].

[87] GEOFFREY KABASERVICE, RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY 98-121 (2012). On the importance of the 1964 convention, see BORIS HEERSINK & JEFFREY A. JENKINS, REPUBLICAN PARTY POLITICS AND THE AMERICAN SOUTH: 1865–1968, at 182-91 (2020).

[88] *See* MICHAEL A. COHEN, AMERICAN MAELSTROM: THE 1968 ELECTION AND THE POLITICS OF DIVISION 262-78 (2016).

[89] On the closer relationship between parties and movements in recent decades, see SCHLOZMAN, *supra* note 22, at 4-13.

grassroots figures and ideologically receptive judges — apart from the party's own processes and beyond the party's control.[90]

Ideological receptivity to movement goals can be mistaken for being democratic, but this view would be too simplistic. Within a pluralistic order, judicial review remains a powerful method for entrenching some groups' or movements' values and policies at the expense of others. Judicial entrenchment of movement ideals is attractive if a current majority fears changes to social or political circumstances will lead to the loss of power. Judicial entrenchment of legal principles and social values can also be attractive to movements whose priorities might never gain majority support. Under certain conditions, it may be easier simply to capture one national institution with the capacity to make fundamental law than it is to gain and hold partisan control of the political branches.[91]

Social movements of all stripes have become common in American life as a political adaptation to several problems: the collective action problem entailed in any effort to mobilize public opinion so as to shift policy, a sense of dislocation and powerlessness in a large nation-state, and the fact that the Federal Constitution is one of the most difficult in the world to amend.[92] In dealing with a mostly 18th-century national Constitution and working in the gaps of the law, political parties, bureaucracies, and other have emerged not just to offer solidarity but also to present vehicles for making new legal meaning.[93]

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[90] *See, e.g.*, DEVINS & BAUM, *supra* note 78, at 3 ("Justices take cues primarily from the people who are closest to them and whose approval they care most about, and those people are part of political, social, and professional elites.").

[91] For an example of this, see LEONARD & CORNELL, *supra* note 77, at 84-115 (studying the Federalist Party's influence on the federal judiciary).

[92] Stephen M. Griffin, *The Nominee Is . . . Article V*, 12 CONST. COMMENT. 171, 172 (1995); see also Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_much_too_hard_blame_the_founders.html [https://perma.cc/S2MQ-R7GK].

[93] *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto Era*, 94 CALIF. L. REV. 1323, 1327 (2006) [hereinafter *Constitutional Culture*] ("Constitutional culture enables mobilized citizens to influence the officials who enforce the Constitution, through lawmaking and outside of it.").

B. How Do We Recognize a Movement Judge?

It is not always easy to identify a movement judge in advance. Someone who aspires to become a judge may say or do things to increase their visibility and attractiveness. The American system of selecting judges incentivizes this kind of signaling, as well as the search for political patrons.[94] There is always the chance that, upon assuming the bench, a judge finds it hard or no longer desirable to be ideologically consistent, changes one's mind over time, or breaks off past social connections with organizations and people that harbor movement ideas. David Souter was touted as a conservative, but he was selected at a time when the Republican Party demanded less discipline in the policing of ideological commitment.[95] He did not turn out to be either a reliable partisan or movement judge, to the consternation of many grassroots conservatives.[96]

Again, too, the mere fact that a judge has used a particular modality of constitutional argument is not decisive proof of movement mindset. Much has been made of the fact that originalist jurists are more willing

[94] Steve Teles, among others, has catalogued the ways in which powerful political figures, including appointees like Ed Meese, served as patrons for ambitious conservative lawyers — some of whom would later become appointed to judgeships. *See* Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61, 69 (2009). Southworth, for her part, reminds us that "[t]he conservative legal movement includes not only the lawyers and judges who participate in Federalist Society activities but also a larger set of legal advocacy organizations, think tanks, media outlets, and financial patrons." Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698, 1708 (2018).

[95] On perceptions of Souter at the time of his nomination, see Linda Greenhouse, *An "Intellectual Mind:" David Hockett Souter*, N.Y. TIMES (July 24, 1990), https://www.nytimes.com/1990/07/24/us/man-in-the-news-an-intellectual-mind-david-hackett-souter.html [https://perma.cc/4FCR-J9HZ]; David Margolick, *Bush's Court Choice: Ascetic at Home but Vigorous on Bench*, N.Y. TIMES (July 25, 1990), https://www.nytimes.com/1990/07/25/us/bush-s-court-choice-ascetic-at-home-but-vigorous-on-bench.html [https://perma.cc/8CD3-26NB].

[96] On Souter's legacy, see Adam Liptak, *Souter's Exit Opens the Door for a More Influential Justice*, N.Y. TIMES (May 7, 2009), https://www.nytimes.com/2009/05/08/us/08court.html [https://perma.cc/QFR6-PHU7].

to overrule precedent,[97] but the priority given to stare decisis is actually a complicated matter that depends on a judge's orientation to existing case law at a particular moment in time. So while it is true that Justice Thomas has shown the greatest willingness to overrule precedent of any jurist currently on the Supreme Court,[98] that is a function of the fact that he is a conservative movement judge interested in toppling much of the juridic infrastructure counted as establishment and progressive achievements. A liberal movement jurist, by contrast, would have a congenial attitude toward favored precedent but would be no less a movement judge.

Most of the time, there are indications in advance that an aspirant to judicial office could be a movement jurist based on past writings, social ties, or political activity. For instance, William Rehnquist faced a firestorm following revelations that he had both written a memorandum as a law clerk at the Supreme Court praising the 1896 decision in *Plessy v. Ferguson* and had served as a poll watcher accused of intimidating Black and Latino voters in Arizona.[99] Antonin Scalia, who enjoyed a relatively smooth confirmation, had become one of the most visible members of an emerging conservative legal movement before Ronald Reagan nominated him to the High Court.[100]

Some jurists become more receptive to movement arguments and ends after assuming the bench. A forty-year-old Chair of the SEC when FDR tapped him for the Supreme Court, William O. Douglas was perceived as a likely partisan judge, given his reputation as an "ardent"

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[97] *See, e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258 (2005); David A. Strauss, *Originalism and Precedent: Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 973 (2008).

[98] *See* Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1286 (2008).

[99] *See* Robert Lindsey, *Rehnquist in Arizona: A Militant Conservative in 60's Conservative Politics*, N.Y. TIMES (Aug. 4, 1986), https://www.nytimes.com/1986/08/04/us/rehnquist-in-arizona-a-militant-conservative-in-60-s-politics.html [https://perma.cc/YT7V-RHKR]; Adam Liptak, *The Memo That Rehnquist Wrote and Had to Disown*, N.Y. TIMES (Sept. 11, 2005), https://www.nytimes.com/2005/09/11/weekinreview/the-memo-that-rehnquist-wrote-and-had-to-disown.html [https://perma.cc/EXE6-MZ8P].

[100] *See* Michael Kruse, *The Weekend at Yale That Changed American Politics*, POLITICO MAG. (Sept./Oct. 2018), https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608/ [https://perma.cc/9YVG-QSK2].

New Dealer.[101] While on the Court, he became increasingly open to movement appeals by the civil rights, anti-war, and conservation movements.[102] He spoke out about world peace and in 1973 issued a stay of a ruling challenging the constitutionality of the bombing in Vietnam.[103] Comparing the situation to a "capital case," he wrote that the stay would help "Cambodian farmers whose only 'sin' is a desire for socialized medicine to alleviate the suffering of their families and neighbors."[104] When the rest of his colleagues lifted his stay, he issued a public statement calling their action "without precedent."[105]

Because of these difficulties in recognizing movement jurists, we think that the best evidence of ideological receptivity is the out-of-court relationships a judge continues to sustain. Thus, the best evidence of openness to movement appeals is membership in or appearances at movement-affiliated or adjacent events. The next best evidence of those social connections is the way that a judge talks about contested issues,

[101] Felix Belair Jr., *W.O. Douglas Is Nominated for Seat in Supreme Court*, N.Y. TIMES (Mar. 21, 1939), https://www.nytimes.com/1939/03/21/archives/w-o-douglas-is-nominated-for-seat-in-supreme-court-confirmation-of.html [https://perma.cc/R8YS-RQP4]. Douglas had worked briefly for a predecessor of the Cravath firm. Some on Wall Street associated him with the Left given his vigorous defense of investors' interests, but he called himself "the kind of conservative who can't get away from the idea that simple honesty ought to prevail in the financial world." *Id.*

[102] On Justice Douglas's environmental activism while on the Supreme Court, see M. Margaret McKeown, *Supreme Court Justice William O. Douglas Was Not Just a Legal Giant, But Also a Powerful Environmentalist*, SEATTLE TIMES (Aug. 17, 2018, 11:49 AM), https://www.seattletimes.com/pacific-nw-magazine/supreme-court-justice-william-o-douglas-was-not-just-a-legal-giant-but-also-a-powerful-environmentalist/.

[103] In 1945, Justice Douglas gave a speech in Chicago urging support for President Truman, who had "taken over the enormous task of winning two remaining wars — the war against Japan, the war against war." *Douglas Asks All to Back Truman*, N.Y. TIMES (May 28, 1945), https://www.nytimes.com/1945/05/28/archives/douglas-asks-all-to-back-truman-justice-in-chicago-speech-calls-for.html [https://perma.cc/L496-S8TT]; *see* James T. Moses, *William O. Douglas and the Vietnam War: Civil Liberties, Presidential Authority, and the "Political Question,"* 26 PRESIDENTIAL STUD. Q. 1019, 1029 (1996).

[104] Warren Weaver Jr., *Douglas Upholds Halt in Bombing but Is Overruled*, N.Y. TIMES (Aug. 5, 1973), https://www.nytimes.com/1973/08/05/archives/douglas-upholds-halt-in-bombing-but-is-overruled-of-the-condemned.html [https://perma.cc/UY8V-FLD5].

[105] *Id.*

which may indicate that they embrace movement perspectives and movement-generated facts.[106]

1. Movement Rationales, Movement Outcomes

The mere fact that a judge's philosophical leanings appear to converge with the beliefs or ends of a movement is not itself decisive evidence that a judge is a movement figure. After all, party leaders appoint or elect judges whose life experiences and career choices may offer some clues that their rulings will facilitate preferred policies, and there will naturally be some affinity between ideas along a similar part of the ideological spectrum. Moreover, given the lack of hard measures to punish a judge for straying from party or movement goals, supporters cannot guarantee that the jurist will become (or stay) a preservationist, a technocrat, a partisan, or a movement judge.

But where rulings by judges with social ties to a movement consistently favor the movement's end-goals or substantive vision of the good, that high degree of convergence of arguments and outcomes offers some evidence that a particular decision maker may be willing to serve as a movement ally. Even better is when the specific rationales and methods advanced by a movement are explicitly adopted by judges as their own.

Take *Dobbs* itself, which represents the rhetorical unification of two movements: an elite legal conservative movement of judges, lawyers, and political patrons, as well as a grassroots-powered antiabortion movement.[107] The ruling is a triumph for these twin movements because

[106] We believe that proximity to movements is a higher bar than merely rendering outcomes that are celebrated by certain movements. When both conditions are true (proximity and congruence), we are more likely to have a movement jurist on our hands. After all, even preservationist and partisan judges will have philosophical leanings that might lead them to support outcomes favored by movement jurists.

[107] We join those social scientists who find that the conservative legal movement is more than a collection of loosely affiliated neutral debate clubs; rather, it spans several organizations that connect academics and students to their counterparts in legal practice, including legislators and judges with formal power over the law. It is also far more politically organized and committed to identifiable methods and goals, including shifting the substance of American constitutional law and recalibrating the relationships between governments and bureaucracies to be treated as purely an intellectual movement. *See* TELES, *supra* note 29, at 5-32; KEN I. KERSCH, CONSERVATIVES AND THE

the nation's apex court has now embraced their collective concerns, methods, vision of power and community, and facilitated many political paths to their desired policy outcomes. At the same time, *Dobbs* has exposed the two movements' diverging agendas and set up possible conflicts on the Right as the contours of a post-*Roe* landscape come into view.

Dobbs is a victory for the conservative legal movement, which coalesced during the Reagan years to chip away at or reverse legal precedents that buttress the modern administrative state as well as Warren Court rulings interpreting the Bill of Rights, particularly the hated substantive due process cases out of which emerged the doctrine of constitutional privacy.[108] Consider Justice Thomas's concurrence in *Dobbs*, which lays out these objectives.[109] Not only does he call *Roe* "the fabrication of a constitutional right," he also invites his colleagues (and presumably movement figures) to make arguments to "reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[110]

For elites, what was once a mission of defanging judicial activism has become more complex, as some conservatives have become invested in judicial expansion of a different set of rights: religious exercise, free speech for corporations, gun rights, economic liberties, and even fetal rights.[111] Hence, Justice Thomas is careful not to mention any other

CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 97-121 (2019); Calvin TerBeek, *"Clocks Must Always Be Turned Back"*: Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 832 (2021).

[108] Conservative legal elites have long trained their ire at substantive due process doctrine for being the source of rights preferred by liberals, though some grassroots conservative groups support usage of the doctrine to protect traditionalist conceptions of the family life. *See* Joanna Wuest, *A Conservative Right to Privacy: Legal, Ideological, and Coalitional Transformations in U.S. Social Conservatism*, 46 LAW & SOC. INQUIRY 964, 968 (2021).

[109] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300-02 (2022) (Thomas, J., concurring).

[110] *Id.* at 2301, 2304.

[111] For example, Josh Hammer's call for "common good originalism" stems from frustrations with the limits of existing originalist doctrine to deliver substantive conservative outcomes. *See* Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 4 HARV. J.L. & PUB. POL'Y 917, 920 (2021) ("Too often, contemporary

cases or rights that might offend grassroots conservatives. But it is originalism and traditionalism that have held this elite movement together, so he leaves matters hazy as to how things might change or stay the same if others join his crusade to reorient existing constitutional law more drastically.[112] *Dobbs*'s use of traditionalism is compatible with most versions of originalism, even if a few academic originalists continue to debate whether the decision is really the best illustration of the approach.[113] What makes students of jurisprudence happy is not the same thing as what judges themselves are willing and able to accomplish in their domain.

Things are somewhat simpler for the antiabortion wing of the coalition (though this movement too is made up of different groups with shifting alliances over time[114]), which is less interested in interpretive methods or abstract institutional arrangements, and more concerned about the bottom line: greater legislative authority to advance a constitutional vision of fetal personhood.[115]

In this second sense, *Dobbs* is also a grassroots movement ruling because it embraces arguments long made by antiabortion lawyers and

'legal conservatism' — as a methodology, not necessarily a specific judicial result — redounds against the interests of substantive conservatism itself.")

[112] *See Dobbs*, 142 S. Ct. at 2300-04.

[113] *Compare* J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), https://www.city-journal.org/article/an-originalist-victory [https://perma.cc/CD6C-69PN] ("To acknowledge this achievement is to acknowledge the constitutional theory around which the coalition that brought it about rallied for a half-century: originalism. . . . The goal of overruling *Roe* and *Casey* bound the conservative political movement to the conservative legal movement, and originalism was their common constitutional theory."), *with* Ilan Wurman, Opinion, *Hard to Square* Dobbs *and* Bruen *with Originalism*, DENVER POST (July 13, 2022, 3:47 PM), https://www.denverpost.com/2022/07/12/roe-vs-wade-originalism-dobbs-bruen-abortion-guns/ [https://perma.cc/GY8A-GLND] (stating that "*Dobbs* is even harder to square with originalism" than *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), and "is not quite originalism").

[114] *See* Rachel Roubein & Brittany Shammas, *A Triumphant Antiabortion Movement Begins to Deal with Its Divisions*, WASH. POST (July 24, 2022, 8:32 AM EDT), https://www.washingtonpost.com/politics/2022/07/24/antiabortion-movement-divisions/ [https://perma.cc/V83R-2S45].

[115] On the underlying goal of the antiabortion movement, see ZIEGLER, AFTER *ROE* *supra* note 72, at 231-32.

activists about the distortion wrought by *Roe* on other areas of the law,[116] the degree to which *Roe* poisoned party politics and federal judicial confirmations,[117] and the reason that *Roe* and *Casey* were unworkable.[118] The Court's historical account relies primarily on Joseph Dellapenna, a law professor who attended antiabortion conferences on "reversing *Roe* through the courts"[119] as well as that of another researcher who held an influential role in the National Right to Life Committee ("NRLC").[120] Since the 1980s, antiabortion lawyers in briefs and articles denounced what they called the "abortion distortion:" the idea that in its quest to preserve *Roe*, the Court had twisted the rules on standing, res judicata, severability, and even freedom of speech.[121] The *Dobbs* Court echoed this point, explaining that *Roe* and *Casey* "led to the distortion of many important but unrelated legal doctrines."[122]

Moreover, when discussing the effect of *Roe* on the Court's legitimacy, the majority ignored scholarly work suggesting that *Roe* and *Casey* played at most one part in a much more complex history of polarization around both abortion and the federal judiciary more generally.[123] Instead, the Court borrowed exclusively from movement narratives claiming that "*Roe* 'destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to

[116] *See* Mary Ziegler & Rachel Rebouché, *Fracture: Abortion Law and Politics After* Dobbs, 76 S.M.U. L. REV. 27, 44 (2023) (describing the significance within the antiabortion movement of the abortion distortion argument).

[117] *See* Mary Ziegler, *Taming Unworkability: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1228-1245 (2019) [hereinafter *Taming Unworkability*].

[118] *See id.* at 1250-1255.

[119] *See Legal Consensus Emerging on Reversing* Roe v. Wade *Through the Courts*, AUL NEWSLETTER, Summer 1984, 1 (on file with the Harvard Divinity School, in the George Huntston Williams Papers, Box 4, Folder 5).

[120] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252 n.33-34 (2022) (quoting Witherspoon). For more on Witherspoon's influence on the movement, see ZIEGLER, AFTER *ROE*, *supra* note 72, at 38-44.

[121] *See* James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181, 183, 218, 235 (1989).

[122] *See Dobbs*, 142 S. Ct. at 2275.

[123] On the complexity of post-*Roe* polarization, see ZIEGLER, AFTER *ROE*, *supra* note 72, at 3-28.

be resolved uniformly, at the national level.'"[124] The Court holds *Dobbs* out as the work of an institution entirely removed from movement politics, all while aligning constitutional law almost perfectly with the claims made by one of the country's most influential grassroots mobilizations.

2. Proximity to Movement Figures

Another set of clues as to whether a judge is a movement jurist is how he or she manages the perceived boundary between law and politics. Every judge attends to that line, but a movement jurist will draw that line in a different place than other kinds of judges. A movement judge, who may view their role as one of politics actualized through law or simply struggles to balance the various communal roles they have taken on, will police their social relationships and public appearances less scrupulously than a preservationist. For instance, David Fontana has detected that Justice Sotomayor's public appearances are "clearly outside of the normal academic circles inhabited by liberal Justices" but commends her for not attending ideologically-inflected events.[125] While Fontana applauds Justice Sotomayor for interacting with regular people, since his piece in 2014, she has made several appearances before the American Constitution Society, which qualify under his rubric as "ideologically affiliated gatherings."[126] This development suggests that

[124] *Dobbs*, 142 S. Ct. at 2310 (Kavanaugh J., concurring). On the movement influence of this narrative, see Ziegler, *Taming Unworkability*, *supra* note 117, at 1253.

[125] David Fontana, *The People's Justice?*, 123 YALE L.J.F. 447, 467, 475 (2014). Fontana focuses on Sotomayor's style of engaging with the public, which is less about promoting particular theories of constitutionalism and more about articulating "the importance of considering realities on the ground." *Id.* This would be compatible with a certain older strand of pragmatism. *See generally* Robert L. Tsai, *Legacies of Pragmatism*, 69 DRAKE L. REV. 879, 885-919 (2021) (detailing the features of judicial pragmatism).

[126] Fontana, *supra* note 125, at 476. In 2014, Justice Sotomayor sat down with Ted Shaw, who worked for the NAACP Legal Defense Fund for over 26 years, for an ACS-sponsored talk. Paul Guequierre, *Private: A Conversation with Justice Sonia Sotomayor and Civil Rights Leader Ted Shaw*, AM. CONST. SOC'Y (Jun. 20, 2014), https://www.acslaw.org/?post_type=acsblog&p=10262 [https://perma.cc/W9KQ-SXJK]. In 2018, Justice Sotomayor appeared at the ACS national convention in a conversation with NYU law professor Melissa Murray. *At the ACS National Convention, Justice Sotomayor and Melissa Murray Emphasize Diversity in Clerkships*, N.Y.U. L. SCH. (Jun. 28, 2018), https://www.law.nyu.edu/news/US-Supreme-Court-Justice-Sonia-Sotomayor-

she may be increasingly receptive to movement-based appeals from the Left — perhaps as a reaction to the consolidation of power among GOP-appointees on the Court.

Consider, too, that Justice Alito, who, along with all three Trump appointees who joined *Dobbs*, decided to appear at the Federalist Society's 2022 annual dinner where all four were given a hero's welcome.[127] In the past, Justice Alito, as we would expect of a movement jurist, has asserted a strong libertarian vision of the First Amendment to justify his own (and others') choice to maintain a close proximity to social movements.[128] In his 2022 Federalist Society speech, Justice Alito offered remarks to both buoy the conservative lawyers and judges in attendance. "Boy, is your work needed today," Justice Alito told the cheering crowd.[129] After Alito left the stage, Steven Markham, founder of the D.C. chapter solidified the feelings of solidarity and gratitude, saying, "The *Dobbs* decision will forever be an indelible part of Justice Alito's legacy."[130]

All figures who believe in legal transformation display not just a conviction that their interpretation of the Constitution is correct, but also that the like-minded must steel themselves against social pressure as they accumulate the power to bring their vision into existence. A movement judge is no different, and we can expect them to associate with others and speak and write in ways that betray this sensibility.

For his part, Justice Alito speaks not only before the Federalist Society, but also appears regularly at gatherings organized by religious

Melissa-Murray-clerkship-diversity [https://perma.cc/PP36-9PD3]. On June 16, 2022, Alito's draft opinion in *Dobbs* was leaked, Justice Sotomayor appeared again at the ACS national convention. *See* Adam Liptak, *Sotomayor Says Supreme Court Can 'Regain the Public's Confidence,'"* N.Y. TIMES (Jun. 16, 2022), https://www.nytimes.com/2022/06/16/us/sonia-sotomayor-supreme-court.html [https://perma.cc/G3Y3-2WBE].

[127] *See* Josh Gerstein, *Conservative Lawyers Hail Alito for Abortion Ruling*, POLITICO (Nov. 11, 2022, 12:03 AM EST), https://www.politico.com/news/2022/11/11/alito-abortion-federalist-society-00066443 [https://perma.cc/QKC5-GJW4].

[128] Alito also asserted a strong First Amendment right for judges to maintain closeness to the conservative legal movement, praising the successful pushback by fellow Federalist Society judges against a proposal to preclude federal judges from membership in the organization, and calling it an effort to "hobble the debate" and maintain "law school orthodoxy." *See* Alito, Address to the Federalist Society, *supra* note 42.

[129] Gerstein, *supra* note 127.

[130] *Id.*

traditionalists. At one such meeting of Catholic lawyers and judges, he urged the audience to help defend the Court's ruling in *Hobby Lobby*, which he authored.[131] That controversial ruling protected a private corporation's RFRA-based religious right to refuse to comply with an HHS rule requiring corporations to provide health-insurance coverage for contraception.[132] Justice Alito told the faithful to prepare themselves to be tough-minded because their liberal opponents would "vilify those who disagree, and treat them as bigots."[133] To win this socio-legal crusade, he explained, they would have to go on the offensive: to "fight . . . for the hearts and minds of our fellow Americans" and to "evangelize our fellow Americans about the issue of religious freedom."[134] These comments reveal Justice Alito's understanding of grassroots figures as fighters who require bravery, commitment, and fortitude to achieve social change.

Consider, too, the recent report that Justice Alito may have tipped off religious leaders about the outcome in *Hobby Lobby* in advance of the opinion's release.[135] Justice Alito has denied the accusation made by a former religious leader, but the charge is plausible because Alito has continued to maintain close ties with prominent movement figures whose interests come before Article III judges.[136] Ethical questions aside, and assuming Justice Alito acted in good faith, our point is simply that his behavior offers further evidence that he is conducting himself as a movement judge rather than a partisan or preservationist. These are

[131] David Porter, *Alito: U.S.'s Dedication to Religious Liberty Being Tested*, ASSOCIATED PRESS (Mar. 15, 2017, 6:58 PM PDT), https://apnews.com/18f3eeb865d442e28486db5b7007e706/Alito:-US%27s-dedication-to-religious-liberty-being-tested [https://perma.cc/QAE5-EV6G].

[132] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724, 736 (2014).

[133] *See* Porter, *supra* note 131.

[134] *Id.*

[135] Letter from Robert L. Schenck, Reverend, to John Roberts, C.J., United States Sup. Ct. (June 7, 2022), https://int.nyt.com/data/documenttools/roberts-letter-redacted-annotated/fb6e34bb904bfafa/full.pdf [https://perma.cc/GA24-NK82]; *see also* Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html [https://perma.cc/NRD7-PH3S].

[136] *See* Kantor & Becker, *supra* note 135.

precisely the kinds of close non-party social networks we would expect a movement judge to cultivate.

Movement jurists can come from grassroots movements themselves, as Thurgood Marshall or Ruth Bader Ginsburg did, though that fact alone does not guarantee that a person will remain open to movement-based arguments once they become judges. Before ascending to the bench, each was a movement lawyer who labored in the trenches to advance broader egalitarian visions of the Constitution.[137] Each was appointed and confirmed at a historical moment when the country was ready to protect the gains of the Black civil rights and feminist movements. Other potential movement jurists, such as Amy Coney Barrett, have come from organizations, institutions, social networks, or the various groups that make up the religious Right, even if their professional lives have not always been devoted to movement ends.[138]

Yet it is also possible for a movement judge to not have social ties to a movement or other background indicators and just become more receptive to movement arguments and objectives. For instance, on racial issues and the death penalty, Harry Blackmun started out as a law-and-order jurist but was drawn more closely to the abolitionist views of Marshall and Brennan over time.[139] On the bench, a movement jurist predictably advances stronger positions than some of their colleagues — and at times, the country as a whole — may be prepared to accept.

3. Embracing Movement Rhetoric

A fair number of judges come to the bench already ideologically predisposed to take non-mainstream arguments seriously. Because they

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[137] *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 3 (1994); Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 162 (2002).

[138] On Barrett's involvement with the pro-life movement, see Stephanie Kirchgaessner, *Barrett Was Member of Anti-Abortion Group that Promoted Clinic Criticized for Misleading Women*, GUARDIAN (Oct. 11, 2020, 3:32 PM EDT), https://www.theguardian.com/us-news/2020/oct/11/amy-coney-barrett-member-right-to-life-organization [https://perma.cc/Q93Y-JMQ8] (reporting on Barrett's signature on a letter calling *Roe* barbaric and her support for the crisis pregnancy center, the Women's Care Center, in South Bend, Indiana).

[139] On Blackmun's evolution, see LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 228-53 (2005).

are already embedded in social networks where non-establishment constitutional ideas and facts flourish, their introduction into a judicial ecosystem is intended to alter the dynamics of what is institutionally and socially possible.[140]

Just like Presidents or legislators who must decide how (if at all) to relate to a social movement agitating for change, judges have the opportunity to validate the factual claims, legal arguments, or vision of political community articulated by a specific movement. They can either embrace movement ideas explicitly or rhetorically hold a movement at arm's length.

Movement judges are more likely to parrot the language of social movements with which they are closely associated or naturally sympathetic. For instance, in the Eleventh Circuit's recent ruling, *SisterSong Women of Color Reproductive Justice Collective v. Governor of Georgia*,[141] upholding Georgia's abortion restrictions, Judge William Pryor repeatedly called the plaintiffs "the abortionists." This term, which Judge Pryor uses twenty-one times, did more than show a break in civility.[142] Instead, it reveals the mindset of a movement jurist, exposing his natural sympathies for the unborn and hostility towards medical providers. This is language that once was used in more neutral terms but has in recent decades been used by antiabortion activists to denigrate pro-choice citizens and medical providers (including by extremists willing to use violence to halt the exercise of the right involved and sow general fear).[143] The term "abortionist" has been

[140] One of us has called this strategy an attempt to "alter[] the social plausibility" of a set of constitutional ideas. *See* Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 384 (2008).

[141] *See* SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320 (11th Cir. 2022).

[142] Critics of Judge Pryor's rhetoric focused on its apparent lack of "professionalism" rather than the point we make. *See* Katheryn Hayes Tucker, *"Shocking and Unprofessional": Harsh Language in Abortion Ruling Sparks Backlash*, LAW.COM (July 21, 2022, 6:47 PM), https://www.law.com/dailyreportonline/2022/07/21/shocking-and-unprofessional-harsh-language-in-abortion-ruling-sparks-backlash/ [https://perma.cc/U6Q8-LWDX].

[143] On the use of the term "abortionist" within the movement, see, for example, Catherine Glenn Foster, *Abortionists' Disposal of Fetal Remains*, AMERICANS UNITED FOR LIFE (July 18, 2022), https://aul.org/2022/07/18/aborted-fetus-used-for-energy/ [https://perma.cc/LC8C-FUUX] (arguing that "abortionists" use fetal remains as energy

regularly used in Supreme Court decisions only by Justice Thomas, another movement jurist.[144] Relieved by higher-ranked jurists from having to do so, Judge Pryor expressed not a scintilla of respect for the autonomy of pregnant people faced with heart-breaking decisions.

In the past, Justice Alito has given speeches that cheer resistance of pandemic restrictions. For instance, on November 12, 2020, before assembled Federalist Society members, he decried "previously unimaginable restrictions on individual liberty" to combat the COVID-19 pandemic.[145] In that same speech, he revealed that he was clearly no technocrat, criticizing the "dominance of lawmaking by executive fiat" advanced by "early 20th century progressives and the New Dealers of the 1930s [so] policymaking would shift from narrow-minded, elected legislators to an elite group of appointed experts" and thus render policy "more scientific."[146]

Against a vision of "rule by experts," he praised "emerging trends in the assessment of individual rights."[147] In offering concrete examples of rights that must be defended to the hilt by the courts, he mentioned

sources); Emily Mangiaracina, *Kamala Harris' Husband Reportedly Called Abortionists to "Thank Them for Their Work*," LIFESITE NEWS (June 27, 2023, 5:27 PM EDT), https://www.lifesitenews.com/news/kamala-harris-husband-reportedly-called-abortionists-to-thank-them-for-their-work/ [https://perma.cc/583G-RZDH] (claiming that Harris's husband planned to call "abortionists" to thank them for their work as part of the anniversary of *Dobbs*).

[144] In his dissent in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2142-49 (2020), Justice Thomas used the term "abortionist" around 25 times. He said that the lawsuit was "brought by abortionists and abortion clinics." *Id.* at 2142. And throughout his dissent, he repeatedly referred to medical providers as "abortionists" to distinguish them from their "clients" seeking to "abort her unborn child," seemingly on both legal and moral grounds. *Id.* at 2142-49. Thomas insisted that "abortionists" should not be permitted to assert third-party standing, especially given his view that "*Roe* is grievously wrong." *Id.* at 2142-50. Judge Kacsmaryk, who blocked access to mifepristone, has also used the term even more broadly to encompass doctors who prescribe drugs that have the effect of ending a pregnancy. *See infra* text accompanying notes 329–332, 335–339. Before movement jurists used the term with great frequency, it rarely showed up in the U.S. Reports. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 557 (1989) (mentioning "back-alley abortionists"); Roe v. Wade, 410 U.S. 113, 142 (1973) (mentioning "criminal abortionist" in passing).

[145] Alito, Address to the Federalist Society, *supra* note 42.

[146] *See id.*

[147] *Id.*

speech, liberty, and the right to bear arms — but no other rights specifically mentioned in the Constitution or established through jurisprudence.[148] In linking progressivism and technocracy, identifying "originalism" as the interpretive methodology of choice, and valorizing movement-preferred rights, Justice Alito would continue to use the judge's tools of the trade to entrench the conservative-libertarian vision of the Constitution preferred by movement conservatives.

A movement judge may be more likely to regurgitate movement facts and figures rather than subject them to adversarial or social scientific testing. Just as one would expect of a movement jurist, Justice Thomas's *Dobbs* concurrence argues that "more than 63 million abortions have been performed" as evidence that the Court's substantive due process jurisprudence has been "wielded to 'disastrous ends.'"[149] This is a consequentialist defense of *Dobbs* and a big reason why *Roe* has been an infamous decision for Justice Thomas and fellow social traditionalists from day one. Justice Thomas got this figure directly from the NRLC, which was founded in 1968 and calls itself "the nation's oldest and largest grassroots pro-life organization," with fifty state affiliates "and more than 3,000 local chapters."[150] As important, Thomas's use of facts melds ideology and description — not all Americans would agree that the figure Thomas cites qualifies as "disastrous."[151]

A significant legal ruling like *Dobbs*, which embraces the antiabortion and legal conservative movements but not that of the modern feminist movement, can supercharge a grassroots movement while, at least in the short run, demoralizing its political enemies.[152] On the other hand, movement decisions like *Dobbs* can also fuel backlash, leading more

[148] *See id.*

[149] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2303 (2022) (Thomas, J., concurring) (quoting Gamble v. United States, 139 S. Ct. 1960, 1989 (2019) (Thomas, J. concurring)).

[150] *Id.*; *History of National Right to Life*, NAT'L RIGHT TO LIFE, https://www.nrlc.org/about/history/ (last visited Sept. 19, 2023) [https://perma.cc/4LLP-Y4TQ].

[151] *Dobbs*, 142 S. Ct. at 2303. Polls confirm that most Americans support the *Roe* decision and strongly favor keeping abortion legal, especially early in pregnancy. *See Abortion*, GALLUP, https://news.gallup.com/poll/1576/abortion.aspx (last visited Sept. 19, 2023) [https://perma.cc/23D8-R7XZ].

[152] *See* Tsai, *Supreme Court Precedent and the Politics of Repudiation*, *supra* note 76, at 106.

Americans to mobilize and even perhaps radicalizing existing activists.[153] Activists who believe that every terminated pregnancy is the killing of a human being will cheer and feel their view of the social order vindicated, while citizens who believe in the right to bodily autonomy and sex equality will be rightly alarmed by this morally strident rhetoric. Such language is explicitly political and polarizing, exposing the tensions between judging and crusading, but our point is that this is precisely what can be expected from movement judges. An increase in movement rhetoric from judges won't just reshape legal doctrine; it may also roil ordinary politics and send the message to those who do not identify with a movement's ambitions that their personhood, beliefs, and values are not worthy of respect.

Judicial entrenchment of a movement's principles reduces the costs of defending those values in other domains. The converse is also true, so that a ruling like *Dobbs* increases the costs of defending the idea of reproductive freedom by making it less certain and by displacing socio-political conflict into other domains (statehouses, state courts, congressional and presidential politics) — and almost certainly intensifying it. A movement judge may predict that with jurisprudence thus altered and a preferred movement freshly empowered rhetorically, politics will move in the direction favored by that movement. But since judges enjoy no control of movements themselves and only partial access to information, such assumptions are unreliable and frequently wrong as time goes on.

Even so, in seeking the empowerment that the law can provide, social movements relish the prospect of discovering judges who will identify with them or sympathize with their agendas (and all the more so because judges have a limited say over what movements themselves do). Part II considers a case study that played an outsized role in the creation of movement judges: the fight to reverse *Roe*. This history helps us to understand movement judges both as independent agents with their own professional identities and as participants in broader struggles over the role of the courts — and the Constitution — in our democracy.

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[153] *See generally* Siegel, *Dead or Alive*, *supra* note 9, at 243 ("[A]dvocates recognize that the public responds, fitfully, to the claims of *both* the gun rights and gun control movements" (emphasis in original)).

II. MAKING PRO-LIFE MOVEMENT JUDGES

Although criticism (and support) of *Roe v. Wade* came from all quarters,[154] we focus now on the two main movements in play when it came to engaging the politics of repudiation to destabilize social support for that ruling. At least for antiabortion activists, movement judges were not always a constant in the Republican Party, the conservative legal movement, or the Supreme Court confirmation process. Instead, the elevation of movement judges became an objective for the movement out of deep disappointment with *Planned Parenthood v. Casey*.[155] That was the first historical moment conservatives felt they had enough jurists on the Court to eradicate *Roe* once and for all.[156]

Contrary to stories told about the outsized importance of *Roe* in shaping Supreme Court confirmations, federal confirmation battles began well before 1973. Josh Chafetz has demonstrated that confirmation battles have always been heated and politically salient, at least episodically.[157] Historian Laura Kalman has traced how in the 1960s, some of the polarization many identify in the post-*Roe* era was already present as members of Congress resisted the making and consolidation of a progressive Warren Court majority.[158] Furthermore, as we show below, the relationships between antiabortion activists, the GOP, and judicial nominees have been fraught because the three have not always moved in tandem.

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[154] Academic criticism of the decision surely played a role in how new generations of lawyers viewed the case: from pragmatists like Posner, who felt the ruling was impractical, to liberals such as John Hart Ely, who believed the decision was not merely wrong, but was "*not* constitutional law and gives almost no sense of an obligation to try to be." *See* ZIEGLER, AFTER *ROE*, *supra* note 72, at 238-39; John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

[155] Planned Parenthood v. Casey, 505 U.S. 833, 855-88 (1992).

[156] Indeed, many expected the Court to reverse *Roe* in 1992. *See* Ziegler, *supra* note 86, at 83 (explaining that Republicans had "put in place a Supreme Court that everyone thought was destined to reverse *Roe*").

[157] *See* Josh Chafetz, *Unprecedented?: Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 98-110 (2017).

[158] *See* LAURA KALMAN, THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT 4-6 (2017).

A. After Roe

After the Supreme Court handed down *Roe* it was not immediately apparent that party leaders — or social movement reaction to it — would change the status quo. John Paul Stevens, the first Justice nominated after *Roe*, faced no questions about abortion and little doubt about his confirmation, and the vote for him was unanimous.[159]

Stevens's smooth ride in part reflected the objectives of the antiabortion movement in the immediate aftermath of *Roe*. Before 1973, the movement had mobilized around the idea of constitutional fetal personhood, suggesting that the word "person" in the Fourteenth Amendment applied before as well as after birth — and that liberal abortion laws (or even individual abortions) violated the Due Process and Equal Protection Clauses.[160]

Roe did nothing to change this basic calculus. In the weeks after the Court's decision, several members of Congress proposed federal constitutional amendments recognizing fetal personhood.[161] Leading antiabortion professors and academics began an intense discussion about what an ideal amendment should do — should it apply to private citizens, like the Thirteenth Amendment?[162] Should it contain an exception for the life of the pregnant person?[163] Implicit in these debates was a desire to avoid any litigation in the Supreme Court. One activist bemoaned the possibility of the Court being "back in the saddle again with many possibilities for delay and inadequate protection of the unborn child."[164] Activists committed to minimizing the Court's role paid relatively little attention to judicial confirmations.[165]

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[159] *See* ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 47.

[160] On the fight for fetal personhood, see ZIEGLER, AFTER *ROE*, *supra* note 72, at 38-44.

[161] *See* MARY ZIEGLER, *ROE*: THE HISTORY OF A NATIONAL OBSESSION 15-16 (2023) [hereinafter *ROE*].

[162] *See* Memorandum from Joseph P. Witherspoon, Consultant to Pub. Pol'y Comm., Nat'l Right to Life Comm., to Exec. Comm., Nat'l Right to Life Comm. 5 (Aug. 14, 1973) (on file at the Gerald Ford Presidential Library, in the American Citizens Concerned for Life Papers, Box 6).

[163] *See* Memorandum from Nellie J. Gray to Members of the Right-to-Life Movement 9-10 (Dec. 1, 1973) (on file at the Gerald Ford Presidential Library, in the American Citizens Concerned for Life Papers, Box 6).

[164] Memorandum from Joseph P. Witherspoon, *supra* note 162, at 5.

[165] *See* ZIEGLER, AFTER *ROE*, *supra* note 72, at 28-38.

Ronald Reagan, who embraced the antiabortion movement, began turning the focus to judges in 1980 when running for President.[166] In a bow to grassroots sentiment, the GOP's platform was altered from one that had recognized abortion as "one of the most difficult and controversial [issues] of our time"[167] to an unequivocal statement that "the unborn child has a fundamental individual right to life which cannot be infringed."[168]

At the time, the Supreme Court was considering the constitutionality of the Hyde Amendment,[169] and Reagan suggested that the main problem in the abortion debate was judicial activism.[170] Reagan's complaints about judicial activism united Republican voters with a variety of views about abortion, and he ran on a platform that called for not only the ratification of a fetal-protective constitutional amendment but also the nomination of Justices "who respect traditional family values and the sanctity of innocent human life."[171]

At this point, seeking movement judges would have hampered Reagan's efforts to build a big-tent coalition; party loyalists were not merely sufficient, they also bolstered the GOP's unifying message to voters. The selection of Sandra Day O'Connor, who was rumored to have supported abortion rights during her time in the Arizona State Legislature, decreased interest in judicial confirmations within the antiabortion movement for a time.[172] Selections like O'Connor's gave preservationists a boost: a popular nominee who was confirmed without

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[166] *See* ZIEGLER, *ROE*, *supra* note 161, at 37-38.

[167] *See Republican Party Platform of 1976*, THE AM. PRESIDENCY PROJECT (Aug. 18, 1976), https://www.presidency.ucsb.edu/documents/republican-party-platform-1976 [https://perma.cc/ANR6-877Q].

[168] *Republican Party Platform of 1984*, THE AM. PRESIDENCY PROJECT (Aug. 20, 1984), https://www.presidency.ucsb.edu/documents/republican-party-platform-1984 [https://perma.cc/4955-MBXZ].

[169] The Court would ultimately reject this challenge. Harris v. McRae, 448 U.S. 297, 297-99 (1980).

[170] *See* ZIEGLER, *ROE*, *supra* note 161, at 37-38.

[171] *See id.* at 43-44. For the language of the platform, see *Republican Party Platform of 1980*, THE AM. PRESIDENCY PROJECT (July 15, 1980), https://www.presidency.ucsb.edu/documents/republican-party-platform-1980 [https://perma.cc/G6RT-9YG9].

[172] *See* DONALD T. CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY 199 (2007).

incident, O'Connor reinforced the idea that the Court differed from partisan institutions or particular movements within the conservative coalition.

At least in the short term, the selection of O'Connor also reinforced for antiabortion activists that there was no reason to focus on the courts. If Republicans used judicial nominations to burnish the nonpartisan appearance of the Court, then radical changes in the federal judiciary could not be guaranteed but depended on hope that a partisan judge would happen to do the right thing, at least in the eyes of the faithful.

By 1983, however, control of the Court struck leaders of the antiabortion movement as far more important. That year, Senators Orrin Hatch and Thomas Eagleton teamed up to propose an amendment permitting the states to ban abortion, but the amendment did not manage to win a bare majority in the Senate, much less the supermajority required to satisfy Article V's threshold for congressional proposals.[173] The same month, the Supreme Court struck down an antiabortion ordinance in *City of Akron v. Akron Center for Reproductive Health Services* (*Akron I*).[174] But Justice O'Connor dissented, suggesting that the *Roe* framework was unworkable and "clearly on a collision course with itself."[175] Her dissent inspired Americans United for Life, a major antiabortion group, to set out a new strategy "around the relatively uncontroversial proposition [. . .] that the Court should reverse itself."[176] O'Connor's dissent hardly made her a movement judge, and antiabortion lawyers did not mistake her for one. O'Connor's dissent suggested that Republican Presidents could transform the Court and ensure the overruling of *Roe* by nominating more judges who shared her views.[177]

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[173] *See* SCOTT H. AINSWORTH & THAD E. HALL, ABORTION POLITICS IN CONGRESS: STRATEGIC INCREMENTALISM AND POLICY CHANGE 109 (2011); *see also* David Shribman, *Foes of Abortion Beaten in Senate on Amendment Bid*, N.Y. TIMES (June 29, 1983), https://www.nytimes.com/1983/06/29/us/foes-of-abortion-beaten-in-senate-on-amendment-bid.html [https://perma.cc/9PGV-ECJM].

[174] *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 443-45 (1983).

[175] *Id.* at 454-58 (O'Connor, J., dissenting).

[176] ZIEGLER, ABORTION AND THE LAW, *supra* note 156, at 74.

[177] *See id.* at 8.

Formally, antiabortion lawyers compared their effort to the incremental litigation campaign launched by the NAACP to dismantle de jure segregation.[178] But the truth was more complicated. While civil-rights lawyers had little influence over a judiciary and political system dominated by whites for decades,[179] antiabortion activists were not truly outsiders and hoped to collaborate with the GOP to nominate *Roe* skeptics to the federal bench.[180]

But what did it mean to nominate a movement-aligned judge? At first, antiabortion activists assumed that Republicans would act in accordance with the Republican platform and choose sympathetic judges.[181] And so between 1983 and 1992, antiabortion activists worked to elect Republicans, whom they expected to nominate and confirm sympathetic Supreme Court Justices.[182] In 1984, for example, the NRLC told voters that "[i]f President Reagan wins reelection, he will appoint at least two and maybe even three new Supreme Court Justices."[183] Even George H.W. Bush, a candidate that many white evangelicals and other social conservatives found to be uninspiring, represented a chance to reshape the Court.[184] The strategy seemed to be working: in 1986, four Justices dissented from a decision striking down an abortion restriction,[185] the most since *Roe*, and three years later, the Court upheld a Missouri regulation and suggested that *Roe*'s trimester framework was unworkable.[186]

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[178] *See* E.R. Shipp, *Foes of Abortion Examine Strategies of N.A.A.C.P.*, N.Y. TIMES (Apr. 2, 1984), https://www.nytimes.com/1984/04/02/us/foes-of-abortion-examine-strategies-of-naacp.html [https://perma.cc/B8JM-CB4C]; *see also* Mary Ziegler & Robert L. Tsai, *How the Anti-Abortion Movement Used the Progressive Playbook to Chip Away at* Roe v. Wade, POLITICO MAG. (June 13, 2021, 7:00 AM EDT), https://www.politico.com/news/magazine/2021/06/13/anti-abortion-progressive-roe-v-wade-supreme-court-492506 [https://perma.cc/VG2V-Q53V].

[179] On the relative powerlessness of early civil rights movement activity, see KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 25, at 3-15, 32-66.

[180] On the close ties between the antiabortion movement and the GOP, see ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 110-45.

[181] *See id.* at 76-91.

[182] *See id.* at 71-86.

[183] *Id.* at 52.

[184] *See* ZIEGLER, ABORTION AND THE LAW, *supra* note 156, at 91.

[185] *See* Thornburgh v. Am. Coll. of Obstets. & Gynecs., 476 U.S. 747, 782-833 (1986).

[186] *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 500-12 (1989).

At the same time, politicians seemed leery of picking nominees who might pass as movement judges, especially following the failed confirmation of Robert Bork.[187] By the mid-1980s, Bork was already one of the best-known and most widely-admired thinkers in conservative legal circles — a well-known voice in antitrust law and a trenchant critic of *Roe* and *Griswold v. Connecticut*.[188]

Bork was unusually vocal about and committed to originalism, his preferred interpretive method. Later, scholars would describe him as "the father of originalism"[189] or the "original originalist."[190] Because of his interpretive commitments, Bork was also quite open about his perspective on a range of issues during his Supreme Court confirmation hearings — even when doing so would not have improved the odds of a successful confirmation.[191] Democratic Senators, who controlled a majority at the time, pounced on Bork's interpretive inflexibility and outspoken beliefs, painting him as a movement judge rather than a neutral arbiter.[192] In his official report on the nominee, Senator Joseph Biden, the architect of the campaign to stop Bork's confirmation, argued that Bork was "a conservative activist and not a practitioner of judicial restraint."[193] Biden pointed to Bork's supposed indifference to popular opinion — evidenced by his opposition to "the right of married couples to use contraception."[194] Bork's confirmation went down by a vote of 58–42, making the nominee into a martyr for many conservative movements

[187] On the significance of Bork's failed confirmation, see Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 389 (2011).

[188] *See* ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 61-63.

[189] Steven G. Calabresi & Lauren Pope, *Judge Robert H. Bork and Constitutional Change: An Essay on* Ollman v. Evans, 80 U. CHI. L. REV. ONLINE 155, 155 (2017).

[190] Mark A. Graber, *Robert Bork, The Original Originalist*, BALT. SUN (Dec. 24, 2012), https://www.baltimoresun.com/opinion/op-ed/bs-ed-bork-20121221-story.html [https://perma.cc/5XE5-BKAS].

[191] *See* PAUL M. COLLINS & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 112-31 (2013).

[192] *See* ZIEGLER, *ROE*, *supra* note 161, at 51-53.

[193] *Id.* at 52.

[194] *Id.*

and inaugurating a new era of caution in the selection of Supreme Court nominees.[195]

The traits that might have made Bork a movement judge — his interpretive inflexibility, his willingness to discard precedent, his fidelity to a vision of the Constitution over institutionalist concerns — had seemingly made him a liability. By contrast, Anthony Kennedy, the judge who was ultimately confirmed in Bork's place, was viewed as a moderate.[196] His opposition to abortion was more restrained (indeed, he had written an opinion that cited *Roe v. Wade* in discussing the scope of a constitutional right to privacy[197]). The lessons of Kennedy's experience seemed to be clear: judges faced a penalty for aligning with movements, and Presidents had incentives to choose nominees who would not rock the boat, even if grassroots movements would prefer them to do otherwise. Just the same, Presidents had reasons to avoid selecting jurists who obviously seemed to be movement judges. Many antiabortion activists did not see any reason to push for anything more: stealth candidates like Kennedy might deliver similar results without as much pushback.[198] At this point, even a partisan judge was preferred to a movement judge.

B. Casey *and Grassroots Disappointment in Partisan and Preservationist Judges*

But in 1992, the antiabortion movement realized that party affiliation alone did not ensure movement judges or movement outcomes. In *Casey*, the Court declined an invitation to reverse *Roe*.[199] Three Republican nominees, David Souter, Sandra Day O'Connor, and

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[195] *See* Linda Greenhouse, *Bork's Nomination is Rejected, 58–42; Reagan Saddened*, N.Y. TIMES (Oct. 24, 1987), https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html [https://perma.cc/H498-3MXF].

[196] *See* Linda Greenhouse, *Senate, 97 to 0, Confirms Kennedy to High Court*, N.Y. TIMES (Feb. 4, 1988), https://www.nytimes.com/1988/02/04/us/senate-97-to-0-confirms-kennedy-to-high-court.html [https://perma.cc/LGG9-397P].

[197] *See* Beller v. Middendorf, 632 F.2d 788, 808 (9th Cir. 1980) (describing *Roe* as a case in which "the government seriously [intruded] into matters which lie at the core of interests which deserve due process protection").

[198] *See* ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 69-71.

[199] *See* Planned Parenthood v. Casey, 505 U.S. 833, 857-883 (1992).

Anthony Kennedy, wrote a joint opinion preserving what the Court called the essential holding of *Roe* — that the Constitution protects a right to abortion before viability.[200]

Despite its formality of preservationism, we think that *Casey* represented a break from *Roe*'s technocratic-preservationist approach. Instead, the *Casey* plurality forged a new compromise that endorsed the importance of autonomy for abortion seekers as well as the rhetoric of the antiabortion movement (recognizing "unborn life").[201] Technocracy largely fell out of the picture.

This approach put judges at the center of trying to facilitate movement-based considerations. The undue burden test cleared the way for moral considerations, including movement-powered ways of thinking about the issue, to have their way in the political domain and shape subsequent juridical answers.[202]

But this attempt at a grand compromise was profoundly unsatisfactory to grassroots conservatives (and to many supporters of reproductive rights and justice too). *Casey* had not repudiated *Roe* nor allowed the outright criminalization of abortion from the moment of fertilization.[203] As long as the compromise struck by partisan and preservationist jurists stood as precedent, the struggle for fetal personhood — which would make all abortions unconstitutional — would have to be postponed indefinitely. *Casey* prompted antiabortion activists to refine what they wanted in nominations to the federal bench.[204] Simply relying on Republicans had failed.[205] Members of the NRLC held up Clarence Thomas as an example of the model for a new kind of Justice.[206]

Before his confirmation, Thomas was not only a self-proclaimed originalist and textualist; he also routinely denounced the very idea of

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[200] *Id.* at 846.

[201] *See id.* at 852, 897-98, 869-71.

[202] On the importance of the undue burden test to movement politics, see Mary Ziegler, *Liberty and the Politics of Balance: The Undue Burden Test After* Casey/Hellerstedt, 52 HARV. C.R.-C.L. L. REV. 421, 430-52 (2017).

[203] *Casey*, 505 U.S. at 845-46 (retaining Roe's essential holding).

[204] *See* ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at xiii, 87-91.

[205] *See id.* at 86, 90.

[206] *See id.* at 79.

legal abortion.[207] He complimented the author of an article published in the conservative *American Spectator* that compared abortion to the Holocaust and described the *Roe* decision as a "'coup' against the Constitution."[208] In the 1980s, he had also spent time at the Claremont Institute with legal movement figures like John Eastman, taking in not merely originalist ideas but also the work of those committed to a revival of natural law.[209] Conservative PACs bankrolled pro-Thomas ads lambasting Democrats who had been critical of the nomination — ads they refused to stop airing even following a request from the Bush Administration.[210]

Thomas's response to the sexual harassment accusations raised by Anita Hill struck NRLC leaders as important too — a proxy for Thomas's ideological commitment and refusal to back down. Thomas, they suggested, was not a "'compromise' candidate,"[211] and as a result, had faced more backlash from the Left. Thomas's response to Anita Hill's story was defiant — he described the questions raised about his behavior as a "high-tech lynching" — and that, too, struck antiabortion activists as pitch perfect.[212] He modeled a suspicion of institutions and a distrust

[207] *See id.*

[208] Neil A. Lewis, *Court Nominee Is Linked to Anti-Abortion Stand*, N.Y. TIMES (July 3, 1991), https://www.nytimes.com/1991/07/03/us/court-nominee-is-linked-to-anti-abortion-stand.html [https://perma.cc/5R96-PTEK].

[209] Emma Brown & Rosalind S. Helderman, *For John Eastman and Clarence Thomas, An Intellectual Kinship Stretching Back Decades*, WASH. POST (Dec. 23, 2022, 10:34 AM EST), https://www.washingtonpost.com/investigations/2022/12/23/john-eastman-clarence-thomas-clerk/ [https://perma.cc/JR6W-8SS8]; *see also* COREY ROBIN, THE ENIGMA OF CLARENCE THOMAS 148-53 (2019). Despite his encounter with Straussians, Thomas's jurisprudential objection to abortion does not sound in natural law; while compatible with it, his constitutional reasons instead are grounded in text, history, and tradition. ROBIN, *supra*, at 148-53.

[210] *See* Steven A. Holmes, *Thomas Backers' Ad Faults Senators*, N.Y. TIMES (Sept. 4, 1991), https://www.nytimes.com/1991/09/04/us/thomas-backers-ad-faults-senators.html [https://perma.cc/5P6H-GKZV]; Andrew Rosenthal, *Bush Acts to Quiet Storm Over TV Ad on Thomas*, N.Y. TIMES (Sept. 6, 1991), https://www.nytimes.com/1991/09/06/us/bush-acts-to-quiet-storm-over-tv-ad-on-thomas.html [https://perma.cc/WM8Q-R6DB].

[211] *See* ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 79.

[212] On Thomas's rhetoric, see R.W. Apple Jr., *The Thomas Confirmation; Senate Confirms Thomas, 52–48, Ending Week of Bitter Battle; "Time for Healing," Judge Says*, N.Y. TIMES (Oct. 16, 1991), https://www.nytimes.com/1991/10/16/us/thomas-confirmation-senate-confirms-thomas-52-48-ending-week-bitter-battle-time.html [https://perma.cc/

of elites that some antiabortion activists shared, and he did not change his tone, even when his nomination seemed to be in danger.

Of course, Thomas was hardly the martyr that NRLC activists made him out to be: a *New York Times* poll from the era found that Americans tended to believe Thomas's denials over the accounts of his accusers and favored confirming him by more than a two-to-one margin.[213]

Clarence Thomas struck antiabortion leaders as what we are calling a movement judge, and they set out to ensure that more nominees would fit the same mold. He had already professed sympathy for constitutional arguments raised by the antiabortion movement and so might be expected to be open to other unconventional constitutional claims.[214] He echoed the view held by many in the antiabortion movement that mainstream institutions were broken — a criticism he leveled against not just universities but also the Senate and the legacy media.[215] When confronted with criticism, Thomas seemed to relish confrontation rather than seek to defuse controversy.[216]

95Z3-PESV]. On antiabortion perceptions of his performance, see ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 80.

[213] *See* Elizabeth Kolbert, *The Thomas Nomination: Most in National Survey Say Judge Is the More Believable*, N.Y. TIMES (Oct. 15, 1991), https://www.nytimes.com/1991/10/15/us/the-thomas-nomination-most-in-national-survey-say-judge-is-the-more-believable.html [https://perma.cc/VP4E-6RQ8].

[214] Thomas had, before joining the Court, indicated sympathy for the pro-life movement. David G. Savage, *Thomas Backs Off Abortion, Natural Law Statements: Court: Nominee Supports Privacy Right but Won't Say Whether It Includes Abortion. He Rejects Anti-Abortion Article That He Once Praised for Applying Natural Law*, L.A. TIMES (Sept. 11, 1991, 12:00 AM PDT), https://www.latimes.com/archives/la-xpm-1991-09-11-mn-1836-story.html [https://perma.cc/BBD2-PWJC].

[215] Clarence Thomas famously called his Senate confirmation hearing — and media coverage of it — a "high tech lynching." Adam Clymer, *The Thomas Confirmation; Senate's Futile Search for Safe Ground*, N.Y. TIMES (Oct. 16, 1991), https://www.nytimes.com/1991/10/16/us/the-thomas-confirmation-senate-s-futile-search-for-safe-ground.html [https://perma.cc/TD4F-Y63B].

[216] On Thomas's defiance and confrontational response to criticism, see Jill Abramson, Opinion, *This Justice Is Taking Over the Supreme Court, and He Won't Be Alone*, N.Y. TIMES (Oct. 15, 2021), https://www.nytimes.com/2021/10/15/opinion/clarence-thomas-supreme-court.html [https://perma.cc/HD8R-23CR]; Joan Biskupic, *Justice Thomas Takes on His Critics*, WASH. POST (Sept. 23, 1998), https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/thomas092398.htm [https://perma.cc/6YRD-CBKR].

For activists, the question became how to identify more movement judges and ensure that Republicans nominated them. The latter was hardly easy. Thomas's confirmation had been a nailbiter: 52–48 in favor of his elevation.[217] Republican Presidents, it seemed, had incentives to pick nominees like Kennedy or O'Connor who sailed through the Senate with almost no opposition — those with a centrist record or no paper trail. To make matters worse, for a time, the antiabortion movement had struggled to influence the conservative legal movement.[218] The early Federalist Society had included lawyers with a variety of views on legal abortion and had sought to play down an issue that seemed unnecessarily divisive.[219] And academic originalists wanted to focus on methods, seeking to develop a form of the theory that might pass for a legitimate judicial approach rather than just window dressing for conservative outcomes.[220] Finding a conservative judge seemed easy, but a movement-aligned conservative judge appeared to be too much to ask.

Groups like NRLC set out to build influence in the conservative legal movement and the Republican hierarchy. In the Federalist Society, abortion opponents gained an ally in Leonard Leo, a young attorney who had helped Thomas during his confirmation hearings.[221] Leo was strongly opposed to legal abortion, and as early as 1997, he objected to the role played by the American Bar Association in rating nominees to the Supreme Court, questioning whether the ABA was "simply just

[217] *See* Apple Jr., *supra* note 212.

[218] *See* Michael Scherer, *Twin Republican Strategies Brought the Antiabortion Movement to the Cusp of Victory in the Supreme Court*, WASH. POST (Dec. 4, 2021, 5:47 PM EST), https://www.washingtonpost.com/politics/abortion-opponents-republicans/2021/12/04/74abbda2-5447-11ec-8769-2f4ecdf7a2ad_story.html [https://perma.cc/VWQ7-YBSA].

[219] *See The Federalist Society: The Cover of a Pamphlet Published by the Federalist Society; Judge Scalia's Cheerleaders*, N.Y. TIMES (July 23, 1986), https://www.nytimes.com/1986/07/23/us/federalist-society-cover-pamphlet-published-federalist-society-judge-scalia-s.html [https://perma.cc/7GGW-KLFR].

[220] On the evolution of academic originalism, see KERSCH, *supra* note 107, at 29-30, 93-100.

[221] On Leo's role in the Thomas confirmation hearings, see Kenneth P. Vogel, *Leonard Leo Pushed the Courts Right. Now He's Aiming at American Society*, N.Y. TIMES (Oct. 12, 2022), https://www.nytimes.com/2022/10/12/us/politics/leonard-leo-courts-dark-money.html [https://perma.cc/AGZ5-UAAZ].

another special-interest group advancing a partisan political agenda."[222] By 2001, Leo had become the head of the Federalist Society's lawyers' division. He remained both profoundly opposed to abortion and angry about what he saw as the biases of elite organizations like the ABA, which he felt rejected conservatives "candidates on ideological grounds."[223] In this capacity, Leo became both a patron and an entrepreneur.[224]

C. Alito's Nomination and Trump's Picks

Following the election of George W. Bush, Leo joined three other men in a group that called itself the Four Horsemen; the group included not only Republican veterans like C. Boyden Gray and Edwin Meese III but also prominent Christian conservative Jay Sekulow of the American Center for Law and Justice.[225] Leo, who had long worked as a Republican Party liaison with Catholics, helped steer John Roberts through the Senate[226] and tried to tamp down anger about the selection of Harriet Miers, a close confidante of the President.[227]

Miers in some ways fit the mold of previously successful nominees. While her critics questioned her credentials (she had not served as a judge or held an academic position), she was famously tight-lipped and

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[222] Richard Carelli, *American Bar Association Criticized for "Liberal" Agenda*, DAILY AMERICAN, Feb. 10, 1997, at 4.

[223] Joshua Rozenberg, *Why the White House Wants to Judge Judges*, DAILY TELEGRAPH, Mar. 27, 2001, at 17, 2001 WLNR 2771929.

[224] *See* Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court [https://perma.cc/AL39-XK4F].

[225] *See* Faye Fiore, *Ready, Set: Legal Activists Await Bush's Go*, L.A. TIMES (July 10, 2005 12:00 AM PDT), https://www.latimes.com/archives/la-xpm-2005-jul-10-na-activist10-story.html [https://perma.cc/Q2K6-ZD7C].

[226] On Leo's role as a liaison and influence on the Roberts' confirmation, see David D. Kirkpatrick, *A Year of Work to Sell Roberts to Conservatives*, N.Y. TIMES (July 22, 2005), https://www.nytimes.com/2005/07/22/politics/politicsspecial1/a-year-of-work-to-sell-roberts-to-conservatives.html [https://perma.cc/27TQ-9B9P].

[227] *See* Robin Toner, *Miers Was Leader in Effort Within Bar to Rescind Support for Abortion*, N.Y. TIMES (Oct. 4, 2005), https://www.nytimes.com/2005/10/04/politics/politicsspecial1/miers-was-leader-in-effort-within-bar-to-rescind.html [https://perma.cc/9XF7-9GWE].

had no track record of divisive positions.[228] But she was seen as a loyal party figure.[229] The same lack of a paper trail had helped ease the way for David Souter's confirmation in the 1990s.[230] As Bush Administration officials put it at the time, Souter was "non-political," the kind of nominee who would make it hard for Congress to "reduce [the confirmation] to [a] partisan battle."[231] The same was true of Miers. But antiabortion activists and other social conservatives refused Leo's reassurances and insisted on a nominee who resembled Clarence Thomas — someone with a more clearly defined jurisprudential approach and ideological bent who seemed indifferent to possible public opposition. Big-name conservative activists denounced Miers;[232] Robert Bork, a hero to the Federalist Society, also called for her to withdraw.[233] Activists wanted to be assured of a movement judge, not a partisan judge, and soon they would get their wish.

When Miers decided to step aside,[234] Bush selected Samuel Alito, a very different kind of nominee.[235] Alito rarely missed the chance to tell people about his deep conservative beliefs (or his admiration for

[228] On contemporaneous impressions of Miers, see Elisabeth Bumiller, *Low-Profile Woman, High-Powered Job*, N.Y. TIMES (Nov. 20, 2004), https://www.nytimes.com/2004/11/20/politics/lowprofile-woman-highpowered-job.html [https://perma.cc/86F4-EDZN].

[229] *See id.*

[230] *See* ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 75-77.

[231] *See* Kristen Gear, Special Assistant to the Deputy Assistant for Commc'ns, White House, Talking Points on David Souter (n.d., ca. 1990) (on file in the George H.W. Bush Presidential Library, in the Kristen Gear Files).

[232] *See* Michael A. Fletcher & Charles Babington, *Conservatives Escalate Opposition to Miers*, WASH. POST (Oct. 25, 2005), https://www.washingtonpost.com/archive/politics/2005/10/25/conservatives-escalate-opposition-to-miers/123928c4-b4e7-41f4-97f2-d4649a32141b/ [https://perma.cc/TLS2-JRHQ]; Colbert I. King, *The Right, on Fire Over Miers*, WASH. POST (Oct. 8, 2005), https://www.washingtonpost.com/archive/opinions/2005/10/08/the-right-on-fire-over-miers/61793015-932b-4ff4-bd02-f7d403a987e5/ [https://perma.cc/5V8U-2DJ7].

[233] *See* Robert H. Bork, *Slouching Towards Miers*, WALL ST. J. (Oct. 19, 2005, 12:01 AM EST), https://www.wsj.com/articles/SB112968557638772718 [https://perma.cc/B596-6KV7].

[234] *See* ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 142-43.

[235] *See* Jeanne Cummings & Jess Bravin, *Choice of Alito for High Court Sets Stage for Ideological Battle*, WALL ST. J. (Nov. 1, 2005, 12:01 AM EST), https://www.wsj.com/articles/SB113075736648684085 [https://perma.cc/QPM3-SW4H].

conservative intellectual icon William F. Buckley).[236] Alito had expressed particular pride in his contributions during the Reagan Administration in arguing "that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion."[237] Rightwing movements regarded him as a reliable conservative — someone expected to disregard the kind of backlash that might follow the reversal of a decision like *Roe v. Wade*.[238] Senators also perceived Alito as a different kind of judge: his confirmation vote was close (58–42),[239] but for conservative movements, the razor-thin margin was not a cause for concern. That Democrats did not like Alito struck some in the antiabortion movement as a good sign.[240]

Like Thomas before him, Alito inspired social movements looking for a different kind of nominee to the federal bench. Both Thomas and Alito had been controversial and squeaked by in close confirmation votes, and both men had won the admiration of a variety of rightwing grassroots movements. Their success suggested that Bork had been less of a cautionary tale after all: movement judges could not just be an asset but could be confirmed through more aggressive coordination and skillful vetting. Thomas and Alito had been exciting to rank-and-file activists — sometimes more so than the men who nominated them — and precisely because they appeared to be movement judges.

For a time, the appeal of movement judges appeared to have faded, especially as Supreme Court confirmation battles became more polarized. Sonia Sotomayor, who would later be seen by progressives as "the conscience of the Supreme Court," had a relatively short paper trail

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[236] *See* Charlie Savage, *Decades Ago, Alito Laid Out Methodical Strategy to Eventually Overrule* Roe, N.Y. TIMES (June 25, 2022), https://www.nytimes.com/2022/06/25/us/politics/samuel-alito-abortion.html [https://perma.cc/SEB5-NR2X].

[237] *See* Charles Babington, *Alito Distances Himself from 1985 Memos*, WASH. POST. (Dec. 3, 2005), https://www.washingtonpost.com/archive/politics/2005/12/03/alito-distances-himself-from-1985-memos/453c2d4b-1b46-4c9d-9914-f842837d5707/ [https://perma.cc/YRT5-4S3Z].

[238] *See* ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 143.

[239] *See* David Stout, *Alito Is Sworn in as Justice After 58-42 Vote to Confirm Him*, N.Y. TIMES (Jan. 31, 2006), https://www.nytimes.com/2006/01/31/politics/politicsspecial1/alito-is-sworn-in-as-justice-after-5842-vote-to.html [https://perma.cc/7VMZ-AQNS].

[240] *See* ZIEGLER, DOLLARS FOR LIFE, *supra* note 86, at 143.

when the Senate confirmed her in 2009.[241] A former prosecutor, Sotomayor had not staked out divisive positions in print and received votes from both Republicans and Democrats for her confirmation.[242] At that time there were no strong signs she would be a movement jurist, but in the years since, the growing strength of the conservative movement bloc on the Court seems to have played a factor in her increased receptivity to progressive movement arguments. She has cited *The New Jim Crow*, a bible of the abolitionist movement, warning that routine stops of citizens leave a person "the subject of a carceral state, just waiting to be catalogued."[243]

Although Elena Kagan was a veteran of the Clinton and Obama White Houses, she was also seen as a centrist pick — some liberals were "suspicious that she may lean too far toward the middle."[244] If it was increasingly difficult to win over members of the other party,[245] the cost of selecting a movement judge might run high, for Presidents and grassroots movements alike. A candidate like Kagan might be more likely to get through an increasingly polarized Senate than the kind of movement judge who would inspire the fierce loyalty of grassroots partisans.

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[241] For the argument that Sotomayor is the Court's conscience, see Elie Mystal, *How Sonia Sotomayor Became the Conscience of the Supreme Court*, NATION (Sept. 12, 2022), https://www.thenation.com/article/politics/sonia-sotomayor-liberal-justice/ [https://perma.cc/MH9D-JF8G]. On progressive concerns about Sotomayor as a nominee, see Lisa Lerer, *"Not a Dyed in the Wool Liberal,"* POLITICO (May 27, 2009, 4:20 PM EDT), https://www.politico.com/story/2009/05/not-a-dyed-in-the-wool-liberal-023020 [https://perma.cc/TDZ5-JKBG]; Charlie Savage, *On Sotomayor, Some Abortion Rights Backers Are Uneasy*, N.Y. TIMES (May 27, 2009), https://www.nytimes.com/2009/05/28/us/politics/28abortion.html [https://perma.cc/KX3Q-HEJ8].

[242] *See* John Stanton, *Senate Confirms Sotomayor on Bipartisan 68-31 Vote*, ROLL CALL (Aug. 6, 2009, 2:14 PM), https://rollcall.com/2009/08/06/senate-confirms-sotomayor-on-bipartisan-68-31-vote/ [https://perma.cc/YAR4-YPGB].

[243] Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting).

[244] *See* Eric Lichtblau, *Potential Justice's Appeal May Be Too Partisan*, N.Y. TIMES (May 16, 2009), https://www.nytimes.com/2009/05/17/us/17kagan.html [https://perma.cc/L9WN-N6Z2].

[245] On the polarization of the Senate (and the electorate), see JAMES E. CAMPBELL, POLARIZED: MAKING SENSE OF A DIVIDED AMERICA 3-32 (2016); JAMES I. WALLNER, THE DEATH OF DELIBERATION: PARTISANSHIP AND POLARIZATION IN THE UNITED STATES SENATE 5-12 (2013).

But when Donald Trump ran for President in 2016, he unveiled a different approach to confirmations, one that dovetailed with abortion opponents' deepening preference for movement judges. Trump stressed that the next President would fill the seat vacated by Antonin Scalia[246] (Mitch McConnell had refused to hold a hearing for Merrick Garland, Obama's centrist choice to replace Scalia)[247] and promised that if he were elected, he would place pro-life Justices on the Court, so that the reversal of *Roe* would occur "automatically."[248] On the campaign trail, Trump released more than one list of prospective nominees to the federal bench to stoke grassroots interest in the Court as means to complete movement goals.[249] Trump promised to select movement-aligned judges, those who would not just adhere to particular interpretive methods but who would deliver certain results.

Trump's guarantee of movement jurists was not meant to defuse potential landmines facing a nominee in a later confirmation hearing. His goal was to outflank his establishment opponents for the nomination and energize movement activists to vote by pledging to give them a certain kind of judge.[250] Trump even made the polarization of the Senate into a turnout strategy. No longer would Presidents pick judges who could be assured of confirmation, hopefully by a wide, bipartisan margin. Instead, Trump's strategy required citizens to vote in the right kind of Senate majority to ensure that movement judges could be confirmed, even by party-line votes.[251] After his surprising victory over

[246] *See* Jeremy Diamond, *Donald Trump Unveils His Potential Supreme Court Nominees*, CNN POL. (May 18, 2016, 10:38 PM EDT), https://www.cnn.com/2016/05/18/politics/donald-trump-supreme-court-nominees/index.html [https://perma.cc/6848-Q395].

[247] *See* Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs Over Next Supreme Court Fight*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html [https://perma.cc/Z2GG-YKHZ].

[248] Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn* Roe v. Wade *Abortion Case*, CNBC (Oct. 19, 2016, 9:31 PM EDT), https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html [https://perma.cc/8G93-KZX2].

[249] *See* Diamond, *supra* note 246.

[250] Trump attracted attention for promising to nominate judges who would overrule *Roe* rather than calling for the selection of originalist or textualist judges. Mangan, *supra* note 248.

[251] *See* Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019),

Hillary Clinton, Trump indeed turned over much of the work of identifying suitable movement jurists to Leo and others affiliated with major movements allied with the GOP.[252]

Trump's first pick, Neil Gorsuch, had the right conservative bona fides. He was already known as a committed textualist and former law clerk to David Sentelle, a protégé of Senator Jesse Helms and a Federalist Society stalwart.[253] Though raised Catholic, Gorsuch belonged to a progressive Episcopalian parish — something that some pro-life activists openly worried about.[254] They were pacified, however, by his rulings defending religious freedom while on the Tenth Circuit[255] and his close connection to John Finnis, a prominent natural law theorist.[256] Before becoming part of the conservative legal movement, Gorsuch had written a dissertation opposing euthanasia and assisted suicide. Though he made no mention of abortion, he extolled the inviolability of human life and, in the book that emerged out of his thesis, insisted that "the intentional taking of human life by private persons is always wrong."[257] Finnis, Gorsuch's dissertation advisor at

https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/ [https://perma.cc/SQ9B-KVJM].

[252] *Id*.

[253] *See* Martin Longman, *Gorsuch's Praise of Sentelle Should Concern You*, WASH. MONTHLY (Feb. 6, 2017), https://washingtonmonthly.com/2017/02/06/gorsuchs-praise-of-david-sentelle-should-concern-you/ [https://perma.cc/LTV2-R6PU].

[254] Daniel Burke, *What Is Neil Gorsuch's Religion? It's Complicated*, CNN POL. (Mar. 22, 2017, 2:37 PM EDT), https://www.cnn.com/2017/03/18/politics/neil-gorsuch-religion [https://perma.cc/62TN-88S2].

[255] *See* Henry Gass, *In Gorsuch Hearings, Questions of Religious Liberty and the Law*, CHRISTIAN SCI. MONITOR (Mar. 21, 2017), https://www.csmonitor.com/USA/Justice/2017/0321/In-Gorsuch-hearings-questions-of-religious-liberty-and-the-law [https://perma.cc/9QRC-ZKZ4].

[256] *See* Oliver Laughland, Molly Redden, Robert Booth & Owen Bowcott, *Oxford Scholar Who Mentored Neil Gorsuch Compared Gay Sex to Bestiality*, GUARDIAN (Feb. 3, 2017), https://www.theguardian.com/law/2017/feb/03/neil-gorsuch-mentor-john-finnis-compared-gay-sex-to-bestiality [https://perma.cc/XF2E-G3GM].

[257] NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 4-5 (2006); *see also* Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599, 606 (2000).

Oxford, is a strong critic of abortion, calling it "approved killing of vulnerable innocent human beings."[258]

Kavanaugh, like Gorsuch, raised doubts for some conservatives. Having played a role in the litigation that ended Florida's recount and catapulted Bush to the White House over Al Gore, Kavanaugh's partisan bona fides were impeccable.[259] While working in the George W. Bush administration, he had questioned whether *Roe* was "settled law" but stopped short of expressing his own views on the matter.[260] Like Gorsuch, Kavanaugh was a regular on the Federalist Society circuit but that did not fully reassure conservatives worried about his connections to the nation's legal elite. At Harvard Law School, he cultivated relationships with well-known professors across the ideological spectrum.[261]

Kavanaugh's dissent in a D.C. Circuit case rejecting abortion rights for migrant minors detained under federal immigration law eventually placated abortion opponents.[262] And as was the case with Clarence Thomas before him, Kavanaugh appeared more sympathetic to rightwing movements after Christine Blasey Ford credibly accused him of sexually assaulting her when the two were in high school.[263] The fact that Ford made the accusation — and that Kavanaugh was angry and

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[258] 4 JOHN FINNIS, PHILOSOPHY OF LAW: COLLECTED ESSAYS 277 n.78 (2011).

[259] *See* Robert Gordon, *Does Brett Kavanaugh Agree With* Bush v. Gore?, ATLANTIC (Aug. 30, 2018), https://www.theatlantic.com/ideas/archive/2018/08/does-brett-kavanaugh-agree-with-bush-v-gore/568420/ [https://perma.cc/CQ6V-7LS5].

[260] Charlie Savage, *Leaked Kavanaugh Document Discusses Abortion and Affirmative Action*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html [https://perma.cc/JXM2-VDFF].

[261] On Kavanaugh's elite connections, see Paul Schwartzman & Michelle Boorstein, *The Elite World of Brett Kavanaugh*, WASH. POST (July 11, 2018, 6:13 PM EDT), https://www.washingtonpost.com/local/dc-politics/the-elite-world-of-brett-kavanaugh/2018/07/11/504d945e-8492-11e8-8f6c-46cb43e3f306_story.html [https://perma.cc/SJ62-X5FJ]; Editorial, *Harvard Should Tread Cautiously with Kavanaugh*, HARV. CRIMSON (Sept. 27, 2018), https://www.thecrimson.com/article/2018/9/27/editorial-harvard-should-tread-carefully-with-kavanaugh/ [https://perma.cc/SC7B-8RUE].

[262] *See* Garza v. Hargan, 874 F.3d 735, 755 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[263] On Ford's statement, see Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html [https://perma.cc/K44V-NANR].

defiant in response — hardly upset antiabortion activists.[264] Kristan Hawkins of Students for Life, a major player in Congress, wrote that Blasey Ford's accusations reflected nothing more than the fact that Democrats "want to keep the issue of abortion away from the voters."[265]

Amy Coney Barrett, by contrast to Kavanaugh, won almost immediate support from social conservatives because of her biography, hints in her scholarly writing that *Roe* was wrongly decided and that *stare decisis* was an equivocal command,[266] and her overt identification with the antiabortion movement.[267] She also incarnated a particular vision of pro-life feminism — a mother of seven children, deeply devout, and professionally successful.[268]

For those seeking a conservative movement jurist, Barrett's social ties to grassroots religious groups stood out. She once belonged to a local antiabortion organization that published an advertisement in an Indiana paper calling for the reversal of *Roe*.[269] Before ascending to the Supreme Court, she also gave five paid talks at the Blackstone Fellowship, a summer program intended to offer participants a "distinctly Christian

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[264] *See* Jeremy W. Peters & Elizabeth Dias, *Evangelical Leaders Are Frustrated at G.O.P. Caution on Kavanaugh Allegation*, N.Y. TIMES (Sept. 20, 2018), https://www.nytimes.com/2018/09/20/us/politics/brett-kavanaugh-religious-voters.html [https://perma.cc/AXV6-4DC2].

[265] Kristan Hawkins, Opinion, *The Chaos in the Kavanaugh Nomination Illustrates the High Stakes of the Supreme Court*, HILL (Sept. 20, 2018, 12:30 PM EST), https://thehill.com/opinion/judiciary/407602-the-chaos-in-the-kavanaugh-nomination-illustrates-the-high-stakes-of-the/ [https://perma.cc/45G7-3KCG].

[266] *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1922-28 (2017) (comparing stare decisis to other rules that make up the avoidance canon); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1737 (2013) (treating stare decisis as primarily "tempering disagreement" rather than the source of truth or wisdom).

[267] *See* Adam Liptak, *Amy Coney Barrett, Trump's Supreme Court Pick, Signed Anti-Abortion Ad*, N.Y. TIMES (updated May 19, 2021), https://www.nytimes.com/2020/10/01/us/amy-coney-barrett-abortion.html [https://perma.cc/6F5Z-98MR].

[268] *See* Erika Bachiochi, Opinion, *Amy Coney Barrett: A New Feminist Icon*, POLITICO MAG. (Sept. 27, 2020, 7:00 AM EDT), https://www.politico.com/news/magazine/2020/09/27/amy-coney-barrett-supreme-court-nominee-feminist-icon-422059 [https://perma.cc/VZ7V-3YF7].

[269] *See* Liptak, *supra* note 267.

worldview in every area of law."[270] The Alliance Defending Freedom, a leader of the conservative Christian legal movement, runs the Blackstone Legal Fellowship, a prestigious opportunity that links Christian law students, elite faculty, and conservative lawyers and judges.[271] Albert Mohler, a leader within the Southern Baptist Convention, has confirmed his own role in "the preparation of law students" to becoming "genuinely committed" future jurists by speaking with Blackstone Fellows and ADF-affiliated figures, describing such efforts as part of "the creation of a conservative legal movement."[272]

D. Dobbs *as a Movement Decision*

By the time the Supreme Court took up *Dobbs*, the movement faction within the institution already comprised a significant bloc. It no longer needed any support from anyone who might prefer to act in a preservationist fashion, much less anyone who might fret that the open repudiation of a constitutional right cherished by millions of women might cause political problems for the party that had appointed them.

Authored by Justice Alito and joined by Thomas, Kavanaugh, Gorsuch, and Barrett, *Dobbs* bears all the hallmarks of a movement opinion. First, its fusion of originalism and traditionalism revives an approach seen as incompatible with modern rights jurisprudence and one that is likely to

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[270] Emma Brown & Jon Swaine, *Amy Coney Barrett, Supreme Court Nominee, Spoke at Program to Inspire "Distinctly Christian Worldview in Every Area of Law,"* WASH. POST (Sep. 27, 2020, 9:02 PM EDT), https://www.washingtonpost.com/politics/coney-barrett-christian-law-fellowship-blackstone/2020/09/27/7ae41892-fdc5-11ea-b555-4d71a9254f4b_story.html [https://perma.cc/D2Z2-9P7K].

[271] Robert L. Tsai & Mary Ziegler, *Why the Supreme Court Really Killed* Roe v. Wade, POLITICO MAG. (June 25, 2023, 7:00 AM EDT), https://www.politico.com/news/magazine/2023/06/25/mag-tsai-ziegler-movementjudges-00102758 [https://perma.cc/6LGX-DX9G].

[272] Albert Mohler, *Theory, Movement, Politics? How Did Dobbs (and Roe's Reversal) Arise?: The Conservative Legal Movement Behind the Decision and the Left's New Response*, THE BRIEFING (June 27, 2023), https://albertmohler.com/2023/06/27/briefing-6-27-23 [https://perma.cc/VB38-PUB3] (podcast transcript) (reflecting on Tsai & Ziegler essay in *Politico* on *Dobbs* and movement judges and confirming own role in "the preparation of law students").

yield outcomes favored by most conservatives.[273] In this respect, the methodology is set up to yield outcomes that appear principled if, in fact, the Court one day eliminates some or all substantive due process cases that have grown out of *Griswold* — as some movement figures like Justice Thomas have urged.[274] Further conservative activism and the already receptive views of movement jurists may produce more radical changes in future substantive due process jurisprudence.[275] By embracing a version of *Glucksburg*'s formulation for interpreting the Constitution rather than those found in cases like *Griswold*, *Casey*, *Lawrence*, or *Obergefell*, *Dobbs* aids traditionalist social movements at the expense of progressive movements.[276]

Second, the ruling embraces a great deal of conservative movement rhetoric. Beyond movement jurists' righteous depiction and defense of the "unborn,"[277] *Dobbs* itself recites a litany of other popular antiabortion arguments: from the claims that *Roe* distorted other areas of the law[278] and that supporters of abortion rights harbor eugenic aims[279] to the argument that *Roe* is to blame for the general polarization of American politics.[280] These have long been activists' complaints about *Roe*. Many are empirically dubious, yet they have gained currency through repeated deployment in the political and legal domains as part

[273] *See* Melissa Murray, John Garvey, Mary Ziegler, Mary Bonauto, Kathryn Kolbert & Erika Bachiochi, Opinion, *Abortion Is Just the Beginning: Six Legal Experts on the Overruling of* Roe, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/interactive/2022/06/24/opinion/politics/dobbs-decision-perspectives.html [https://perma.cc/SLN2-B8QT]; Robert L. Tsai, *What Rights Could Unravel Next*, POLITICO MAG. (May 3, 2022, 12:52 PM EDT), https://www.politico.com/news/magazine/2022/05/03/supreme-court-abortion-draft-other-precedents-00029625 [https://perma.cc/FAC7-TUQC].

[274] *See* Kenji Yoshino, *After the Supreme Court's Abortion Ruling, What Could Happen to Other Unwritten Rights?*, WASH. POST MAG. (Nov. 30, 2022, 5:34 PM), https://www.washingtonpost.com/magazine/interactive/2022/substantive-due-process-dobbs/ [https://perma.cc/9T3B-7RAR].

[275] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2236 (2022).

[276] *See id.* at 2242-43.

[277] *See id.* at 2243-45, 2280-85.

[278] *See id.* at 2275-78.

[279] *See id.* at 2256 n.41. For more on these arguments, see Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2030-45 (2021).

[280] *Dobbs*, 142 S. Ct. at 2265.

of the "politics of repudiation" to weaken social support for abortion rights.[281]

Third, the sweep and timing of *Dobbs* hint that it is the work of movement jurists. There was no pressing need for the Court to hear a case on fifteen-week abortion bans and no circuit split about their constitutionality — indeed, very few states had introduced such laws in the first place.[282] And when the Court agreed to hear *Dobbs*, the State of Mississippi had not pressed the Court to reverse *Roe*.[283] The State changed its litigation position after the Court's composition changed — and almost certainly in response to the rise of the movement bloc.[284] *Dobbs*, in a word, dismantled *Roe* on a timeline that was advantageous to the antiabortion movement yet was plainly damaging to the Court and the Republican party.[285]

The Court also catered to the antiabortion movement by deciding more than was necessary to justify the reversal of *Roe*, much less resolve the case. Neither the petitioners nor the respondents had briefed the question of whether the Equal Protection Clause justified a right to

[281] *See* Tsai, *Supreme Court Precedent and the Politics of Repudiation*, *supra* note 76, at 106-108.

[282] Later, when the Court seemed poised to uphold Mississippi's law, more states passed or considered 15-week bans. *See* Alice Miranda Ollstein & Megan Messerly, *States Push 15-Week Abortion Bans as the Right Argues Over a Post-*Roe *Strategy*, POLITICO (Feb. 23, 2022, 4:30 AM EST), https://www.politico.com/news/2022/02/23/states-push-15-week-abortion-bans-00010782 [https://perma.cc/33AV-9KUR].

[283] *See* Richard M. Re, *Should Gradualism Have Prevailed in* Dobbs*?*, *in* ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee C. Bollinger & Geoffrey eds., 2024) (manuscript at 3) (on file with the authors).

[284] *See id.*

[285] Indeed, the Dobbs decision transformed the 2022 midterm, which was expected to be a wave election for Republicans, turned out quite differently, with Democrats retaining control of the Senate and faring better than expected in House races. *See* Lisa Lerer & Elisabeth Dias, *How Democrats Used the Abortion Debate to Hold Off a Red Wave*, N.Y. TIMES (Nov. 10, 2022), https://www.nytimes.com/2022/11/10/us/politics/abortion-midterm-elections-democrats-republicans.html [https://perma.cc/4SSB-5RPZ].

choose abortion.[286] Nevertheless, the Court reached out to reject this claim, suggesting that it was foreclosed by precedent.[287]

The rush to do as much as possible, to take the entire federal judiciary off the field of action when it comes to abortion politics, suggests a movement faction that understands it possesses an anomalous power of indefinite duration.

Fourth, the Court's uses of history perpetuated a grassroots version of the past.[288] The majority suggested that the right to abortion could not be deeply rooted in the nation's history and tradition because "abortion had long been a crime in every single State."[289] To support its narrative, the Court relied exclusively on a trio of scholars whose only historical work addressed the problems with *Roe* itself, scholars who held key roles in grassroots pro-life groups or attended events on reversing *Roe* hosted by leading antiabortion organizations.[290]

The Court all but ignored the prevailing scholarly consensus on abortion — that a quickening distinction and changes in scientific

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[286] *See* Brief for Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3145936; Brief in Opposition, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2020 WL 5027312.

[287] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245-46 (2022); *see also* Cary Franklin & Reva Siegel, *Equality Emerges as a Ground for Abortion Rights in and After Dobbs*, *in* ROE V. DOBBS: THE PAST, PRESENT AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION, *supra* note 283 (manuscript at 5) (on file with the authors) (arguing that taking proper account of equality would lead to an "anti-carceral presumption" in assessing regulations of family).

[288] On this point, see Reva B. Siegel, *Memory Games:* Dobbs' *Originalism as Anti-Democratic Living Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1144-69 (2023).

[289] *Dobbs*, 142 S. Ct. at 2248.

[290] *Id.* at 2249-2253. For these works, see JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 1-34, 132-65 (2006); JOHN KEOWN, ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982, at 3-12, 43-112 (1988); James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 34-36 (1985). Part II, *supra*, discusses the movement connections of these scholars at greater length. Keown would also continue to write against *Roe*. *See* John Keown, *Abortion Distortion: A Review of* Dispelling the Myths of Abortion History *by Joseph W. Dellapenna*, 35 J.L., MED. & ETHICS 325, 325-28 (2007) (book review) [hereinafter *Abortion Distortion*]; John Keown, *Back to the Future:* Roe*'s Rejection of America's History and Traditions on Abortion*, 22 ISSUES L. & MED. 3, 5 (2006).

knowledge had long shaped law and culture around abortion — not even acknowledging that the history of pre-quickening abortion was contested.[291] Despite proclaiming the irrelevance of legislative intent, the Court also whitewashed the history behind abortion regulations.[292] Scholars who study the physicians who campaigned to criminalize abortion in the nineteenth century paint a complex picture of their aims, one that included beliefs about fetal life, resentment of Catholic immigrants, and retrograde views about the proper roles of women.[293]

Faced with this historical evidence, Alito's response was simple incredulity.[294] "Are we to believe," he wrote, "that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?"[295] In Alito's account, the only justification for nineteenth-century abortion laws was the one supplied by movement organizations: "a sincere belief that abortion kills a human being."[296] This democratic-moral presentation of the community's now-legitimate power to regulate women's bodies wiped out any lingering memory of *Roe*'s early construction of an individual's domain to enjoy privacy and consult expertise or *Casey*'s fragile balancing of communal and individual interests.[297]

Dobbs echoed movement arguments in its treatment of stare decisis too. When insisting that the reasoning of *Roe* and *Casey* were deeply flawed, the Court invoked a comparison popular in movement circles:

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[291] *Dobbs*, 142 S. Ct. at 2255-67. On other historians' views of the quickening distinction, see *OAH and AHA Issue Joint Statement on the U.S. Supreme Court* Dobbs v. Jackson *Decision*, ORG. OF AM. HISTORIANS (July 6, 2022), https://www.oah.org/2022/07/06/joint-oah-aha-statement-on-the-dobbs-v-jackson-decision/ [https://perma.cc/3BFC-D8NH].

[292] *See Dobbs*, 142 S. Ct. at 2255-57.

[293] *See* JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 143-87 (1994); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, at 123-99 (1978); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 23-30 (1997).

[294] *Dobbs*, 142 S. Ct. at 2255-56.

[295] *Id.* at 2256.

[296] *Id.*

[297] *See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 40 (1983) (observing that in creating a new normative set of meanings, judges also suppress other legal meanings and narratives).

the Court's infamous segregation decision, *Plessy v. Ferguson*.[298] Mentioning *Plessy* invokes a range of meanings for abortion opponents, who argue that American law and culture have dehumanized the unborn child in much the same way that Jim Crow once degraded people of color.[299] Alito comfortably wielded this movement claim in writing that both *Plessy* and *Roe* were "egregiously wrong and deeply damaging."[300]

The Court also borrowed from movement reasoning in explaining why *Roe* and *Casey* were unworkable. Since the 1990s, antiabortion groups had conflated workability with both ambiguity and divisiveness.[301] A precedent could be unworkable, movement lawyers suggested, when it produced a range of interpretations or clashing results in the lower courts.[302] And antiabortion lawyers suggested that a decision was likely to be unworkable if it was controversial — if it had failed to "settle" an issue.[303] *Dobbs* picked up on this idea, insisting that "ambiguity is a problem" and pointing to a "long list of Circuit conflicts" as evidence that *Roe* and *Casey* were incoherent.[304]

Since the 1980s, abortion opponents had also refined what they called the "abortion distortion" argument.[305] They maintained that the Court had warped free speech protections to save abortion rights, altered the rules of severability, expanded third party standing beyond recognition, and perverted the rules on res judicata.[306] Alito wrote this criticism into

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[298] *See Dobbs*, 142 S. Ct. at 2265, 2278-79.

[299] For a sample of antiabortion invocations of the case, see Brief Amicus Curiae of Americans United for Life in Support of Respondent and Cross-Petitioner, June Med. Servs. LLC v. Russo, 140 S. Ct. 2103 (2020) (No. 18-1323), 2020 WL 92195; Amicus Brief of Human Coalition Action and Students for Life of America in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3375863.

[300] *Dobbs*, 142 S. Ct. at 2265.

[301] *See* Ziegler, *Taming Unworkability*, *supra* note 117, at 1219-30.

[302] *See id.*

[303] *See id.*

[304] *Dobbs*, 142 S. Ct. at 2272, 2274.

[305] *See* Bopp, Jr. & Coleson, *supra* note 121, at 218, 235; Keown, *Abortion Distortion*, *supra* note 290, at 325-28.

[306] *See supra* notes 300, 304 and accompanying text.

Dobbs, despite the fact that the plasticity of legal rules and concepts is considered a virtue in many other contexts.[307]

Even the Court's response to classic preservationist concerns echoed movement logic. In *Casey*, the Court had declined to reverse *Roe* partly because of concerns about the damage such a ruling would do to the Court as an institution.[308] In *Dobbs*, the Court's movement judges offered two responses to this concern.[309] First, Alito echoed a point made by antiabortion activists since the 1980s: it was *Roe* that had polarized politics and damaged the Court.[310] Movement judging — framed as adherence to principle — would save the Court as an institution rather than damage it.[311]

For those unpersuaded by such a narrative about the legal world's appropriate orientation to the political world, Alito proposed an alternative: questions about the integrity of the Court were largely irrelevant anyway.[312] "We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*," Alito reasoned.[313] "And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job."[314] Doing one's job, in this formulation, meant dismissing consequentialist arguments and mocking the kinds of preservationist concerns raised by both the *Dobbs* concurring opinion and dissent.

In the end, all three of Trump's picks joined Justices Alito and Thomas to overrule the entire line of precedent in this area beginning with *Roe*. Kavanaugh, who professed institutionalist concerns, echoed grassroots arguments that *Roe* "damaged the Court as an institution."[315] For his part, Chief Justice Roberts behaved like a preservationist, urging a more simplified way for Mississippi to win (getting rid of "viability" as the key

[307] *See Dobbs*, 142 S. Ct. at 2275-82.

[308] *See* Planned Parenthood v. Casey, 505 U.S. 833, 865-72 (1992).

[309] *See Dobbs*, 142 S. Ct at 2278-79.

[310] *See id.*

[311] *See id.*

[312] *See id.*

[313] *Id.* at 2279.

[314] *Id.*

[315] *Id.* at 2310 (Kavanaugh, J., concurring).

moment in the test) and castigating the majority's "dramatic and consequential ruling."[316] In response, the majority ridiculed Roberts, saying that the Court could not tolerate a middle ground when the concurrence failed to offer "any principled basis for its approach."[317]

*E. Post-*Dobbs *Litigation Over Mifepristone Access*

Beyond these high-profile Supreme Court Justices behaving like movement figures, there is some evidence that Trump's lower court nominees have more social ties to conservative Christian, gun rights, or antiabortion organizations, and are likely to render movement-aligned decisions.[318] Perhaps the best example is Matthew Kacsmaryk, a federal judge in the Northern District of Texas. Given his antiabortion activism before assuming the bench, grassroots opponents of legal abortion had high hopes he would deliver in cases of interest to the movement.[319] On April 7, 2023, he fulfilled those outsized expectations, issuing a decision that blocked access to mifepristone over twenty years after the FDA first approved the drug.[320]

Several features of Kacsmaryk's ruling suggest the work of a movement judge.[321] First, the ruling adopted the movement plaintiffs' exceedingly broad view on standing — one that would effectively permit any grassroots figure to have an Article III injury simply by asserting a

[316] *Id.* at 2311 (Roberts, J., concurring).

[317] *Id.* at 2281 (majority opinion).

[318] Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Trump's Lower-Court Judges and Religion: An Initial Appraisal*, at 3-4, 12 (Univ. of Va. Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series, Paper No. 2023-49, 2023), https://ssrn.com/abstract=4488397 [https://perma.cc/5XMA-NCTD].

[319] *See* Caroline Kitchener, *Texas Judge Delivers on Hopes of His Antiabortion World*, WASH. POST (Apr. 8, 2023, 7:32 PM EDT), https://www.washingtonpost.com/politics/2023/04/08/abortion-pill-ruling-judge-matthew-kacsmaryk/ [https://perma.cc/Z7VC-YQHS]; Abbie VanSickle, *For Texas Judge in Abortion Case, a Life Shaped by Conservative Causes*, N.Y. TIMES (Apr. 7, 2023), https://www.nytimes.com/2023/04/07/us/politics/texas-judge-matthew-kacsmaryk-abortion-pill.html [https://perma.cc/8LVZ-R8UK].

[320] All. for Hippocratic Med. v. U.S. Food & Drug Admin., No. 22-CV-223, 2023 WL 2825871, at *32 (N.D. Tex. Apr. 7, 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023).

[321] Kacsmaryk's ruling was upheld in part by the Fifth Circuit. All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 256 (5th Cir. 2023).

risk of experiencing side effects from the drug or viewing an aborted fetus.[322] On the merits, the preliminary injunction was expansive, grounded in part on the view that an anti-vice federal law, the Comstock Act, could be revived through statutory interpretation alone to ban access to abortion drugs nationwide.[323] By contrast, a preservationist would have hewed more closely to precedent that cast doubt on use of that federal law in this context. Since the 1930s, federal courts had adopted a narrower interpretation of the Comstock Act.[324] Although Kacsmaryk did not need to endorse the plaintiffs' interpretation to resolve the case, he ignored these precedents and signaled support for a sweeping — and novel — interpretation of the 1873 law.[325]

Second, while a technocrat would have shown due respect for agency decisions or the expertise involved in declaring the drug safe for its intended usage, the judge's opinion flogged the FDA for allegedly "stonewall[ing] judicial review."[326] He rejected *Auer* deference after giving the Comstock Act an expansive reading.[327] He also found, over the considered judgment of experts, that "chemical abortion drugs do not provide a meaningful therapeutic benefit over surgical abortion."[328] This lack of deference to scientific authority seemed especially striking when applied to mifepristone, a drug that had been subject to more scrutiny than many others given the divisiveness of abortion in the United States.[329]

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[322] *See All. for Hippocratic Med.*, 2023 WL 2825871, at *3-9.

[323] Kacsmaryk writes that "the Comstock Act plainly forecloses mail-order abortion in the present." *Id.* at *18.

[324] For examples of the current judicial interpretation of the Comstock Act, see United States v. Nicholas, 97 F.2d 510, 512 (2d Cir. 1938); United States v. One Package, 86 F.2d 737, 738-39 (2d Cir. 1936); Bours v. United States, 229 F. 960, 964 (7th Cir. 1915).

[325] *See All. for Hippocratic Med.*, 2023 WL 2825871, at *16-19.

[326] *Id.* at *1.

[327] *Id.* at *20-21.

[328] *Id.* at *21.

[329] For an overview of studies on the safety of mifepristone, see Amy Schoenfeld Walker, Jonathan Corum, Malika Khurana & Ashley Wu, *Are Abortion Pills Safe? Here's the Evidence*, N.Y. TIMES (last updated Apr. 7, 2023), https://www.nytimes.com/interactive/2023/04/01/health/abortion-pill-safety.html [https://perma.cc/7Z2M-RFXB].

Third, Judge Kacsmaryk refused to use the term "fetus," claiming it would be "unscientific" to do so.[330] Instead, he strictly used the term "unborn human" or "unborn child."[331] At the same time, he repeatedly employed the term "abortionists" to refer to health care professionals who help terminate a pregnancy, including those who prescribe mifepristone.[332] He also described the chemical effect of the drug as "starv[ing] the unborn human until death."[333] Kacsmaryk used the language of the antiabortion movement and called attention to his decision to do so.

Fourth, he cited an amicus brief on fetal personhood under the Fourteenth Amendment by antiabortion scholars John Finnis and Robert George, signaling that he is receptive to fetal rights arguments.[334] Fetal personhood, whether enshrined through judicial interpretation (as Finnis and George advocate) or explicit amendment to the Constitution, has reemerged as a movement goal.[335] While Kacsmaryk did not rest his decision on the fetal personhood rationale, his citation of the brief is evidence of his mindset that the Overton window for such arguments is now open, inside and outside the courts.

Fifth, toward the end of the opinion, the judge accused government lawyers of making eugenic arguments simply because they point out an interest in families being able to take care of existing children as a reason to preserve the status quo (and deny an injunction).[336] These

[330] All. For Hippocratic Med., 2023 WL 2825871, at *1 n.1.

[331] *Id.* at *1-2, 10, 14-15, 1 n.1, 25 n.50.

[332] *Id.* at *2, 5, 16, 19, 28.

[333] *Id.* at *1.

[334] *Id.* at *14 (citing Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3374325).

[335] On the reemergence of personhood as a central movement objective, see Elaine Godfrey, *The New Pro-Life Movement Has a Plan to End Abortion*, ATLANTIC (last updated June 21, 2023), https://www.theatlantic.com/politics/archive/2023/04/pro-life-anti-abortion-roe-mifepristone-pill-ban/673763/ [https://perma.cc/DA6R-2Q4P]; Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes*, N.Y. TIMES (Aug. 21, 2022), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html [https://perma.cc/7S8H-JPE2].

[336] Quoting Justice Thomas's similar accusation of eugenics on the part of abortion rights proponents, Kacsmaryk invokes Nazi policies: "Though eugenics were once fashionable in the Commanding Heights and High Court, they hold less purchase after

arguments, too, have a rich history in antiabortion advocacy: from films like Mark Crutcher's *Maafa 21*[337] to laws banning "eugenic abortions,"[338] the movement has argued that the legalization of abortion reflected ableist and racist aims. Kacsmaryk echoed all of these points, even when they seemed at most tangentially related to the legal questions at hand.[339] Collectively, these aspects of the ruling reveal not only the jurist's ideological priors but also the movement mindset that brings coherence to its logic and language.

III. NORMATIVE CONSIDERATIONS

With a robust appreciation for the ascendance of movement jurists across the ideological spectrum, we now turn to normative concerns. Is the rise of movement judging beneficial or destructive for the rule of law and the ideal of democratic constitutionalism? This is not a simple question, and we do not offer a simplistic answer. We think the best way to think about these questions requires adopting a historical and institutional perspective. While we do not explicitly endorse a "many minds" view of what an ideal Supreme Court might look like,[340] we do appreciate there is something to be said for the observation that a mix of life experiences and philosophies would best enrich the deliberations of such a powerful body making fundamental law for a pluralistic nation. But we caution that even a body that looks like the rest of America could still face a potential democratic deficit if the Justices' actual rulings consistently fail to render constitutional self-government possible or

the conflict, carnage, and casualties of the *last* century revealed the bloody consequences of Social Darwinism practiced by would-be Übermenschen." *All. for Hippocratic Med.*, 2023 WL 2825871, at *31.

337 On Crutcher and *Maafa 21*, see Shaila Dewan, *To Court Blacks, Foes of Abortion Make a Racial Case*, N.Y. TIMES (Feb. 26, 2010), https://www.nytimes.com/2010/02/27/us/27race.html [https://perma.cc/S627-WUC2]; Michael J. New, *Mark Crutcher, R.I.P.*, NAT. REV. (Mar. 12, 2023, 10:40 PM), https://www.nationalreview.com/corner/mark-crutcher-r-i-p/ [https://perma.cc/V85C-C6J5].

338 Sital Kalantry, *Do Reason-Based Abortion Bans Prevent Eugenics?*, 107 CORNELL L. REV. ONLINE 1, 1-12 (2021); Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1601, 1604-06, 1611-20, 1622-23. (2022).

339 *All. For Hippocratic Med.*, 2023 WL 2825871, at *31.

340 CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 2-12 (2009).

effective, merely facilitate partisan entrenchment, or validate movement ends over majority preferences.

From such a vantage point, we underscore some positive effects of movement judging as well as certain causes for concern. These concerns are divided accordingly: democratic legitimacy, justice, jurisprudential range, and the role of judging.

A. Democratic Legitimacy

One set of arguments in defense of movement jurists arises from a belief that movement-based jurisprudence can enhance democracy.[341] Because it is so difficult to make national policy in the United States and even harder to amend the Constitution, social movements — and by extension, judges who might be receptive to their appeals — could plausibly serve the function of ensuring democratic legitimacy.[342] Many of the Court's decisions during the Warren Court era, especially those dismantling racial segregation and brushing back state and local resistance to *Brown*, echoed these kinds of claims.[343] Indeed, John Hart Ely justified judicial review on these grounds: when doing so would clear the channels of the political process.[344]

It is possible to make a related argument about legal doctrine itself: because the Supreme Court's decisions are formally unreviewable and the Justices are unelected and enjoy life tenure, there is always a risk that its rulings become too insensitive to and out of step from the needs of the people. At a time when legal doctrine has calcified or frustrated popular policies, movement jurists can help bring the law back into alignment with values or priorities broadly shared by members of the political community. Certainly from the perspective of traditionalists, matters of life and death ultimately pose moral questions, and the Court's abortion jurisprudence had in the eyes of conservative

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[341] *See* Akbar et al., *supra* note 3, at 825-26; Hasbrouck, *supra* note 2, at 631-35.

[342] *See* Siegel, *Constitutional Culture*, *supra* note 93, at 1323-42.

[343] An excellent example is *NAACP v. Button*, 371 U.S. 415 (1963), which creatively called constitutional litigation anti-government expression and invalidated state laws that hampered public interest lawyers from doing so. *See* ROBERT L. TSAI, PRACTICAL EQUALITY 181-87 (2019).

[344] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 5-34 (1980).

movement figures long frustrated the wide-open expression of those values. We call this *the claim of democratic accountability* asserted by movements seeking to reorient the jurisprudential work of judges.

However, we caution that the mere fact that a movement has allies on the Supreme Court (or in the White House for that matter) does not mean that this development will necessarily promote democracy. It may only create the impression that democracy is being advanced.

Even when the claim of democratic accountability is asserted at the highest levels of generality, we have doubts that closer ties between judges and movements will always redound to the benefit of democracy. As we have already shown, there is no guarantee that a social movement jurist will be committed to democracy, much less one that prioritizes sex equality as an essential aspect of political community. Movements organize around all sorts of belief systems, from egalitarianism to anti-statism to authoritarianism. And other movements may be agnostic about democracy, seeing it as valuable but secondary to the achievement of some other objective, such as the protection of specific rights or social goods, or one segment of the community. Some may see the Warren Court's jurisprudence on race as a sign that movement jurists value democracy, but support for what the Court did on behalf of racial equality ultimately depends upon some degree of agreement that racial equality is essential to democracy (a connection that most accept today but was not always an article of democratic faith).[345]

Much therefore depends on which movements enjoy better access to courts and which substantive visions of the political order they choose to promote. Is the judiciary more solicitous of arguments advanced by the modern militia movement or those made by a movement opposed to an armed society? Will the Supreme Court be more receptive to arguments made by immigration "restrictionists" or immigrant rights activists?

And even if one is comfortable with the Supreme Court as a venue for the wide-open expression of movement visions on roughly the same terms as other political institutions, we must confront the fact that what

[345] For a rich account of the many groups that agitated to defend (and the communities that adopted) racialized conceptions of political membership, see ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2009).

democracy itself means will always remain highly contested. While every social movement insists that it is presenting popular sentiments that have been unfairly blocked by existing institutions, rules, or precedents, the values and priorities represented by a particular movement may not, in fact, be widely shared. Moreover, even when a theory of democracy encompasses respect for minority rights, which rights deserve attention — or what qualifies as a marginalized group — will almost by definition be disputed. This means there will always be some problematic tension between movements invested in rights-based constitutionalism and those invested in more majoritarian formulations of democracy.[346]

When it comes to abortion rights, the Court's decision in *Dobbs* self-consciously seeks to unleash democratic politics by *eliminating* a constitutional right relied upon by at least two generations — a highly unusual step — and is based upon a purely majoritarian view of democratic legitimacy.[347] According to that simple vision of democracy, *Roe* as an individual right, along with the judges' duty to enforce a rights-based vision of the Constitution, unfairly and unjustifiably hampered political mobilization. But part of the anti-*Roe* coalition is comprised of those who expect judges or politicians to take the next step and establish fetal rights, which would tie the hands of communities that prefer a more nuanced and balanced approach to citizenship, equality, and democracy.[348] The anti-*Roe* coalition also encompasses some who have

[346] We take to heart Aziz Huq's warning that "democracy cannot be reduced to elections" but that its "democratic quality turns on the openness and responsiveness of its institutions to public judgment." Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. U. L. REV. 1099, 1113, 1115 (2023).

[347] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022) ("Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power.").

[348] On the importance of fetal personhood to many abortion opponents, see Mary Ziegler, Opinion, *The Next Step in the Anti-Abortion Playbook Is Becoming Clear*, N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/opinion/abortion-fetal-personhood.html [https://perma.cc/H7NE-5JXC] [hereinafter *The Next Step in the Anti-Abortion Playbook*].

sought to undermine the 2020 election or sponsored laws that make it harder to vote.[349]

Casey's approach exemplified one way to foster democratic compromise: judges would be responsive to external developments, while protecting core individual values of autonomy and equal respect.[350] For now, *Dobbs* represents an entirely different vision of democracy, one that takes the judge off the playing field entirely, leaving the pregnant person entirely to the mercy of state legislatures.[351] As an unenumerated right opposed by conservative judicial elites and some parts of their coalition, it is a question upon which moral institutions and belief systems should be permitted to leave their imprint. Of course, the High Court does not always articulate or defend this vision of majoritarian democracy: in other areas, such as the unenumerated rights to marriage or to raise children, judicial enforcement is firmly accepted as part of the democratic order.

At all events, a major test of the Court's vision of majoritarian democracy freshly unveiled in the context of reproductive rights (or their absence) entails the ongoing experiment in Texas. There, state legislators not only enacted a fetal personhood law but authorized private citizens to sue anyone who aids another to procure an abortion.[352] At least until the Court decided *Dobbs*, the Justices had permitted the State's policy to go into effect by declining pre-enforcement injunctions against the law in federal court.[353] Remedies against the unusual measure may or may not exist under state law.[354] But

[349] There is an overlap between those who support fetal personhood and those who sought to overturn the 2020 election or otherwise make it harder to vote. Megan O'Matz, *How an Anti-Abortion Law Firm Teamed Up with a Disgraced Kansas Attorney to Dispute the 2020 Election*, PROPUBLICA (Mar. 1, 2023, 5:00 AM EST), https://www.propublica.org/article/anti-abortion-activists-fighting-to-change-election-law [https://perma.cc/84YA-7FJW].

[350] *See* Post & Siegel, *supra* note 9, at 379-87.

[351] *Dobbs*, 142 S. Ct. at 2284.

[352] TEX. HEALTH & SAFETY CODE ANN. §§ 171.204(a) (2021), 171.207(a) (2021), 171.208(a)(2), (3) (2021).

[353] *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 525 (2021).

[354] *See* Alison Durkee, *Key Part of Texas Abortion Law — That Anyone Can Sue — Apparently Dismissed by Court*, FORBES (Dec. 9, 2022, 1:40 PM EST), https://www.forbes.com/sites/alisondurkee/2022/12/08/key-part-of-texas-abortion-law-

if this strategy of privatizing enforcement of a state policy against abortion can truly reach across state lines, it would mean that at least with respect to these life-altering decisions, a pregnant person would not enjoy democratic citizenship on the same terms as others. At the point that one state's laws impair the rights of another state's citizens, that policy would seem to run counter to respect for majoritarian rule.

B. Justice

Another set of arguments in favor of movement jurisprudence sounds in justice-based rationales. Even if the sentiments and rationales accepted by movement judges are not popular, and indeed, even when they are actively disfavored by the citizenry as a whole (as with *Dobbs*), one might still contend that juristic recognition of movement grievances enhances justice. Movement judges may be especially useful for marginalized groups when majoritarian politics seem closed off to them.[355] This was the case with the civil rights movement in the early twentieth century when the NAACP first began litigating against segregation,[356] and also when courts embraced an idea of sex equality that echoed the Equal Rights Amendment after a failed ratification battle.[357] Movement judges may serve as an important backstop when majoritarian politics ignore important questions of justice or the voices of marginalized groups who raise them. It is certainly how some defenders of *Dobbs* justify movement-inflected jurisprudence.[358]

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that-anyone-can-sue-apparently-dismissed-by-court/?sh=7fbc81721964 [https://perma.cc/RY6M-VSRG].

[355] On the potential utility of courts and litigation to such movements, see Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1552, 1582-99 (2017).

[356] *See* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 25, at 88, 101-73.

[357] *See* Siegel, *Constitutional Culture*, *supra* note 93, at 1323-42 (2006).

[358] *See* Michael F. Burbidge, *Chairman's Statement on Dobbs Anniversary*, U.S. CONF. OF CATH. BISHOPS COMM. ON PRO-LIFE ACTIVITIES (June 24, 2023), https://www.usccb.org/resources/23-chairman-statement-dobbs-anniversary.pdf#:~:text=Chairman%E2%80%99s%20Statement%20on%20Dobbs%20Anniversary%20USCCB%20Committee%20on,on%20demand%20has%20been%20put%20to%20an%20end [https://perma.cc/Z8AG-PT6S] (describing *Dobbs* as reason for celebration and thanking "countless faithful laborers who have dedicated themselves to prayer, action, witness, and service in support of the cause of life").

Even though it is not the vision of democracy we might prefer, for now the Court's democracy-enhancing defense of *Dobbs* is stronger than any justice-based one, as the Court can still assert (though perhaps not convincingly[359]) that it has merely unblocked political processes over a morally fraught issue. But what if those politics express themselves in ways that run counter to other constitutional principles?

Many movement visions of justice are robust and would require judges to embrace substantive visions of the good life rather than profess to be reading the Constitution according to neutral principles. For instance, the ruling has supercharged efforts to have the unborn judicially recognized as "persons" within the meaning of the Fourteenth Amendment.[360] Drawing on both liberal rights-based notions and religious visions of justice, proponents of fetal personhood have sought statutory and constitutional recognition of fetal status, and antiabortion scholars have proposed a wide variety of personhood strategies.[361] Increasingly, antiabortion scholars have fashioned originalist arguments for personhood — suggesting that the framers equated personhood with biological humanity — and that the original public meaning of the Constitution reflected the criminal abortion laws being passed by states at the time the Fourteenth Amendment was ratified.[362] The Court recently turned away a case involving fetal personhood, one backed by few leading groups,[363] but this was merely

[359] We add a caveat because we think that whether *Dobbs* in fact can be justified by resort to democratic principles is a question of political theory – one that turns not just on the internal legal logic of the opinion, but also on whether eliminating abortion rights could be defended as part of a coherent vision of democratic politics and is consistently implemented, rather than a selective exercise of judicial review to benefit particular parties or movements.

[360] Ziegler, *The Next Step in the Anti-Abortion Playbook*, *supra* note 348.

[361] *See* Zernike, *supra* note 335.

[362] For a sample of originalist arguments for personhood, see Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 539-46 (2017); John Finnis, *Abortion Is Unconstitutional*, FIRST THINGS (Apr. 2021), https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional [https://perma.cc/E9H3-WY8D].

[363] *See* Ariane de Vogue & Devan Cole, *Supreme Court Declines to Hear Fetal Personhood Case*, CNN POL. (Oct. 11, 2022, 4:16 PM EDT), https://www.cnn.com/2022/10/11/politics/fetal-personhood-case-supreme-court/index.html [https://perma.cc/UK7N-QDGC].

due to timing. Movement lawyers will be trying to tee up other cases, hoping to entice the bloc of movement jurists.[364]

The more that the Supreme Court entertains fetal personhood arguments or permits outlier legal views to become effective on the ground by manipulating procedural rules, the more proponents of movement judges might have to resort to justice-based grounds to defend their actions. At that point, it will be harder to reconcile originalism and traditionalism. Some conservative scholars have rejected the originalist case for personhood, noting that the activists seeking to ban abortion said nothing about the Constitution in seeking to criminalize abortion — and that the framers of the Fourteenth Amendment said nothing about abortion.[365] Embracing fetal personhood would stretch originalism past its breaking point. If that happened, the question would no longer be what citizens living at the time of the Fourteenth Amendment's ratification understood deprivation of "life, liberty, or property" to mean but instead what respect for traditional beliefs might permit.

Acceding to activist demands for fetal personhood would almost certainly entail facile textualism and openly or thinly-disguised religious justifications. It would also create enormous practical problems, as the interests of the unborn would have to be logistically managed and would, at times, trump the rights of living persons. The Court might have to give up the pretense of operating within a liberal constitutional order and then fully commit to a morally thicker vision of justice, such as common good constitutionalism or a revival of natural law.[366] And opening up the law to movements of all sorts may crack open the door to the capture of constitutional law by illiberal movements.

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[364] *See* Mary Ziegler, *The Quest for Fetal Personhood Is Just Getting Going*, BOS. GLOBE (Oct. 18, 2022), https://www.bostonglobe.com/2022/10/17/opinion/quest-fetal-personhood-is-just-getting-going/ [https://perma.cc/QNN6-L84N].

[365] *See* Edward Whelan, *Doubts About Constitutional Personhood*, FIRST THINGS (Apr. 8, 2021), https://www.firstthings.com/web-exclusives/2021/04/doubts-about-constitutional-personhood [https://perma.cc/7W26-NWS5].

[366] Josh Hammer, *Common Good Originalism After* Dobbs, AM. MIND (Sept. 21, 2022), https://americanmind.org/features/florida-versus-davos/common-good-originalism-after-dobbs/ [https://perma.cc/3WEG-X8RB] (urging conservative jurists to reject neutrality, maximize considerations of justice, and "interpret the 14th Amendment's Equal Protection Clause to ban abortion and protect unborn life nationally").

By the same token, maximalist protections for the unborn will threaten to erase the autonomy and egalitarian interests of people who can become pregnant. Such visions of law and community will raise competing, fundamental concerns of justice.

Justice-based defenses of movement jurists thus reintroduces the problem believed to be solved by a democracy-enhancing rationale: the proper role of judges. Because the project of justice involves going beyond what is politically convenient but instead entails appealing to higher moral principles, judges would be authorized to assume an outsized role in our political order. As Niko Bowie and Daphna Renan argue,[367] the kind of judicial supremacy and rights-based constitutionalism many citizens (and more than a few academics) already take for granted has a troubling history: an ascendant idea in the aftermath of the Civil War when the courts hamstrung broad understandings of the Reconstruction Amendments. As it stands, other actors, including Congress, have too often ceded responsibility to interpret the Constitution almost entirely to the judiciary. But this power would be even more troubling if judges with life tenure operate with little regard for either majoritarian preferences or conventional interpretive limits. When contested questions of justice come to the fore, it would be less clear than ever why the federal judiciary should be the forum that settles our disputes.

C. Jurisprudential Range

A world in which judges are increasingly allied with social movements is one where it is marginally easier to enact major legal change without majority support. But, as *Dobbs* shows, it is also easier to dismantle hard-won legal achievements without majority support. Sudden capture of a nation's apex court alone might do it. Precisely because movements try to expand the range of what is socially plausible within governing institutions and democratic politics, the presence of a sizeable bloc of movement jurists will likely spur detractors to demand movement

[367] Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2026-32 (2022); Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ [https://perma.cc/A83U-GDQU].

judges that reflect their preferences — if for no other reason than to correct for imbalance. Such changes in personnel and substantive law will ultimately have an effect on perceptions about the rule of law.

We thus predict that the rise of movement judging would, in a pluralistic society, eventually lead to a wider range of jurisprudential outcomes if we take the long view, but also to a higher degree of uncertainty about the scope of constitutional powers and rights as opposing movements battle more openly for control over the future of America's fundamental law. Radical visions of equality and fairness — along with unusual bureaucratic arrangements — might become mainstreamed through movement jurisprudence. Socialist visions of American law could emerge as more plausible to judges, but so might freshly authoritarian ones. The temptation to not merely unblock institutions and unleash the political imagination could also degenerate into efforts to entrench incompatible visions into basic law.

Under some circumstances, the inclusion of more movement judges might mean a broader range of perspectives on what the Constitution requires. The empirical evidence strongly suggests that judges often reflect the perspectives of the class, race, and legal community to which they belong, and that we should generally expect an impoverished conversation about law and justice, one dominated by elite institutions.[368] Introducing a wide variety of movement judges might make for a more capacious conversation. Such seemed to be Barack Obama's vision when he called for judges with "a keen understanding of [the law's] impact on people's lives."[369]

But there is no assurance that a Court dominated by movement judges will in fact be more inclusive along these lines. The fundamentals of

[368] *See* Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., Testimony to the Presidential Comm'n on the Sup. Ct. of the U.S., The Contemporary Debate over Supreme Court Reform: Origins and Perspectives 14-16, 23 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf [https://perma.cc/5WSR-5QNK].

[369] Barack Obama, Pres. of the U.S., & Elena Kagan, Solic. Gen. of the U.S., Remarks at the Nomination of Solicitor General Elena Kagan to the Supreme Court (May 10, 2010, 10:02 AM EDT), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el [https://perma.cc/2RL4-7PG6].

judging do not change through demographic diversity alone.[370] Formal power over nominations still lies in the hands of those selected through partisan and constitutional mechanisms. Moreover, movements themselves often only represent a slice of social life. Movements do not exist to support diversity for its own sake, but only when demographic pluralism improves the odds of fulfilling other objectives. When it comes to substantive equality, movements can see racial inequality either as a myth or as the problem of our time. Throughout history, there have been powerful movements to eliminate taxes on the wealthy, block universal healthcare, or roll back limits on election spending just as there have been mobilizations to reduce the influence of big money in politics or secure welfare rights for the poor.[371]

Even if the Court's jurisprudence oscillates between different movement perspectives, there may be institutional costs that flow from an ecosystem populated by too many movement judges. Americans tend to view courts as legitimate and their pronouncements worthy of obedience when judges appear less openly political — when, for example, it is hard ex ante to predict how judges will rule based on their ideological orientation or partisan affiliation.[372] The same may be true when it comes to judicial proximity to or sympathy for social movements, especially those pursuing goals that fail to generate majority support.

Our point here drills down on the connections between popular perceptions and the rule of law. A federal judiciary that veers between different movement-driven extremes will appear anything but apolitical — especially if institutional culture also shifts so that disagreements between movement judges and other kinds of judges become more

[370] *See* Robert L. Tsai, *Why Judges Can't Save Democracy*, 72 SYRACUSE L. REV. 1543, 1551-54 (2022) (noting that in other countries illiberal movements have also constrained what judges can do over the long run).

[371] KEYSSAR, *supra* note 345, at 55-65.

[372] *See Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ [https://perma.cc/X4VS-CCK3] (showing a positive correlation between unfavorable views of the Supreme Court and the public's perception of the Court's partisanship).

caustic and visible to the public.[373] That too may have a bearing on how citizens perceive the relative health of the institutions that govern on their behalf. Of course, there has never been complete separation between judicial decision-making and politics, but perceptions about the rule of law matter in a healthy constitutional democracy. This is something that many movement jurists neglect, because they tend to underestimate the potential for popular reaction against their rulings to alter the range of what is legally and politically possible down the road.[374] International organizations have documented the extent to which American democracy is already in decline, marked by profound polarization, distrust of government, the media, and the scientific establishment — as well as the rise of charismatic populist figures backed by movements.[375]

In the worst-case scenario, there could also be a spillover effect that capsizes the institution's ability to reach agreement over important matters. A court dominated by factions of movement jurists might exacerbate a sense of instability and undermine the citizenry's

[373] Justice Sotomayor made waves when she wondered aloud during oral arguments in *Dobbs*, "Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts?" She added, clearly referring to the sudden reality of a movement bloc, "I don't see how it is possible." Dareh Gregorian, *Sotomayor Suggests Supreme Court Won't "Survive the Stench" of Overturning* Roe v. Wade, NBC NEWS (Dec. 1, 2021, 10:48 AM PST), https://www.nbcnews.com/politics/supreme-court/sotomayor-suggests-supreme-court-won-t-survive-stench-overturning-roe-n1285166 [https://perma.cc/23X7-A73B]. At the 2023 annual meeting of the Association of American Law Schools, Justice Sotomayor expressed a "sense of despair" at the direction of the U.S. Supreme Court. Debra Cassens Weiss, *Sotomayor Says She Felt "Sense of Despair" in Previous SCOTUS Term*, ABA J. (Jan. 5, 2023, 12:33 PM CST), https://www.abajournal.com/news/article/justice-sotomayor-says-she-felt-sense-of-despair-last-term [https://perma.cc/HB7S-JDU3].

[374] *See* Tsai, *Supreme Court Precedent and the Politics of Repudiation*, *supra* note 76, at 99 (explaining that judge-centered accounts are "dangerously incomplete" because "there is no single interpretive community, but legion").

[375] *See* Sarah Repucci, *Reversing the Decline of Democracy in the United States*, FREEDOM HOUSE https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule/reversing-decline-democracy-united-states (last visited Sept. 20, 2023) [https://perma.cc/U4WS-88KD]; *The Threats to American Democracy and the Need for National Voting and Election Administration Standards*, NEW AM. (June 1, 2021), https://www.newamerica.org/political-reform/statements/statement-of-concern/ [https://perma.cc/9KLD-HRDR].

willingness to accept rulings that resolve contested elections or other democratic crises. An already polarized electorate that sees the nation's highest court as no different from any other institution riven by siloed factions may, ironically, become one that is not capable of confronting serious democratic deficits or contributing meaningful solutions to questions of justice.[376]

D. The Role of the Judge

This brings us to the function of judging and the deep tension between crusading and adjudication — a line that the movement judge finesses but at the risk of obliterating. All along, we have presented a pluralistic model of judging characterized by competing mindsets and relationships rather than just ideologies or methods. We have created room for movement judges as a historical fact but now take seriously the claim that it puts significant stress on the practice of adjudication. This is a concern that goes beyond whether *Dobbs* is defensible and involves contemplating what the rise of movement jurisprudence may do to the practice of judging over time.

It is, of course, laudable for movements to try to disrupt the status quo, try to "abate the violence of law," and demand "transformation and redistribution," as movement scholars urge.[377] It is, however, something altogether different when a number of judges begin to see themselves as extensions of movements. Our concern is influenced by Gerald Postema's observation that the "professional role of judging" calls for "moral ambidexterity," a "practical," habit-based capacity to keep

[376] On the risks of insisting upon ideological consistency, see Alan I. Abramowitz, *The Polarized American Electorate: The Rise of Partisan-Ideological Consistency and Its Consequences*, 137 POL. SCI. Q. 645, 645-654 (2022).

[377] Akbar et al., *supra* note 3, at 883. These self-identified movement scholars write eloquently and openly about producing work that "take[s] seriously the epistemological universe of today's left social movements, their imaginations, experiments, tactics, and strategies for legal and social change." *Id.* at 825. The goal is to decenter elites and write "in solidarity and with commitments to justice and freedom" with an orientation that "often begins outside of the law as traditionally conceived." *Id.* Our view is informed by an appreciation for the project that these Left scholars are engaged in, but also by our observation that those on the Right are organizing on similar terms and making comparable demands of existing institutions in the name of freedom and justice.

competing values and "manage the complexity responsibly."[378] The difficulty with movement judges is they tend to perceive the world in morally clear terms and may come to believe that their role is to eliminate moral ambiguity rather than help citizens learn to live with it. Movement lawyers and activists tee up disputes to heighten moral and conceptual contradictions, creating immense pressure to resolve them decisively. The movement jurist is most likely to give in to this temptation.

We believe the judge acts as a mediating figure in relation to the political world and that the law serves planning, coordinating, and expressive functions. While it is certainly true that certain interpretations can justify violence, it is also true that the rule of law is intended to reduce, and indeed to supplant, more overtly violent ways of solving a community's disagreements.

Straddling multiple worlds, the movement judge insists that he or she has not given up the formal parts of the job that make adjudication a professional and legitimate practice: justifications are given and ceremonies observed. But in the end, movement judges do not see themselves as managers but as world builders (or at least as adjuncts to visionaries). World builders tend to treat individuals and their affected communities as means to an end; their creations leave behind a lot of rubble.

Postema puts the necessity of moral ambidexterity in terms of accounting for all ethically relevant features of a dispute,[379] but we emphasize a broader set of reasons for this habit: not just general respect for the values themselves, but also respect for the various communities, social organizations, and individuals that wish to live by their own, different, rules. What starts out as a laudable desire to listen to underappreciated voices and address unmet grievances can morph into a program to impose fresh orthodoxy and punish practitioners of

[378] Gerald J. Postema, *As One Is, So One Sees: Delacroix on the Role of Habit in Moral Discernment*, JURISPRUDENCE (forthcoming 2023) (manuscript at 12-13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4311244 [https://perma.cc/F2N5-JN4K]. By contrast, the activist who is focused on social justice is committed to eradicating practices or dethroning entire value systems. *See* ERIN R. PINEDA, SEEING LIKE AN ACTIVIST: CIVIL DISOBEDIENCE AND THE CIVIL RIGHTS MOVEMENT 1-23 (2021).

[379] Postema, *supra* note 378 (manuscript at 11-12).

alternative ways of life. This concern has nothing to do with any claim about the neutrality of the law or mandated distance of judges and everything to do with values beyond freedom and equality, such as pluralism.

A related concern is that the decisions by movement jurists might be more easily discredited. Rather than settling questions definitively, as a movement judge might believe is possible, perceptions that a judicial ruling is merely validating the mobilized beliefs and priorities of one segment of the country may very well render such decisions subject to more intensive repudiation. Consider, for instance, that the strident *Dred Scott* decision was seen by many as reflecting the views of the slaveholding elite and led even centrist figures like Lincoln to openly reject it.[380] By the same token, abolitionist rulings were treated by some as less persuasive as they might have been precisely because they were perceived by some as going beyond what the proper judicial role envisions.[381] Certain highly creative Warren Court rulings were opposed the same way, and now *Dobbs* may get similar treatment.[382] This is ultimately an empirical question, but in a pluralistic legal order, movements might be better off — they might end up with more durable

[380] Abraham Lincoln, Ill. Republican Candidate for U.S. Senate, House Divided Speech at Springfield, Ill. Statehouse (June 16, 1858), https://quod.lib.umich.edu/l/lincoln/lincoln2/1:508?rgn=div1;view=fulltext [https://perma.cc/QA38-QJAJ] (speech transcript) (castigating the *Dred Scott* ruling as part of "common plan" on the part of a "political dynasty" to entrench slavery throughout the country).

[381] In *State v. Post*, 20 N.J.L. 368 (1845), the New Jersey Supreme Court refused to adopt the reasoning of the Massachusetts Supreme Judicial Court in interpreting identical language in its State Constitution abolishing slavery. Among other reasons, New Jersey's highest court tried to discredit those precedents by referring to "the humane spirit of abolitionism" that "may have influenced the opinion of the courts" due to the fact that the issue was "long agitated and much discussed." *Id.* at 377. In rejecting the approach of fellow jurists, Justice Nevius declared that "judges must be more than men," which implied that abolitionist judges in Massachusetts may have been unduly influenced and not followed positive law. For a dramatic account of the oral argument in the case as well as key background, see Daniel R. Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, 4 LAW & HIST. REV. 337 (1986).

[382] We are reminded in correspondence with David Seipp that popular reaction against Prohibition may be seen as a model for reformers who seek an example of when constitutional politics cut across partisan lines, captured majorities, and amended the Constitution in the service of a strong moral vision in 1919, only to face a popular reaction by 1933 more potent than any since the reaction to *Dred Scott*.

precedent — when some of what they want comes not from movement jurists but from judges whose experiences and commitments do not obviously signal sympathies with specific movement goals or their ways of life.

Our objective is not to urge the elimination of movement jurists but to suggest that tradeoffs are involved when they are pursued as a mechanism for legal change. We wish to point out a paradox. Movement judges will increase the odds of reaching a movement goal, but such a victory might be less durable or broadly accepted than if others served as the messengers: non-movement judges or elected officials not as closely identified with a movement.

CONCLUSION

In this Article, we have presented a socio-legal account of the relationship between judges, social movements, and the Constitution, informed by a historical and institutional view of what takes place before and after momentous rulings like *Dobbs*. We offered a definition of movement jurists capacious enough to capture an increasingly intensive strategy: the elevation of movement-aligned or adjacent lawyers to the bench by progressives and conservatives. We then used abortion politics to show why *Dobbs* should be understood as a movement-based decision — despite pleas by its defenders that it represents nothing more than the application of neutral methods and some of the decision's opponents who insist that it is not a movement decision at all. From there, we considered broader normative concerns posed by the rise of movement jurists.

In the end, we are less optimistic than many of our academic counterparts that an increase in movement judges will necessarily prevent democratic backsliding or produce solutions that address major problems of justice.[383] To the contrary, the emergence of identifiable blocs of competing movement judges laboring to enact their visions of the Constitution may continue the damage done by *Dobbs:* the erosion

[383] *See, e.g.*, Evan D. Bernick, *Movement Administrative Procedure*, 98 NOTRE DAME L. REV. 2177, 2206-07 (2023) (claiming that "left grassroots" activists desire to reform administrative procedure to shift power to "race-class subjugated populations"); Hasbrouck, *supra* note 2, at 695 ("Movement judges have tremendous potential to reshape and reinforce our democracy.").

of popular perceptions about the rule of law and a fundamental shift in what we can expect of judges who faithfully fulfill their obligations to the entire polity. Time will tell.

When one's ideological opponents are seeking to elevate movement judges, it is exceedingly difficult to not follow suit. But what's an understandable tactical reaction may not be healthy for the political order as a whole. By pointing out our concerns with an increased emphasis on movement jurists, we do not mean to suggest that the phenomenon can or should be entirely eradicated. We do mean to raise questions about whether resources are better put into winning political fights outright, which would both fulfill a movement's goals while leaving open democratic channels as much as possible.