Dobbs' Sex Equality Troubles

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INTRODUCTION

*Dobbs v. Jackson Women’s Health Organization* is already famous the world over as a U.S. Supreme Court ruling that strips women and other pregnant people of their constitutional abortion rights.¹ *Dobbs* is also increasingly widely known as a decision eliminating those rights based upon a conservative originalist method for interpreting the Constitution.² In *Dobbs*, this originalism demands that unenumerated individual rights protected by the Fourteenth Amendment’s liberty and due process provisions must have deep historical and traditional roots, including—vitaly—foundations discoverable at or around the time of the amendment’s enactment, to warrant judicial protection.³


² See, e.g., *Dobbs*, 142 S. Ct. at 2242.

³ Since Justice Samuel Alito’s *Dobbs*’ opinion leaked in draft, legal academics have been debating whether *Dobbs* is an originalist ruling. The view in these pages is ultimately that *Dobbs* both is—and is not—a conservative originalist decision. See infra text accompanying note 218. On the identification side, *Dobbs* reads as conservative originalism in the Scalan “faint-hearted originalist” mode. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989); Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (Scalia, J., plurality opinion); id. at 127 n.6 (Scalia, J., joined by Rehnquist, C.J.); District of Columbia v. Heller, 554 U.S. 570 (2008); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). As part of its constitutional abortion rights analysis, *Dobbs* negatively locks the Fourteenth Amendment’s text, specifically its silence on abortion, while placing distinctive emphasis on the Fourteenth Amendment’s original meaning in 1868, as illuminated by the pattern of state abortion laws, collected in Appendix A of the opinion. See 142 S. Ct. at 2242, 2246–49, 2252–54, 2259–60, 2267, 2285–300. Justice Brett Kavanaugh’s *Dobbs* concurrence treats this distinctive emphasis on the state of state law in 1868 as central to the majority’s “dispositive point.” Id. at 2304 n.1 (Kavanaugh, J., concurring). Not to be missed in this connection, however, is Joseph Fishkin’s turnaround of the contemporaneous “public meaning” of originalism itself as the basis for defending *Dobbs* as originalist. Joseph Fishkin (@joeyfishkin), TWITTER (May 14, 2022, 2:57 AM), https://twitter.com/joeyfishkin/status/1525369808979603457 [https://perma.cc/L47X-R4D6]. Some who remain unconvinced, thinking the only “true”
fail, but spectacularly fail this test, has led many of Dobbs’ readers—starting with the Dobbs joint dissenters—to raise alarms about how this conservative originalist take-down of constitutional abortion rights imperils other rights secured by constitutional privacy and Fourteenth Amendment liberty guarantees, notably rights to contraception, sexual intimacy, and marriage.4

No similar sirens have sounded warnings about Dobbs’ possible meanings for women’s and other people’s sex equality rights under the Fourteenth Amendment’s Equal Protection Clause.5 Are these sex equality rights—themselves always intersectionally inflected—safe?6 Does Dobbs portend no other sex equality troubles ahead?7


4 Dobbs, 142 S. Ct. at 2243 (majority opinion); id. at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting).


7 A classic account of abortion as a sex equality right is found in CATHERINE A. MACKINNON, Abortion: On Public and Private, in TOWARD A FEMINIST THEORY OF THE
Carefully considered, *Dobbs* indicates multilayered reasons for concern. Notwithstanding *Dobbs*’ position that it does not implicate constitutional sex equality guarantees, various aspects of its reasoning place existing constitutional sex equality protections—still predominantly understood in single-axis identity terms—into different forms of doubt. At a minimum, *Dobbs* might “only” prefigure future Supreme Court rulings slowing or stalling constitutional sex equality gains or perhaps rulings effectuating incrementalist sex equality rollbacks. More dramatically, *Dobbs* could instead prefigure a larger doctrinal reversal eliminating remaining constitutional sex equality protections in one fell swoop.

Gaining a handle on how *Dobbs*’ possible dangers for constitutional and positive law sex equality protections arise and how they might play out requires a realistic assessment of how Justice Samuel Alito’s majority opinion in the case generates its conclusions. *Dobbs* reaches its result eliminating constitutional abortion rights by at least temporarily suspending certain conventional rules of regular constitutional order. These are the rule-of-law rules of ordinary constitutional law development that, before *Dobbs*, made a decision like it seem practically inconceivable. *Dobbs*’ turnabouts, swiftly tearing up the Court’s abortion rights jurisprudence from its roots, are so dramatic and far-reaching that many Court watchers—even after the Court’s draft *Dobbs* opinion leaked—believed that the Supreme Court would stop and find another resolution of the case at the eleventh hour. Now that

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10 For post-*Dobbs* argument that the Fourteenth Amendment’s equal-protection sex equality rights are at least partially set by the meaning of the amendment at the time of its enactment, see Brief of Defendants-Appellants at 24, 30, 35, *L. W. ex rel. Williams v. Skrmetti*, 73 F.4th 408 (2023) (No. 23-5600).

11 *Leaked Draft Opinion in Dobbs v. Jackson Women’s Health Organization*, POLITICO
Dobbs has arrived while defying ordinary laws of constitutional gravity—proving once-unimaginable constitutional transformations are now imaginable and realizable in far-jumping jurisprudential leaps—other seemingly impossible constitutional prospects, like those involving constitutional sex equality guarantees, must be tracked with care, taken seriously, and prepared for just in case.

Another previously improbable constitutional development that Dobbs opens up—involving the largely moribund Fourteenth Amendment Privileges or Immunities Clause—provides a way to scale and further assess Dobbs’ threats to Fourteenth Amendment equal protection-based sex equality rights.12

In an important footnote that could prove historically significant, Dobbs indicates that a majority of the Supreme Court is presently considering a new Fourteenth Amendment Privileges or Immunities Clause jurisprudence that itself could include a new, transformative conservative originalist doctrine of unenumerated fundamental rights.13 Naturally, Dobbs insists that any developments along these lines would have to be undertaken in conformity with the conservative originalist methodology that it says it employs.14 Long before the arrival of such a doctrine, however—a possibility that Justice Antonin Scalia once ridiculed as the self-abuse of “the professoriate”—it is already possible to glimpse new classes of fundamental economic and social rights on the legal horizon that Dobbs places in view.15

These new economic liberties might generally spell bad constitutional news for various forms of ordinary economic regulation. They could also, however, concretely impact economic regulations that promote sex equality in workplaces and other spheres of public life in which women were historically not treated as men’s equals.16 Likewise, the new social rights that might also be coming down the pike after Dobbs could entail constitutional protections, especially significant in the family law setting, for old and classically racialized patriarchal privileges and immunities—ancient fundamental rights—that operate crosswise with modern constitutional racialized sex equality guarantees and policy developments that reflect robust visions of sex equality in society and under law.17 Among the prospects Dobbs

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12 U.S. CONST. amend. XIV, § 1.
14 Dobbs, 142 S. Ct. at 2248 n.22. For more discussion, see infra Part II.
15 Transcript of Oral Argument at 7, McDonald, 561 U.S. 742 (No. 08-1521).
16 For discussion of women’s historical exclusion from the public realm of work, see Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973). For a history of sex in public accommodations law, see generally Elizabeth Sepper & Deborah Dinner, Sex in Public, 129 YALE L.J. 78 (2019).
17 How these new social rights might operate in the family law setting and with what racialized sex equality effects are discussed infra Part II.
makes newly conceivable are cultural conservative challenges to left-liberal and progressive family-law law reform developments that break with family law’s ancient racialized male dominant forms, including rules about who can marry, on what terms, and what happens to property and money and with children when marriages end, along with other rules governing married and unmarried people’s lives. Recognizing these possibilities, the mechanics of how the Court could realize them are worth underscoring, given what they reveal about Dobbs’ self-portrait as a judicial power-denying and democracy-respecting ruling. While some of Dobbs’ sex equality perils may arrive, as with abortion rights, through rulings that unwind existing constitutional rights guarantees, other developments, like those involving new Fourteenth Amendment privileges or immunities, could function by removing new fundamental economic and social rights from ordinary political management in the democratic realm. In some cases, Supreme Court rulings after Dobbs could operate in both directions via rulings announcing new conservative-minded originalist constitutional rights that come online in part by dissolving existing rights indexed to left-liberal and progressive constitutional values. These destructive and generative jurisprudential prospects are among the consequences of a newly consolidated conservative originalist Supreme Court majority that is beginning to stretch its wings as it formulates a larger working agenda for future decisions realigning the Constitution with the majority’s beliefs about the Constitution’s “proper” meaning and course. Imagining some constancy in Court membership, what Dobbs becomes may thus be a function of the justices’ abstract commitments to conservative originalism and the politically saturated substantive positions that that originalism involves. Another possibility that should not be overlooked, however, is that the abstract commitments shaping what Dobbs comes to mean may themselves be conditioned in important ways by the kinds of material social terms that helped give rise to Dobbs to begin. On this level, the social grounds and drivers in particular of Justice Brett Kavanaugh’s swing-vote concurrence in the case may serve as an important key—perhaps the key—to Dobbs’ future.

18 See, e.g., Dobbs, 142 S. Ct. at 2243.
19 An additional conceptual possibility involves rulings that dissolve existing constitutional rights indexed to left-liberal and progressive constitutional values while regrounding them in new conservative-minded originalist terms. Foundations for this type of prospect in the sex equality realm are seen in Steven G. Calabresi & Julia T. Rickert, Originalism and Sex Discrimination, 90 Tex. L. Rev. 1 (2011).
21 Dobbs, 142 S. Ct. at 2304 (Kavanaugh, J., concurring).
Engagement with the material social determinants of Kavanaugh’s *Dobbs* concurrence and thus of *Dobbs* itself requires not getting bogged down by disputes about whether either opinion is properly classified as a conservative originalist ruling or the byproduct of an on-the-march religious conservatism, as some, focused mainly on the *Dobbs* majority opinion, believe. \(^\text{22}\) Both of these opinions do partake of those qualities, to be sure, but also more—much more.

On close examination, Kavanaugh’s concurrence and the *Dobbs* majority opinion are jumbled admixtures of an array of competing, inconsistent, and warring outlooks on, and experiences of and in, the social world. \(^\text{23}\) The opinions thus patch together worldviews that are, at once, historical and contemporary, religious and secular, socially conservative, libertarian, left-liberal, and progressive, all while being male-centered and male-dominant in variegated ways that trace racialized histories and practices, both in their basic framings of doctrines and in the positions on them that they finally take. \(^\text{24}\)

These details of Kavanaugh’s *Dobbs* concurrence and of *Dobbs* itself present challenges when trying to account for the opinions, given how their incommensurate elements defy conventional rationalist templates for constitutional rule-making. Challenging, if not impossible, to explain in those usual terms, steps toward resolving the puzzles the opinions pose can be taken by reading Kavanaugh’s concurrence and its most significant legal plot-points against certain details of Kavanaugh’s biography. This way of reading Kavanaugh’s *Dobbs* concurrence illuminates how aspects of the social grounds and life experiences from which the concurrence emerges appear in doctrinal form in its text. \(^\text{25}\)

Seen in this light, Kavanaugh’s *Dobbs* concurrence is no mechanical or abstract deduction from constitutional originalist first principles. The concurrence’s responsiveness to some of the material conditions of Kavanaugh’s social background and life experiences points to the opinion’s ongoing responsiveness to the social world. This, in turn, suggests that *Dobbs*’ larger trajectory, which is for now significantly

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\(^{23}\) See infra Part III. Other points in this paragraph and the next are elaborated and sourced in Part III.

\(^{24}\) For some parallel thoughts helpfully linked to a wide perspective on the current Court’s “jurisprudence of masculinity,” see generally Murray, *Children of Men*, supra note 5.

\(^{25}\) See infra text accompanying note 221.
in Kavanaugh’s hands, may likewise not be found strictly within Dobbs’ four corners. To a meaningful degree, that trajectory may instead be set through a dialogue between the Court and the American people about the fundamental views and values of American life.

If these dialogic possibilities are presently closed to reconsidering Dobbs itself, their openness in other directions re-raises reasons for both further sex equality alarm and possibly some much-needed hope. Over time, what Dobbs becomes may be an expression of the large-scale, conflictual currents of present-day sex equality struggles—struggles that are intersectionally composed and unfolding across the expanse of American political life.

In one direction, Dobbs could become increasingly aligned with, and defined by, the resurgence of old forms of reactionary masculinist and male dominant ideals now prominent on the populist-nationalist political right, where they are dynamically catalyzing with other radical supremacist ideologies, regularly involving race, sexuality, and gender identities, to produce a distinctively revanchist political brew.26 In the opposite direction, Dobbs’ arc could increasingly bend toward a future in which the ruling yields to the notable pro-sex-equality swells of opposition to it, led by American women and others, prominently including women of color who helped found and have since scaled reproductive justice movements, more recently joined in their pro-choice efforts by some white, middle-class, and cis-heterosexual suburban women concerned about their own and their children’s futures.27 Chas-tened and returning to the classic forms of constitutional moderation that Dobbs abandons in the abortion setting, Kavanaugh’s Dobbs concurrence holds out the prospects for a future decision announcing that the Court will stay the course of its pre-Dobbs sex equality march, thereby quieting—if not necessarily wholly settling—concerns about Dobbs’ sex equality dangers.

The possible rise and fall of Dobbs’ sex equality troubles in these ways might be the best thing that those who are committed to enduring left-liberal and progressive, including intersectional, values of sex equality might realistically hope for.

26 See infra text accompanying note 255.
from the current Supreme Court. After Dobbs, sex equality political agendas must include the hard work of figuring out how to navigate the political seas that Dobbs is already churning up around a crucial set of sex equality rights: abortion rights. Charting prominent aspects of Dobbs’ sex equality troubles in these pages is not—because it cannot be—a map of what remains only potentially scouted but not yet conquered constitutional territory. It is instead an effort that critically assesses the revolutionary futures that Dobbs builds for the Constitution and the nation in a ruling that purports to be only about abortion rights.

The discussion that follows is organized along the following lines. Part I traces Dobbs’ constitutional sex equality troubles with a particular eye on sex equality rights under the Fourteenth Amendment’s Equal Protection Clause. Of note here among the sex equality threats that Dobbs poses is how the ruling practically clears the way for the state to give husbands authority over their wives in the context of abortion rights and choice. Part II engages conventional legal intuitions that are inclined to doubt that Dobbs places Fourteenth Amendment equal protection sex equality rights in substantial danger. This Part shows how Dobbs’ suspension of certain traditional rules of regular constitutional order conditions the grounds for far-reaching transformations in existing constitutional sex equality doctrine—a doctrine that has helped alter the meaning of, and expectations around, sex equality under law by promising women equality to men in the nation’s economic and social life. At the same time, this Part measures the prospects of major transformations in the Court’s sex equality jurisprudence—including its elimination—against the potential scale of Dobbs’ contemplation of a new Privileges or Immunities Clause jurisprudence, which generates sex equality concerns of its own, given the prospects of the Court announcing and protecting ancient economic and social rights, including in the family law setting. Part III then details some of the complexities of both the Dobbs majority opinion and Kavanaugh’s Dobbs concurrence on the way to a biographically focused account of the material social grounds and life experiences behind Kavanaugh’s Dobbs concurrence and thus Dobbs itself. Having shown what those social grounds and life experiences look like and how they manifest in doctrinal form in Kavanaugh’s Dobbs opinion, the analysis turns to diametrically opposed sexual politics prospects for what Dobbs may come to mean for, and do to, constitutional and positive law sex equality rights. The Conclusion briefly sketches in other terms what might be next for those committed to robust visions of sex equality principles—both at the Court and in the court of American politics.


I. DOBBS’ SEX EQUALITY THREATS

A. An Initial Tally

To understand Dobbs’ relation to existing Fourteenth Amendment sex equality rights under the Equal Protection Clause, it is useful to begin with the Dobbs joint dissent coauthored by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan.30

As the joint dissent explains, constitutional abortion rights—from Roe v. Wade through Planned Parenthood v. Casey to Dobbs—involved nearly a half-century of interlocking constitutional values of liberty and equality operating within the Court’s constitutional privacy and Fourteenth Amendment liberty jurisprudence.31 The liberty-equality “double-helix” in this setting tied abortion rights at their foundations to vibrant and ongoing living constitutionalist traditions.32

Rather than lawless rulings as the Dobbs majority declares, Roe and Casey instructed that constitutional privacy and liberty ideals implicate what Justice Ruth Bader Ginsburg called women’s “equal citizenship stature,” and what Casey dubbed women’s right “to participate . . . in the economic and social life of the Nation” on equal terms with men.33 Liberating women from otherwise embodied and legally controlled destinies, Roe and Casey fit neatly into well-grooved Fourteenth Amendment traditions of the American spirit of liberty—or, more exactly, equal liberty—that have underwritten the constitutional rights that, until Dobbs, Americans enjoyed to make certain sexual, reproductive, and intimate life decisions for themselves.34

The Dobbs joint dissent invokes and mobilizes these American ideals when it spurns the Dobbs majority’s reconstruction of constitutional liberty and equality guarantees. The joint dissent rejects Dobbs’ “pinched,” formalistic conceptions figuring liberty and equality rights as implicating distinct constitutional provisions and hence distinct classes of rights “hermetically sealed” off from one another.35 Bypassing cases beyond Roe and Casey that rejected this vision, Dobbs maintains

35 Dobbs, 142 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, J.J., dissenting); id. at 2329.
that equal protection defenses of abortion rights cannot stand because abortion has nothing to do with constitutional sex equality guarantees.36

*Dobbs*’ “brief” explanation of the point opens by noting that neither *Roe* nor *Casey* expressly declared itself a Fourteenth Amendment equal protection ruling.37 While technically accurate, this is also misleading. It short-changes *Roe*’s and *Casey*’s different ways of validating liberty and equality concerns.38 *Dobbs*’ technical point, however, remains sufficient for *Dobbs*’ own sense of its doctrinal purposes, giving the Court a way to avoid grappling with the equality facets of *Roe*’s privacy and *Casey*’s liberty decisions.

As if conceding the maneuver’s deficiencies, however, *Dobbs* reaches past *Roe* and *Casey* to seize hold of two other rulings: *Geduldig v. Aiello* and *Bray v. Alexandria Women’s Health Clinic*.39 *Dobbs* sees *Geduldig* and *Bray* converging on the view that, because women and men are biologically different in relation to sexuality’s reproductive consequences, there is ordinarily no constitutional sex equality violation under the Equal Protection Clause when the state treats women and men differently where pregnancy—or ending it, as by abortion—is involved.40

This line is vulnerable to attack on multiple fronts. One emphasizes that, in saying neither pregnancy nor abortion raises constitutional sex equality concerns, *Dobbs* is taking a position that Congress repudiated generations ago when it

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36 The bypassed rulings in which constitutional liberty and equality features intersect include some decisions the *Dobbs* majority insists remain good law, like *Eisenstadt v. Baird*, 405 U.S. 438 (1972), involving contraception for unmarried persons, and *Obergefell v. Hodges*, 576 U.S. 644 (2015), involving the right to marry and its meaning for same-sex couples.

37 *Dobbs*, 142 S. Ct. at 2245 (majority opinion). Other references to abortion and sex equality in the opinion can be found, for example, in *id.* at 2240, 2246, 2258, 2261. It is interesting and potentially revealing that *Dobbs*, 142 S. Ct. at 2245 n.17, cites *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), as the standard authority for the Court’s sex equality rule, particularly given that Justice Clarence Thomas’ concurrence in the case, joined by Justice Alito, bracketed “whether the 1952 version of the INA was constitutional, . . . or whether other immigration laws . . . are constitutional.” *Id.* at 1701 (Thomas, J., concurring in the judgment in part). These brackets raise questions about where the Thomas concurrence might have been thinking to go with the Court’s sex equality jurisprudence.


40 *Dobbs*, 142 S. Ct. at 2246 (first citing *Geduldig*, 417 U.S. at 496 n.20; and then citing *Bray*, 506 U.S. at 273–74). One understanding of *Dobbs*’ suggestion here is that there simply is no illicit sex-based classification for the Court to examine under the Equal Protection Clause, consistent with *Geduldig*’s and *Bray*’s conclusions. An incisive note on *Dobbs*’ invocation of *Geduldig* is in Andrew Koppelman, *The Use and Abuse of Tradition: A Comment on DeGirolami’s Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2023) (manuscript at 12), https://ssrn.com/abstract=4383680 [https://perma.cc/MV8F-2RTB].
legislated against pregnancy discrimination consistent with American understandings of pregnancy discrimination as discrimination based on sex. Instead of challenging Dobbs’ reasoning head-on in this way, the joint dissent makes the technical and academic argument that Dobbs’ sex equality analysis is mistaken for not recognizing that sex equality principles have long permeated the Court’s abortion rights jurisprudence, where “constitutional values of liberty and equality [have] go[ne] hand in hand.”

It is possible to rationalize the joint dissent’s approach as a strategy seeking to use Dobbs’ sex equality logics to insulate equal protection-based sex equality from Dobbs’ erasure of abortion rights. If, as the Dobbs majority opinion maintains in dismissing Roe and Casey, constitutional abortion rights are unrelated to sex equality guarantees under the Equal Protection Clause, then Dobbs’ erasure of abortion rights does not imply anything about other equal protection-based sex equality guarantees. The joint dissent’s tactic may provisionally accept Dobbs’ abandonment of sex equality grounds and thereby possibly prevent later decisions from building on Dobbs to undermine sex equality rights beyond the abortion setting. If successful, the move could enable a future Court to correct—and overturn—Dobbs by pouncing on its sex equality shortcuts. This gambit would be easier to realize if it successfully preserved the Court’s Fourteenth Amendment sex equality jurisprudence more or less intact, certainly in robust enough doctrinal health to bear the considerable weight of rehabilitating Roe and abortion rights in constitutional sex equality terms.

Strategy aside, the joint dissent’s failure to engage Dobbs’ rejection of constitutional equality arguments for abortion rights aligns with the dissent’s further choice not to drill into the possible implications of Dobbs’ endorsement of traditionalist and increasingly outmoded ideas about sex, gender, and natural differences between the sexes. Dobbs imbues these notions—and their cisnormative and sex-binaristic features—with fresh energy and constitutional significance.

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42 Dobbs, 142 S. Ct. at 2329 (Breyer, Sotomayor & Kagan, JJ., dissenting).

43 For Dobbs’ discussion of the point, see id. at 2245–46 (majority opinion).


45 Dobbs, 142 S. Ct. at 2245–46 (majority opinion); cf. Bostock v. Clayton Cnty., 140 S.
Long before any equal protection-based revival of Roe is at hand, Dobbs’ natural sex differences logics provide a template for future Fourteenth Amendment sex equality rulings. Those sex equality cases may now center and enhance what has been called the Court’s sex equality jurisprudence’s “real (sex) differences” doctrine, an exception to the Court’s general constitutional disapproval of and skepticism toward sex inequality under law that has permitted certain sex-based classifications grounded in “real” or “natural” sex differences to stand. Before Dobbs, the Court, without formally eliminating this real differences exception, had been letting it dwindle in legal significance and practical meaning. Now it may be revitalized—and expanded.

One implication of the structure and content of Dobbs’ sex equality analysis is that it confounds the joint dissent’s easy confidence that Dobbs crisply cordons off constitutional privacy and Fourteenth Amendment liberty from Fourteenth Amendment equal protection positions. If Dobbs does that in some ways, it also occupies Fourteenth Amendment sex equality terrain just long enough to declare that men and women are different and in ways that will continue to shape that Court’s understanding of constitutional sex equality requirements. “Natural” sex differences here are the mantra by which the Dobbs Court refuses to credit constitutional sex equality
defense of abortion rights—whether under the Equal Protection Clause or as an expression of equality interwoven with constitutional privacy or liberty guarantees.50

B. Dobbs’ Originalism and Its Threat to Sex Equality in the Abortion Setting

Dobbs’ reliance on a conservative constitutional originalist method when deciding the central abortion rights question in the case suggests that the Supreme Court may not, and perhaps in principle ought not, rest content with modest expansions of its “real differences” doctrine as a side-constraint on the Court’s sex equality jurisprudence in future cases.51 Those real differences rulings could pile up then serve as a predicate for resuscitating historical constitutional baselines that once generally tolerated sex inequality under law on the theory that men and women are naturally different.52

Already in Dobbs, the Court’s conservative originalist ruling tees up these far-reaching possibilities in other terms—terms that, in the abortion setting, now dramatically allow women’s re-subordination to men they have been intimate with. The Dobbs joint dissent frames the relevant point this way, quoting from the Casey joint opinion:

[T]he men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. . . . A woman [back] then . . . “had no legal existence separate from her husband.” . . . [Women lacked] “full and independent legal status under the Constitution.”53

Unlike the Dobbs joint dissent, which like Casey trumpets the idea that the Constitution no longer tolerates laws that “insist on the historically dominant ‘vision of the woman’s role,’” the Dobbs majority’s abortion positions reveal that its conservative originalist interpretations of the Constitution are open to the state doing just that—to a striking degree.54

50 Dobbs’ ostensible sexual scientism thus lines up with its conservative constitutional originalism and also with outmoded sexist thinking holding that women’s “nature” is their destiny and the basis for their political and legal subordination to men. See, e.g., Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring). Additional pertinent discussion is in Franklin, supra note 46, at 92–97, 119–42, 143–63, and generally in Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 55 STAN. L. REV. 261 (1992).

51 See supra notes 46–47 and accompanying text.

52 See sources cited supra note 50; see also, e.g., Muller v. Oregon, 208 U.S. 412, 421–23 (1908); see also DEBORAH L. RHODE, GENDER AND JUSTICE 2–3 (1989); Ruth Bader Ginsburg, Gender and the Constitution, 44 U. CIN. L. REV. 1, 7 (1975).


54 Id. at 2330 (citation omitted).
Long after leaving Fourteenth Amendment sex equality defenses of abortion rights in the dust, *Dobbs* acknowledges that *Casey* understood abortion rights as integral to women’s social and economic equality to men.55 If *Dobbs* renders that idea constitutionally inert in its depiction of *Casey* earlier on, *Dobbs’* overruling of *Casey* disavows *Casey*’s stance that women’s equal liberty is a living constitutional promise that properly governs in the abortion realm.

Eliminating Fourteenth Amendment protections for abortion rights, *Dobbs* nullifies *Casey*’s promise of equal liberty, paving the way for laws like those that *Casey* condemned. Memorably, *Casey* included a challenge to a Pennsylvania measure requiring that married pregnant women notify their husbands before ending pregnancies.56 In many instances, including marriages defined by domestic violence, the measure would have amounted to an abortion ban, which is why *Casey* rejected it.57 Then-Circuit Judge Samuel Alito voted to sustain this measure throughout pregnancy—before *Casey* corrected him.58 Deep in *Dobbs’* background, this turn suggests that *Dobbs* may arrive not only as triumphal comeuppance, but also built with an awareness of the kinds of male prerogatives under law that it resurrects.

In toppling *Roe*, *Dobbs* goes further. *Roe*’s destruction eliminates the constitutional predicate for *Planned Parenthood of Central Missouri v. Danforth*, a case in which the Court held the state cannot give married pregnant women’s husbands abortion veto rights that the state itself lacks.59 When *Dobbs* returns wide authority over abortion decisions to the state, it guts *Danforth*’s substantive protections in a way that sustains and reverses their polarities. Post-*Dobbs*, *Danforth*’s reasoning indicates that the state—practically liberated to veto abortion decisions—may now convey this veto right to others, including husbands and other men who have impregnated women.60

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55 *Id.* at 2276 (majority opinion).
57 *Casey*, 505 U.S. at 887–98 (opinion of the Court, delivered by O’Connor, Kennedy & Souter, JJ.). Technically, the statute had an exception within it for cases in which “[t]he pregnancy is a result of spousal sexual assault[,] . . . which has been reported to a law enforcement agency having the requisite jurisdiction,” and an exception where “[t]he woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.” 18 PA. CONS. STAT. ANN. § 3209(b)(3)–(4) (West 1989). Still, the operative sweep of the measure was sufficient for the *Casey* majority to find the spousal notification provision wanting. 505 U.S. at 892–94 (opinion of the Court, delivered by O’Connor, Kennedy & Souter, JJ.).
60 *See* *Danforth*, 428 U.S. at 70–71.
Spousal notification and/or veto laws revived after Dobbs—now, of course, more likely to be political compromise measures than efforts designed to precipitate Roe’s reversal—will be assessed in a new constitutional environment. Presumed constitutional after Dobbs, spousal notification and veto laws could readily be upheld as pro-life rules that satisfy Dobbs’ minimum rationality review. Dobbs may even be deemed consistent with arguments that these laws permit “informed consent” to abortion in ways that give women more freedom to choose to end unwanted pregnancies than an absolute abortion ban would. However sexist it is to require pregnant women to consult or heed husbands or other men in order to make informed reproductive decisions for themselves, this sexist logic accords with Dobbs’ decision to allow the states to make women’s and other pregnant people’s pregnancy-ending decisions for them.

Dobbs’ practical preclearance of spousal notification and veto rules under its terms starkly illustrates how Dobbs resubjects women and others to the possibility of once again being legally ruled by men, husbands or otherwise. Thanks to Dobbs, historical conditions that constitutionally tolerated cis-heterosexual male dominance and sex-based legal subordination of women and other pregnant people are back and flourishing in the abortion realm.

C. Dobbs’ Threats to Fourteenth Amendment Equal Protection-Based Sex Equality Rights (or Dobbs and “Footnote 4”)

Differently telling of Dobbs’ conservative constitutional originalism and its alignments with old visions of constitutionally permissible sex inequality under the Fourteenth Amendment’s Equal Protection Clause is another aspect of Dobbs’ treatment of the Court’s abortion rights precedents.

Having announced that abortion rights are not constitutionally protected, Dobbs reinforces its case about why returning them to the political arena is appropriate with a gesture that is evidently meant—somehow—to reassure supporters of abortion rights. Dobbs explains that there is no need for them to fear abortion’s return to politics. Women, after all, can politically look after themselves. Dobbs bases this

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61 Dobbs, 142 S. Ct. at 2283–84.
62 It is a separate matter where pregnant women and other pregnant people make the choice to consult or even go along with the reproductive wishes of those who impregnated them. This is also not to overlook that there may be other bases on which to challenge these laws. Nor does it miss how these ideas may emerge through litigation, as, for example, in Plaintiff’s Original Petition, supra note 28.
63 This is not to assume only men can get women pregnant but rather to figure the point—provisionally—in the conventional sex-binaristic terms Dobbs sets.
65 Dobbs, 142 S. Ct. at 2277.
66 Id.
reassurance on social statistics, observing that women—who are on different sides of the abortion controversy—are a political majority in the United States, including in Mississippi, whence Dobbs came. Then Dobbs reasons that, as a political majority, women can exercise their political power to defend whatever legal rights they wish to defend.

Dobbs’ position that women are a not-powerless majority group is constitutionally significant beyond the abortion setting. In form, the basic idea traces back to United States v. Carolene Products, which Dobbs later approvingly cites for its description of rational basis review, and its famous “Footnote 4,” which Dobbs does not mention but whose thinking it summons when making its own point.

As background, Footnote 4, which helped open the gates to judicial protection of certain minority groups not originally thought to be within the ambit of the Fourteenth Amendment’s Equal Protection Clause, broadly contours the constitutional landscape beneath the Court’s modern Fourteenth Amendment sex equality jurisprudence. This helps explain why many today believe women receive constitutional sex equality rights under the Fourteenth Amendment as a “discrete and insular minority” in Footnote 4’s terms. One common understanding is that to get the benefit of Footnote 4’s protections, a group must both be a minority and be lacking in meaningful political power.

Resonating on these wavelengths, Dobbs’ declaration that women are not a minority and do not lack for political power is a potential constitutional landmine. Without any additional conceptual footwork, the post-Dobbs Court could mobilize these premises to eliminate not just some but all existing Fourteenth Amendment sex equality rights.

Seeds for this position were planted more than twenty-five years ago in Justice Antonin Scalia’s lone dissent in United States v. Virginia (VMI), the case in which

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67 Id.
68 Id.
69 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Dobbs, 142 S. Ct. at 2284.
70 The key language from Footnote 4 is as follows: “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” Carolene Products, 304 U.S. at 152 n.4.
71 Or anyway, that those protections may be eliminated on the grounds that women are not a “discrete and insular minority.” See infra text accompanying notes 72–85. Notwithstanding beliefs about Footnote 4’s role within the Court’s sex equality jurisprudence, there is the matter of how the Court launched its sex equality caselaw into orbit by way of direct analogy to Fourteenth Amendment race equality guarantees, as noted in Reva B. Siegel, “She the People”: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947, 949 (2002).
the Court announced that the Virginia Military Institute’s males-only admissions policy violated the Fourteenth Amendment’s Equal Protection Clause.72

Scalia’s VMI dissent decried the Court’s plans for reconfiguring constitutional sex equality requirements.73 Justice Ruth Bader Ginsburg’s majority opinion in VMI foretold the prospect of the Court raising the standard of review for sex-based legal classifications, making them fully suspect, just like race-based classifications, and hence subject to strict judicial scrutiny.74 The Court’s VMI opinion additionally took its own step in that direction, applying a distinctive form of “heightened review” in the case.75 Objecting, Scalia’s dissent countered that any modification of the Court’s sex equality doctrine should lower the standard of review for sex-based legal classifications, viewing them less critically, not more, and presuming, not doubting, their constitutionality while subjecting them only to minimal rationality review.76

Scalia’s dissent offered two main reasons for this revolutionary conservatism. One was that women are not a “discrete and insular” political minority.77 As an electoral majority, the dissent said, women were perfectly capable of generating pro-women political results. It then cited national legislative victories as proof.78 Dobbs copies the crucial elements—women’s political majority and their power—found in Scalia’s VMI dissent, applying them against abortion rights.79

Dobbs also retraces the second major reason Scalia’s dissent gave as an argument for eliminating the Court’s modern sex equality doctrine and for returning sex equality rights to the political realm.80 As the Scalia dissent explained it, this approach to Fourteenth Amendment sex equality rights better comports with the Court’s historical and traditional treatment of sex discrimination than the Court’s modern sex equality jurisprudence does.81 For more than a century after the Fourteenth Amendment’s enactment in 1868, the Equal Protection Clause generally tolerated women’s inequality, including inequality expressed through sex-based legal rules.82

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73 Id. at 566 (Scalia, J., dissenting).
74 Id. at 532–34 (majority opinion).
75 Id. An antecedent for this standard, cited in VMI, id. at 533, was in Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982).
76 VMI, 518 U.S. at 575 (Scalia, J., dissenting).
77 Id.
78 Id. at 575–76.
80 See id. at 2245–46.
81 VMI, 518 U.S. at 567–70 (Scalia, J., dissenting).
82 See id.; see also id. at 560 (Rehnquist, C.J., concurring). Reed v. Reed, 404 U.S. 71, 74 (1971), inaugurated the line. Framed this way, the point takes into view long-standing and still-circulating authoritative understandings of the Nineteenth Amendment as limited to voting rights. U.S. CONST. amend. XIX.
These details expose the straight line that can be drawn from Scalia’s VMI dissent to the Dobbs majority opinion, which proudly brandishes conservative constitutional originalist credentials like Scalia’s.83 If one way to Scalia’s conclusions is by building slowly to them via ideas about natural sex differences, another is to embrace Scalia’s positions outright, declaring either that women are not a “discrete and insular minority” or that sex equality rights are not protected by the Fourteenth Amendment’s Equal Protection Clause, because it was originally publicly understood around the time of its enactment to be limited to race.84 That more ambitious ruling, of course, might cause yet another shoe to drop, given the doubt it casts on Footnote 4’s larger project of protecting “discrete and insular minorities.”85

Should Dobbs “only” and more “modestly” lead to the return of now-protected Fourteenth Amendment sex equality rights to the political arena in one of the ways the decision makes available, the results would scarcely be bounded by any particular legal domain. One area where its effects would likely be widely noticed and

83 For an earlier expression of Scalia’s conservative originalist approach that shades the line from Scalia’s VMI dissent to the Dobbs majority opinion, compare Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (plurality opinion), and id. at 127 n.6 (opinion of Scalia, J., in which Rehnquist, C.J., joined).

84 See VMI, 518 U.S. at 575 (Scalia, J., dissenting); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Slaughter-House Cases, 83 U.S. 36, 81 (1872); Bradwell v. Illinois, 83 U.S. 130, 141–42 (1873) (Bradley, J., concurring in the judgment). Needless to say, judicial statements that the Equal Protection Clause was limited to race do not mean that that view was popularly accepted. Even if it was the predominant view, it was not unchallenged. Thanks to Les Benedict for engagement on these points. For additional connections between ideas of natural sex differences and women’s historical legal status as a not-constitutional concern, see Cary Franklin, Biological Warfare: Constitutional Conflict Over “Inherent Differences” Between the Sexes, 2017 SUP. CT. REV. 169 (2017). Kenji Yoshino has aptly called the prospect of re-constraining the Fourteenth Amendment to race a “downright apocalyptic result for the nation and the Constitution.” Kenji Yoshino, Is the Right to Same-Sex Marriage Next?, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/opinion/same-sex-marriage-supreme-court.html [https://perma.cc/8S5T-8X8F].

85 Along these lines, Dobbs’ conservative originalism could align with the elimination of protections for other “discrete and insular minorities,” including those defined by alienage, “illegitimacy,” and, such as they are, sexual orientation and identity and trans identity. On the last, see generally Eyer, supra note 46. At the same time, it should be noted that the Court may wish to preserve the general idea of “discrete and insular minorities” in the relevant Footnote 4 sense, not only because some of its recent religious liberties decisions have seemed to appeal to it, on which, see generally Leah M. Litman, Disparate Discrimination, 121 Mich. L. Rev. 1 (2022), but also because preserving it leaves open the prospects of identifying other “discrete and insular minorities” whose rights the Court might like to protect. See, e.g., Jack Wade Nowlin, Roe v. Wade Inverted: How the Supreme Court Might Have Privileged Fetal Rights Over Reproductive Freedoms, 63 MERCER L. REV. 639, 667 (2012); cf. Clarence Thomas, The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, 12 HARV. J.L. & PUB. POL’Y 63, 68 (1989).
keenly felt is in American family law, which, for generations, has increasingly been coordinated to respect constitutional equality rights in their liberty-equality double-helix and classic equal protection forms inside and beyond marriage and traditional family life.\textsuperscript{86} \textit{Dobbs}' sex equality dangers thus include the prospect that the Court might clear the space for politically unraveling these achievements.

Many people may presently believe that \textit{Dobbs}' tolerance for the legal return of male-dominant sex-based hierarchies will remain limited to the abortion setting, based on the theory that no rational Supreme Court would ever endorse eliminating Fourteenth Amendment sex equality rights across the board, and especially not quickly out of the post-\textit{Dobbs} gate.\textsuperscript{87}

\textit{Dobbs} offers reasons for questioning this confidence. \textit{Dobbs} defeats many conventional legal bets about what big, bold, constitutionally transformative, and even revolutionary doctrinal moves are and are not now possible, and on what timeline. \textit{Dobbs}' example teaches that rulings which only yesterday appeared impossible may today be anything but.

II. \textit{Dobbs} AND Regular—and Irregular—Constitutional Order

Among the other ways to describe it, \textit{Dobbs} is a dizzying opinion, or anyway an opinion that arrives in dizzying times reflecting the spirit of its age.

In previous eras, intellectual honesty, combined with professional élan, would—at a juncture like this—recommend a polite acknowledgment of \textit{Dobbs}' potentially far-reaching threats to the run of Fourteenth Amendment sex equality equal-protection rights followed by a prescription for two aspirin and a good night's sleep.\textsuperscript{88}

This is because ordinary, orderly motions of constitutional development, built from and regularly expressed as rule-of-law ideals—ideals about the content, scale, and, importantly, the pace of constitutional development, reflecting governance values of coherence, clarity, stability, and predictability—condition legal intuitions

\textsuperscript{86} Examples here include judicial race-neutralization and sex-neutralization of marriage and family law rules, see, e.g., \textit{Loving v. Virginia}, 388 U.S. 1 (1967); \textit{Palmore v. Sidoti}, 466 U.S. 429 (1984); \textit{Orr v. Orr}, 440 U.S. 268 (1979), and the various legislative sex-equalization efforts undertaken in the wake of the Court’s treatment of sex-based classifications as quasi-suspect. An important part of this story is in Susan F. Appleton, \textit{The Forgotten Family Law of Eisenstadt v. Baird}, 28 YALE J.L. & FEMINISM 1 (2016). The reference to the “liberty-equality double-helix and independent equal protection forms” in the text is a way of tracking the sex equality ideals presently at work within the Court’s privacy and liberty rulings as well as within its sex equality jurisprudence. See generally Tribe, Equal Dignity, supra note 32.

\textsuperscript{87} One expression of the conventional sentiment is in Eric Segall, \textit{The Year Originalism Became a Four-Letter Word}, DORF ON LAW (Dec. 12, 2022, 7:00 AM), http://www.dorfonlaw.org/2022/12/the-year-originalism-became-four-letter.html [https://perma.cc/76T7-3BKN].

\textsuperscript{88} The prescription is borrowed from Charles L. Black, Jr., \textit{A New Birth of Freedom: Human Rights, Named and Unnamed} 120 (1997).
about *Dobbs* that render its far-reaching sex equality troubles difficult to credit, even in its own intuition-flouting wake.\(^{89}\) Sure, *Dobbs* might prefigure new activity under the Court’s real sex differences doctrine—action that could eventually make it the exception that swallowed the Court’s Fourteenth Amendment sex equality rule. As an immediate possibility, however, anything else—or more—is too outlandish to take seriously as a project that *Dobbs* actually indicates the Court might realize. A radical transformation eliminating the Court’s constitutional sex equality jurisprudence would be a massive “jolt” to the American people and the legal system that would send shockwaves across every level of government, destabilizing American society, politics, and law to a much greater degree than even the jolting *Dobbs* ruling does.\(^{90}\)

Almost luckily, legal intuitions shaped by regular rules of constitutional order find ready translation as interpretations of *Dobbs* that affirm the traditional legal common sense. One such interpretation begins with *Dobbs*’ announcement that the Fourteenth Amendment’s Equal Protection Clause does not implicate abortion rights.\(^{91}\) This announcement arrives amidst a discussion evidently approving of the Court’s basic constitutional sex equality rules, even as the discussion hangs its hat on the Court’s real sex differences doctrine as the hook for saying abortion rights are not sex equality rights. *Dobbs*’ approval of both the Court’s constitutional sex equality rules and their real differences exception looks to be sufficient to conclude that *Dobbs* does not place the Court’s constitutional sex equality jurisprudence into any large-scale, active doubt.


\(^{90}\) *Dobbs*, 142 S. Ct. at 2316 (Roberts, C.J., concurring in the judgment).

\(^{91}\) Id. at 2245–46 (majority opinion).
This conclusion is reinforced by Dobbs’ repeated insistence that it is a ruling limited to abortion rights. 92 Effectively acknowledging its conservative constitutional originalism’s potential reach, Dobbs clarifies that other rights in the Roe-Casey line are different. 93 Only abortion, it declares, involves the destruction of the “potential life” or, in pro-life terms, “the life of an ‘unborn human being.’” 94 This distinction supplies the basis for Dobbs’ promise to the nation—what the joint dissent dubs its “[s]cout’s honor” pledge—that it does not “undermine” other constitutional privacy or liberty rulings “in any way.” 95

Dobbs’ self-portrayal as a limited, tactical originalist strike against abortion rights creates problems for Dobbs’ conservative originalism. Nothing in Dobbs’ originalism is in any way indexed to abortion rights in ways that make it a unique subject or target for this method of constitutional interpretation. 96 Leaving aside how Dobbs’ limitation of its ruling to abortion rights makes its originalism unprincipled, Dobbs is, by its own lights, no bunker-buster ruling that destroys the larger line of constitutional privacy and liberty cases of which Roe and Casey were once parts. It follows from thinking like this that Dobbs likewise does not endanger that other long line of constitutional cases—the Court’s sex equality cases—that Dobbs says are not even relevant to “the critical moral question posed by abortion.” 97 Ergo, the reasoning goes, constitutional sex equality rights are safe. 98

The fly in this otherwise soothing balm of a reading is that Dobbs’ constitutional significance—and part of the law of the case that it announces—is bound up not just with what Dobbs says but also with what it does. In operation, Dobbs’ conservative constitutional originalism disrupts rules of regular constitutional order on its way to

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92 See, e.g., id. at 2243, 2261, 2266–68, 2277–78, 2280–81.
93 See id.; see also id. at 2257–58.
94 Id. at 2258. Bringing this position into doubt is the practical recognition of a right to terminal sedation in Washington v. Glucksberg, 521 U.S. 702 (1997), on which, see, for example, Marc Spindelman, Death, Dying, and Domination, 106 MICH. L. REV. 1641, 1661 (2008), and also the Court’s decision in Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 279 (1990), recognizing, technically “assum[ing],” a right to passive euthanasia, neither of which the Dobbs majority mentions—strange, if convenient, omissions in the ruling. The Kavanaugh Dobbs concurrence cites Cruzan, but only Justice Scalia’s concurring opinion in the case. Dobbs, 142 S. Ct. at 2306 (Kavanaugh, J., concurring) (citing Cruzan, 497 U.S. at 292–93 (Scalia, J., concurring)). The Dobbs joint dissent cites the majority opinion in Cruzan, id. at 2328 (Breyer, Sotomayor & Kagan, JJ., dissenting) (citing Cruzan, 497 U.S. at 269), but not as the basis for directly challenging the majority’s abortion-is-unique position.
95 Dobbs, 142 S. Ct. at 2332 (Breyer, Sotomayor & Kagan, JJ., dissenting); id. at 2258 (majority opinion).
96 Except, perhaps, that, in some of its origins, conservative originalism was a device for expressing anti-Roe hostilities, on which, see Siegel, Memory Games, supra note 20, at 1148.
97 Dobbs, 142 S. Ct. at 2258 (majority opinion).
98 There is a separate point to be made about how Dobbs’ self-limitation to abortion rights binds lower courts in cases involving rights that Dobbs might otherwise be thought to impact, including sex equality rights. For work elaborating the point in the context of trans sex equality rights, see Spindelman, Trans Sex Equality Rights After Dobbs, supra note 9.
eliminating constitutional abortion rights. Without any conventional doctrinal way-paving, *Dobbs* all of a sudden explodes nearly fifty years of tested and multiply reaffirmed constitutional abortion precedents, precedents of the same basic vintage as the Court’s sex equality jurisprudence, and it does so based on a rule of decision pinned distinctively to the Fourteenth Amendment’s public meaning in 1868 when women were not full citizens. Just two years before *Dobbs*, the Court’s last major abortion rights decision, *June Medical Services LLC v. Russo*, pledged that the Court would preserve *Casey’s* basic doctrinal framework for securing constitutional abortion rights first guaranteed by *Roe*. *Dobbs* throws those institutional and constitutional promises out the window.

Seen in this light, *Dobbs’* law-of-the-case instructs by demonstration that regular-order constitutional rules and their intuitions about what is and is not constitutionally possible, thinkable, or doable cannot now be confidently trusted as before. If *Dobbs* arrives like a jurisprudential lightning bolt—abruptly wiping out constitutional abortion rights in a wall-to-wall way that devastates nearly fifty years of settled and re-settled law, law that accords with settled American expectations about the rock-solid and irreversible nature of individual constitutional rights—what, exactly, is the persuasive argument based on *Dobbs’* text for saying that it could not presage the Court’s radical elimination of existing constitutional sex equality protections in the future? Or for saying that those dramatic constitutional positions—endorsed more than a quarter century ago by Justice Scalia—could not now be realized by the Court given how *Dobbs* doubles down on them?

*Dobbs’* aggressive attacks on Chief Justice John Roberts’ concurrence demonstrates the intentionality of its own irregular constitutional order and the conservative originalist maximalism it puts into play. Without irony, *Dobbs* excoriates Roberts’ concurrence—by its evident designs, an institutionalist, difference-splitting ruling—for being unprincipled in its novel interpretation of constitutional abortion rights, protecting them insofar as they afford pregnant people a “reasonable opportunity” to make reproductive choices for themselves. The concurrence’s so-called


102 *Dobbs*, 142 S. Ct. at 2281–83 (majority opinion); *id.* at 2310–12 (Roberts, C.J., concurring in the judgment); Joan Biskupic, *The Inside Story of How John Roberts Failed to
Moderation is relative, and involves its own sudden about-face eliminating the constitutional viability rules in effect since Roe in favor of its newly minted Dobbs standard.\textsuperscript{103} As the Dobbs majority sees it, this doctrinal development leaves the Roberts concurrence without any principled way to say how it would rule in future abortion cases.\textsuperscript{104} What is a “reasonable opportunity” after all?\textsuperscript{105}

The Dobbs majority opinion indicates that the concurrence’s shakiness, lacking the old viability rules to stabilize it, will inevitably lead to its doctrinal collapse.\textsuperscript{106} The concurrence’s weakening of Roe and Casey’s structure by removing the old viability line and substituting for it its novel reasonable opportunity standard strike the Dobbs majority as anticipating Roe and Casey’s shared fall onto the very ground it announces.\textsuperscript{107} This trajectory suggests to the Dobbs majority that the only sound position in the case is its own.\textsuperscript{108} Dobbs thus steamrolls over what the concurrence would have preserved of abortion rights, dashing its institutionalist attempt to preserve a modicum of conventional constitutional order.

Within the Dobbs majority, conventional constitutional order rules finally and practically count for little—indeed, perhaps effectively for naught—as Dobbs ends Roe’s and Casey’s constitutional lives before giving them the ignominious burial it believes they deserve. In doing this—this is key—Dobbs subordinates the conventional rules of regular constitutional order and legal development to the demands of its conservative constitutional originalism. This is an integral feature of Dobbs’ meaning as constitutional precedent and constitutional practice.

If—after all this—it is still difficult for some people to shake the idea that Dobbs’ subordination of regular order constitutional rules to the demands of its conservative constitutional originalism will be limited to abortion rights, Dobbs has more news to share. Dobbs itself exposes this self-announced limitation as, at best, a partial truth.

A widely overlooked feature of the Court’s Dobbs opinion shows that the Court is already imagining using Dobbs as a tool to bridge past conventional rules of


\textsuperscript{103} For discussion of Roberts’ positions in June Medical which frames his about-face in Dobbs, see Spindelman, \textit{Embracing Casey}, supra note 100, at 128–36. For pertinent discussion in Roberts’ Dobbs concurrence, see 142 S. Ct. at 2310–12 (Roberts, C.J., concurring in the judgment).

\textsuperscript{104} Dobbs, 142 S. Ct. at 2283 (majority opinion).

\textsuperscript{105} Id.

\textsuperscript{106} Id. at 2281–83.

\textsuperscript{107} Id.

\textsuperscript{108} Id. at 2283.
regular constitutional order toward another large-scale doctrinal transformation that, if realized, could be as significant as the possible take-down of the Court’s Fourteenth Amendment equal protection-based sex equality rights. Hardly incidentally, this doctrinal transformation, involving the Privileges or Immunities Clause of the Fourteenth Amendment, could itself involve threats of its own to constitutionally grounded and positive-law sex equality rights and gains. To see those sex equality possibilities, however, requires some preliminary work explaining where the Court’s Privileges or Immunities Clause ideas might go in the domain of economic and social rights.

A. Footnote 22: Dobbs on Fourteenth Amendment Privileges or Immunities

In a footnote that might someday rival or outpace Carolene Products’ Footnote 4 in legal significance, Dobbs temporarily, but unmistakably, abandons its claim that it is restricted to the project of releasing abortion rights back into the political wilds.¹⁰⁹ This footnote—Footnote 22—suggests and then quickly, if abstractly, sketches the potential operation of a new fountain of unenumerated fundamental rights under the Fourteenth Amendment’s still largely defunct Privileges or Immunities Clause.¹¹⁰

Before getting to Footnote 22’s text and details, a few words about its context. The idea of a new Privileges or Immunities Clause jurisprudence is not original to Footnote 22. The footnote itself is nevertheless remarkable and groundbreaking. With Footnote 22, the idea of a new Privileges or Immunities Clause jurisprudence finds expression in a majority opinion for the Supreme Court that is otherwise busy inaugurating a new conservative era of constitutional law, order, and governance.¹¹¹ Also striking is how Footnote 22 is at right angles with the majority opinion’s basic self-presentation as a “scrupulously neutral” ruling committed to relinquishing the Court’s illegitimate authority over unenumerated constitutional abortion rights in ways that adhere to the Constitution’s commitments to American self-government.¹¹²

¹⁰⁹ See supra note 92 and accompanying text.
¹¹¹ Compare Dobbs, 142 S. Ct. at 2248 n.22, with McDonald v. City of Chicago, 561 U.S. 742, 758 (2010).
¹¹² The language of “scrupulous neutrality” is from the Kavanaugh concurrence, Dobbs, 142 S. Ct. at 2305 (Kavanaugh, J., concurring). See also id. at 2310. The theme is also
Footnote 22 abandons those impulses, showing the Court’s taste for an activist conservative originalism ready and willing to engage in counter-majoritarian and judicial supremacist decision-making even where unenumerated individual rights are concerned. Footnote 22 suggests the Court is holding space for itself to continue to weigh in on, and perhaps even to lead charges involving, ongoing American culture war disputes in non-neutral ways. Footnote 22 lends credence to critiques of *Dobbs* that see it not as democracy’s white knight, but among its major legal antagonists.113

Footnote 22 arrives at a vital crossroads in the *Dobbs* opinion. The text that the footnote appends is actively framing a pivot to *Dobbs*’ account of abortion laws’ history and tradition, the beating heart of its conservative originalist case against abortion rights. The text that Footnote 22 endcaps is discussing the seductions of judicial decision-making involving unenumerated constitutional rights.

At first glance, the textual passage leading up to Footnote 22 reads like a classic statement about the perils of adjudication in the open-ended fields of Fourteenth Amendment liberty and due process.114 *Dobbs* rehearsing familiar admonitions about judges dangerously ignoring “the teachings of history” and tradition.115 The classic positions are updated as *Dobbs* pours some acid on non-originalist decisions.116 Re-worked, *Dobbs* intimates that courts that do not abide by its conservative originalism will inevitably find themselves slouching toward “freewheeling judicial policymaking,” itself described as “an unprincipled approach” to constitutional rule-making.117 *Dobbs*, of course, recognizes this and so will never “fall prey to” those missteps.118

Immediately after indicating that it has run its historical and traditional tabulations, *Dobbs* previews them by saying that “the clear answer is that the Fourteenth Amendment does not protect the right to abortion.”119 After that sentence comes Footnote 22.120

Stripped of its authorities and parenthetical explanations, Footnote 22 ventures that the Court’s statement about the Fourteenth Amendment not protecting the right to abortion

is true regardless of whether we look to the Amendment’s Due Process Clause or its Privileges or Immunities Clause. Some

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113 See generally, e.g., Siegel, *Memory Games*, supra note 20.
115 *Dobbs*, 142 S. Ct. at 2248.
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.* at 2248 n.22.
scholars and Justices have maintained that the Privileges or Immunities Cause is the provision of the Fourteenth Amendment that guarantees substantive rights. But even on that view, such a right would need to be rooted in the Nation’s history and tradition.\(^{121}\)

Read merely as a textual clarification, Footnote 22 is curious. Where is this talk of privileges or immunities suddenly coming from? The footnote cites no position anywhere in the \textit{Dobbs} litigation defending abortion rights in these terms.\(^{122}\) No wonder either. Before \textit{Dobbs}, the claim was precluded by the \textit{Slaughter-House Cases}, decided five years after the Fourteenth Amendment’s enactment.\(^{123}\) The \textit{Slaughter-House Cases} famously considered—then rejected—arguments by a group of butchers against a state-created slaughterhouse monopoly, claiming that the monopoly deprived them of their right to ply their trade and earn a living in violation of the Privileges or Immunities Clause.\(^{124}\) The \textit{Slaughter-House} Court rejected this position in a way that closed the Privileges or Immunities Clause off as an active source of judicially protected unenumerated rights, a position that has largely held in the 150-ish years since.\(^{125}\) Had Footnote 22 actually only intended to clarify \textit{Dobbs}’ text in a minor, technical way, it might have stopped after its first sentence, or the Court might have slightly altered its text to avoid the need for the footnote altogether.

Footnote 22’s operative designs become clearer as it continues. Not a device for warding off reasonable misunderstandings about what \textit{Dobbs} has just said, Footnote 22 is a carefully staged occasion sharing how the Court’s conservative originalist majority is presently thinking about ideas involving where the Court might take the Constitution next.

Nor is this the only allusion or invocation of the Fourteenth Amendment’s Privileges or Immunities Clause in \textit{Dobbs}. Justice Brett Kavanaugh’s concurrence gestures toward it when suggesting that, notwithstanding \textit{Roe’s} and \textit{Casey’s} elimination, it knows (without any case or controversy presenting the arguments) that the Constitution protects a right to interstate travel to obtain an abortion.\(^{126}\) The wider right to interstate travel is a long-recognized substantive right of national citizenship, whether the Court protects it or its specification involving abortion rights as a

\footnotesize{\begin{enumerate}
\item\(^{121}\) Id. (citations omitted).
\item\(^{122}\) Id.
\item\(^{123}\) Slaughter-House Cases, 83 U.S. 36, 80 (1873).
\item\(^{124}\) Id. at 60–61.
\item\(^{126}\) For discussion of the point in the concurrence, see \textit{Dobbs}, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).
\end{enumerate}}
structural individual right or as a right guaranteed by the Fourteenth Amendment’s Privileges or Immunities Clause. For its part and in contrast, Justice Clarence Thomas’ concurrence explicitly flags the prospects of a new Privileges or Immunities Clause jurisprudence, but one that neither endorses nor limits itself to Kavanaugh’s position.

Footnote 22 brings its raison d’être into sharper focus, thereby exposing its own underlying anti-democratic and judicial supremacist impulses, when it observes that “some scholars and Justices have maintained that the Privileges or Immunities Clause is the provision of the Fourteenth Amendment that guarantees substantive rights.” Saying this, Footnote 22 is not mocking legal mandarins’ kooky notions, as when Justice Antonin Scalia ridiculed arguments seeking to resurrect the Privileges or Immunities Clause as the “darling of the professoriate.” Footnote 22’s positive regard for the ideas is indicated by the first citation honors that it gives to Justice Thomas, specifically his concurrence in McDonald v. City of Chicago, the case where Scalia made his remark and where the Court held that the Second Amendment applies to the states via the Fourteenth Amendment’s Due Process Clause. Cross-indexing Thomas’ position in McDonald, which supported those incorporationist results but on Privileges or Immunities Clause grounds, the Dobbs majority reaches toward Thomas’ stance with an air of sympathetic acknowledgement.

More significant than Footnote 22 not citing any litigation arguments in Dobbs compelling it to address the Privileges or Immunities Clause ideas that it engages

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127 Id. The Court’s opinion in Saenz v. Roe, 526 U.S. 489, 500–04 (1996), re-raised questions about the foundations of the right to travel, on which, see, for example, Edwards v. California, 314 U.S. 160, 178–80 (1941) (Douglas, J., concurring), but any shifting of its full ground onto the Fourteenth Amendment’s Privileges or Immunities Clause would arrive on a non-blank slate, as productively sketched by Erwin Chemerinsky, Constitutional Law: Principles and Policies 510–18, 537–45, 593, 927–38 (6th ed. 2019). A pre-Dobbs vision of the relevant specification of the right to travel as the right to travel to obtain an abortion that flags some possible limits is in B. Jessie Hill, The Geography of Abortion Rights, 109 Geo. L.J. 1088, 1127–29 (2021). See also infra note 146.

128 Dobbs, 142 S. Ct. at 2302–03 (Thomas, J., concurring); id. at 2309 (Kavanaugh, J., concurring).

129 Id. at 2248 n.22 (majority opinion).


131 McDonald, 561 U.S. at 750, 791; id. at 806 (Thomas, J., concurring in part and concurring in the judgment). The McDonald majority examined, id. at 754–58, but ultimately rejected the Privileges or Immunities Clause argument ventured in the case. Id. at 758.

132 Dobbs, 142 S. Ct. at 2248 n.22 (majority opinion); McDonald, 561 U.S. at 806, 837–38, 850 (Thomas, J., concurring in part and concurring in the judgment).
is the conspicuous silence the footnote constructs around the *Slaughter-House Cases*, and two other cases, *Bradwell v. Illinois* and *United States v. Cruikshank*, that contributed to sending the Privileges or Immunities Clause into constitutional near-oblivion.\(^\text{133}\) Without naming any of these decisions—even in counterpoint to the authorities it does mention—*Dobbs* casts them all, most significantly, the *Slaughter-House Cases*, into negative relief in a new, and suddenly far from wholly certain, light.

Suggesting what may be transpiring in this silence, Footnote 22 declares that, in general, any unenumerated substantive rights under the Privileges or Immunities Clause would “need to be rooted in the Nation’s history and tradition” for the Court to recognize them.\(^\text{134}\) This observation suggests that the Court is already contemplating the extension of its conservative originalist approach to abortion rights to a still-formally nonexistent Privileges or Immunities Clause jurisprudence. Before the Court formally cracks that doctrinal nut open, *Dobbs* enlarges the authority of *Washington v. Glucksberg*, a case about the constitutional right to die that serves as *Dobbs*’ ur-authority for its originalist history-and-tradition test.\(^\text{135}\) Footnote 22 configures *Glucksberg* as the controlling precedent in any future Privileges or Immunities Clause jurisprudence.\(^\text{136}\) It is now ready to do that work.

Without diving deeply into existing scholarship about the meaning of the Privileges or Immunities Clause, other than the few sources it quickly, if carefully, mentions, Footnote 22’s focus on history and tradition reaffirms its initial point that nothing it is saying is meant to give abortion rights supporters any hope of a fresh bite at the constitutional apple under the Privileges or Immunities Clause. Footnote 22 does not concretize new privileges or immunities that the Court might recognize, but it is adamant that they do not and will not include abortion rights.\(^\text{137}\)

Other authorities on the Fourteenth Amendment’s Privileges or Immunities Clause’s meaning that Footnote 22 invokes function as gestures toward the sorts of

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\(^\text{133}\) *Dobbs* does not discuss *Bradwell v. Illinois*, 83 U.S. 130, 137, 139 (1873), an early women’s rights case that infamously refused to respect Myra Bradwell’s right, under the Privileges or Immunities Clause, to become a lawyer, or *United States v. Cruikshank*, 92 U.S. 542, 548, 557–59 (1876), a case involving the meaning of state action that powerfully intersects with race equality rights. On *Cruikshank*, James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 386, 392 (2014), is indispensable.

\(^\text{134}\) *Dobbs*, 142 S. Ct. at 2248 n.22.


\(^\text{136}\) See *Dobbs*, 142 S. Ct. at 2248 n.22.

\(^\text{137}\) Not even—to look ahead a bit—as an unenumerated contract right between a doctor and a patient. See infra text accompanying note 170.
unenumerated rights the Clause could be used to protect. Footnote 22’s leading source here is Justice Bushrod Washington’s opinion in *Corfield v. Coryell*, which offers what Footnote 22 treats as an authoritative description of the large headings of fundamental rights protected as “privileges or immunities.” Parenthetically, the footnote tracks Washington’s explanation that privileges or immunities are those “‘fundamental’ rights ‘which have, at all times, been enjoyed by the citizens of the several states.’” That “at all times”—with its tacit nod toward history and tradition—makes the fundamental rights at stake sound like American-soil descendants of the ancient rights of Englishmen. *Dobbs* thus conjures ideas and raises wonders about what the ancient fundamental rights of “Americanmen”—perhaps consistent with a “manly originalism”—might turn out to be.

As it draws to a close, Footnote 22 reiterates the general prospects that the ancient fundamental rights protected by the Privileges or Immunities Clause may include unenumerated rights. The footnote’s final citation—a “cf.” indicating that *Dobbs* sees this as elective authority—cycles back to where its authorities list began. This time around, the footnote seems less like it is sympathetically citing than affirmatively joining cause with the project of Thomas’ *McDonald* concurrence, described in Footnote 22 as “reserving the question whether the Privileges or Immunities Clause protects ‘any rights besides those enumerated in the Constitution.’” Thomas’ *Dobbs* concurrence also re-ups this question.

Astute readers, including those who have been angling for a new Fourteenth Amendment Privileges or Immunities Clause jurisprudence, will see Footnote 22’s mention of Thomas’ reservation of the question in *McDonald*, about whether the Privileges or Immunities Clause protects unenumerated rights, as the *Dobbs* Court’s own way of aligning itself with Thomas’ concurrence in the era of *Dobbs*’ dreamscaping of transformative constitutional possibilities.


139 *Dobbs*, 142 S. Ct. at 2248 n.22 (citation omitted).


141 *Dobbs*, 142 S. Ct. at 2248 n.22.

142 *Id*.

143 *Id.* at 2302 (Thomas, J., concurring).

144 *Id.* at 2248 n.22 (majority opinion). This stands in stark contrast to how *Dobbs* distances
By its end, then, Footnote 22 has morphed from a curious clarification of a textual point into a litigation invitation that could set the Court, the Constitution, and the nation on a new course in which the Court exercises its supreme powers of counter-majoritarian judicial review to require American politics and law to conform to its conservative constitutional originalist vision. In this sense, Footnote 22 exposes *Dobbs* as not involving any unidirectional abandonment of judicial authority out of respect for democracy. To the extent that *Dobbs* does involve that by releasing abortion rights back to politics, it comes along with Footnote 22’s programmatic outline suggesting the Court’s anti-democratic ambitions for its own preferred set of unenumerated constitutional rights and this new doctrinal device for enacting them.

Perhaps anticipating criticisms that the Court is gearing up to launch a politically conservative unenumerated constitutional rights counter-revolution, Footnote 22 avoids citing any prominent living conservative voices arguing for the kinds of politically rightward constitutional prospects that it potentiates. Hardly coincidentally, Footnote 22 invokes the work of two well-known liberal legal academics, one of them living, and the other, sadly, deceased.145 The footnotes’ citations to their scholarship imply that the Court’s contemplation of a Privileges or Immunities Clause jurisprudence transcends politics, and would never—ever—have any inherently politically conservative torque.

Tellingly, Footnote 22, like Thomas’ *Dobbs* concurrence, declines to endorse as proof of concept the Kavanaugh concurrence’s suggestion that the right to interstate travel, which could be held to be encompassed by the Privileges or Immunities Clause, vindicates a right to travel to exercise abortion rights.146 Then again, read in light of Footnote 22’s prospects, the Kavanaugh concurrence’s nod toward limited interstate travel protections for the abortion decision seems less like a simple left-liberal or progressive reserve of constitutional respect for reproductive choice than a potential Trojan horse, on the theory that no new Privileges or Immunities Clause jurisprudence could be assailed as improperly driven by conservative politics were it to offer abortion rights even limited safe harbors within it.

While there might yet be some privileges or immunities that lean in left-liberal or even progressive directions or that transcend standard right/left political configurations, Footnote 22’s position that privileges or immunities must be understood in itself from the Thomas concurrence’s position on what *Dobbs* should be understood to mean for other substantive due process rights.


historical and traditional terms makes it unlikely that any new Privileges or Immunities Clause jurisprudence in the current Court’s hands would be meaningfully politically blended, much less apolitical. Anchored to ancient fundamental rights of American men, Footnote 22 seems presently more predisposed to launch a jurisprudence whose basic contours would less honor than defy the Privileges or Immunities Clause’s origins in ideas about socially progressive transformation. The ancient past, anyway, is a strange axis for any clause from the Civil War Amendments, whose legislative history and object lessons involve consulting history and tradition not in order to reanimate them, but, if anything, in order to break with, “dismantle,” or overcome them.

Although Footnote 22 does not precisely detail the kinds of privileges or immunities the Court might yet recognize as ancient fundamental rights, important groundwork has been done by scholars and justices that points to the Clause’s potential meanings consistent with Footnote 22’s terms. There are at least two broad classes of ancient fundamental rights that the Court could recognize should it proceed to uncap the Fourteenth Amendment’s Privileges or Immunities Clause as a constitutional hydrant of unenumerated individual rights. Both these categories of individual rights—one, economic, and the other, social, to use modern constitutional locutions—are in different kinds of tension with existing constitutional rules and baselines, as well as positive law developments enacted during the Slaughter-House Cases’ long reign. If one possibility is that these economic and social rights might

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147 These conditions thus pose risks for pro-choice advocacy positions seeking to seize upon and vindicate the interstate abortion travel right that Kavanaugh’s Dobbs concurrence announces. They also pose risks for other left-liberal and progressive arguments that would press the Privileges or Immunities Clause as the basis for judicial decisions, including decisions that might treat the clause as a predicate for congressional Section 5 authority. See, e.g., Lawrence Lessig, The Brilliance in Slaughterhouse: A Judiciarially Restrained and Original Understanding of “Privileges or Immunities” 12–13, 23, 29–32 (Harv. Pub. L. Working Paper, No. 22-29, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186210 [https://perma.cc/26AA-W6Q9].


149 The modern locution is found in many statements of traditional rational basis review. See, e.g., FCC v. Beach Communications, Inc. 508 U.S. 307, 313 (1993). This categorization
“augment” existing constitutional and positive law guarantees, another is that a new Privileges or Immunities Clause jurisprudence could instead “displace” them, erasing them altogether.150 Either way, understanding their contours in more detail will begin to show how far and in what directions Footnote 22 indicates the current Court might go. Beyond the substance of what Footnote 22 may hold in store, including for sex equality rights, it is the scale of the potential constitutional changes associated with it that must be registered. That scale rightsizes the prospects of the Supreme Court carrying through on Dobbs’ other dangers for existing Fourteenth Amendment sex equality rights—rights that, again, a new Privileges or Immunities Clause jurisprudence may imperil on its own account.

First, a few words on privileges or immunities operating as unenumerated economic liberties, and then a few more words on privileges or immunities operating as social rights, recognizing that the two categories of rights have been and are deeply interconnected.151

B. Privileges or Immunities as Economic Liberties

For some time now, a number of prominent libertarian legal academics have been studying the history of the Fourteenth Amendment’s Privileges or Immunities Clause, animated by a dream of restoring constitutional protections to a range of unenumerated economic liberties.152 If successful, the project would bring back the

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150 Dobbs, 142 S. Ct. at 2302 (Thomas, J., concurring); Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting). The alternative of what may be thought of as a substitution play is noted supra note 19.


right to contract embraced by \textit{Lochner v. New York}, but in Privileges or Immunities Clause garb, along with privileges or immunities protections for a range of other economic freedoms—from property to corporate rights and perhaps different freedoms for capital markets and other capital arrangements.\footnote{Lochner v. New York, 198 U.S. 45, 64 (1905).}

Given these stakes, now part of Footnote 22’s constitutional potential, it is useful to bring to mind an old account of \textit{Lochner}’s prehistory and the history of its rise and fall. Recalling the story in this form helps to show how \textit{Dobbs} and Footnote 22 track it, but while starting to rewrite it, recasting \textit{Lochner}’s mistake in ways that clear room for the Court to take the groundbreaking doctrinal steps Footnote 22 primes.


As the old story goes, after the *Slaughter-House Cases* refused to affirm unenumerated economic liberties as Fourteenth Amendment privileges or immunities to be protected by the Court, the Court began seizing upon the neighboring Fourteenth Amendment language of liberty and due process to do at least some of the same work.\(^{154}\) Launching and sustaining a substantive due process contract liberty jurisprudence for some time through and after *Lochner*, the Supreme Court eventually found itself, partly owing to its laissez-faire commitments and ambitions and their opposition to New Deal economic social welfare legislation, in a face-off with President Franklin D. Roosevelt and the Congress.\(^{155}\) This face-off—a national crisis much recalled of late—produced the Court’s famous “switch in time that saved nine” and the nation, with the Court reversing course on the constitutionality of New Deal legislation—at *Lochner’s* expense.\(^{156}\)

After *Lochner’s* repudiation, the Court began a long and still generally ongoing season of robust deference toward ordinary social and economic legislation, expressed in and through classic rational basis review.\(^{157}\) For generations, this constitutional compromise position also entailed minimal Supreme Court examination of the scope of Congress’ authority to manage vast dimensions of the nation’s economic life.\(^{158}\) If the Court were to make good on Footnote 22 and its potential revival of what the Court thinks of as ancient, fundamental economic liberties under the Privileges or Immunities Clause, it would place this long-standing constitutional compromise arrangement into new forms of basic doubt.

Practically on cue, the textual paragraph that Footnote 22 appends to conjures *Lochner’s* ghost in order to beat it, as if *Dobbs* were seeking to reassure the American public that it has not forgotten—and remains duly humbled by—the old lessons that *Lochner* taught the Court.\(^{159}\) *Dobbs’* assessment of *Lochner* thus initially sounds like the classic line. In *Dobbs’* terms, *Lochner* is illegitimate as “discredited,” “unprincipled,” “freewheeling judicial policymaking.”\(^{160}\)

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\(^{154}\) See, e.g., TRIBE, supra note 138, at 1311–12.


\(^{157}\) *Dobbs* invokes the traditional rational basis review standard as the measure of judicial review of abortion, including anti-abortion, legislation. 142 S. Ct. 2228, 2283–84 (2022); see also id. at 2245–46.

\(^{158}\) See, e.g., United States v. Morrison, 529 U.S. 598, 640 (2000) (Souter, J., dissenting). For an important rehabilitative summary of Edward Corwin’s account of the developments, see FISHKIN & FORBATH, supra note 151, at 442.

\(^{159}\) *Dobbs*, 142 S. Ct. at 2247–48. *Dobbs* invokes *Lochner* elsewhere. Id. at 2262, 2278–79. *Lochner* also makes other appearances in *Dobbs*. Id. at 2307, 2308 n.3 (Kavanaugh, J., concurring); id. at 2341 (Breyer, Sotomayor & Kagan, JJ., dissenting).

\(^{160}\) Id. at 2248 (majority opinion).
Re-reading Dobbs’ observations about Lochner with Footnote 22 and its possibilities in mind, however, exposes new shades of meaning in what Dobbs’ text is saying. On closer inspection, Dobbs is not simply retelling the story of Lochner’s mistake as being founded in a categorical error of the Court imposing laissez-faire economic positions on the nation when the Fourteenth Amendment’s text is silent on the nation’s basic economic organization.161 Thinking of the possibilities of ancient, fundamental economic liberties that may be consistent with Footnote 22’s terms, Lochner’s defect now appears, more precisely, to involve the error of the Court imposing the justices’ laissez-faire economic views on the Due Process Clause, where they did not belong.

An ostensibly very different story obtains by contrast when laissez-faire economic principles are understood as reflected in the ancient, fundamental substantive economic liberties protected by the Privileges or Immunities Clause. Located there, Lochner-like laissez-faire rulings may follow consistent with reasoning like Dobbs’—not as “discredited,” “unprincipled,” or “freewheeling judicial policymaking,” but rather as sound originalist decision-making disciplined and driven by historical and traditional tallies of ancient fundamental rights safeguarded as privileges or immunities of national citizenship.162

If this accurately captures the Dobbs Court’s reasoning, the Court may yet bounce down the path of announcing unenumerated economic freedoms under the Privileges or Immunities Clause, liberated from Lochner’s shame and with a newfound pride about its work. This confident outlook might condition the Court’s approach to cases involving not only what economic rights to recognize but also what to do with post-Lochner constitutional baselines of traditional rational basis review for ordinary economic legislation. Recognizing that the Court could not get very far in honoring new economic liberties while classic rational basis review remains the metric for judging their abridgments, what might the Court do? Would it start crafting exceptions to its conventionally generous deference to economic legislation, making that deference turn on novel constitutional distinctions between “ordinary” and “extraordinary” economic regulation?163 How far might the Court go

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162 Dobbs, 142 S. Ct. at 2248.
163 But cf. Barnett, supra note 152, at 329–33. Dobbs’ invocation of traditional forms of rational basis review as the proper measure for pro-life, anti-abortion bans and regulations, see supra note 157, might be adjusted to accommodate a post-Dobbs Privileges or Immunities Clause jurisprudence, even supposing unenumerated fundamental economic liberties receive special constitutional protections. Conveniently, Dobbs paves the way to those adjustments when it indicates in its stare decisis analysis that abortion rights do not involve the kind of contract relations that give rise to the kinds of reliance expectations Court decisions should heed. 142 S. Ct. at 2276. There is, of course, a conceptual puzzle in this—why do they not?—but the Court’s position itself may go to show how the current Court’s sense of fundamental economic liberties might also be inflected with moral sensibilities. Also worth noting in this regard is how the Court has already started carving up the universe of federal economic regulation
to question existing economic legislation and regulatory and management regimes built atop them that are themselves all constructed atop *Lochner’s* grave? Would the Court recognize only those economic rights claims that strictly conform to originalist understandings of economic freedoms protected by the Privileges or Immunities Clause? Or might the Court exceed them on the theory that, keyed to laissez-faire principles, the Privileges or Immunities Clause must be translated into constitutional operating rules for superintending the political and administrative management of modern economic life?

Dancing with *Lochner’s* ghost, the Court has already been recognizing economic rights in various legal settings that, regularly articulated in other terms, implicate contract freedom and the rights of individuals and business interests to be free from what have, for a long time now, been widely regarded as wholly unexceptionable forms of governmental regulation of the economic realm undertaken in the public’s interest. Given those steps, a new doctrine of economic liberties under the Privileges or Immunities Clause could offer a forthright rationalizing principle for what might otherwise seem like scattershot, but still related constitutional decisions that imply, without yet identifying, a unifying constitutional theory. If so, a new Privileges or Immunities Clause doctrine of economic rights could supply the missing constitutional ideal, functioning to rationalize and ground, as well as to coordinate, legitimate, and enhance the other economic pronouncements in the direction of a comprehensive constitutional project of laissez-faire principles and rights.

Seen in these terms, a new Privileges or Immunities Clause jurisprudence of economic rights could also coordinate the Court’s operative understandings of the


164 See, e.g., EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, supra note 152, and reconsider in this light the stakes of 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023), where First Amendment free-speech rights, contingently underpinned by faithful conservative views and values, also do double-duty as a constitutional economic liberty management device the effects, if not purposes, of which may reflect and reinforce notions of faithful wealth or market power and/or contract liberty corresponding to ideals of religious and/or secular conscience. Important work in this context includes Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); cf., e.g., United States v. Lopez, 514 U.S. 549, 598 (1995) (Thomas, J., concurring) (discussing United States v. E.C. Knight, 156 U.S. 1, 14, 16 (1895)).

scope of Congress’ legislative authority, particularly insofar as Congress exercises it to regulate the national economy, sometimes using the federal government’s economic might to purchase state compliance with Congress’ regulatory wishes.166 Here, too, a new Privileges or Immunities Clause jurisprudence of ancient economic rights might install a laissez-faire outlook as the organizing principle for future doctrinal developments about Congress’ powers, shrinking them with an eye toward liberating the economy from politics, thus letting what the Court thinks passes for economic freedom ring.167

Somewhere down these paths looms a post-Dobbs and post-Footnote 22 Court encounter with the Slaughter-House Cases. Eye-to-eye with that ruling, might the Court that decided Dobbs also decide that the ruling in the Slaughter-House Cases was simply wrong, or, like Roe, “egregiously wrong,” and then overturn it?168 By Dobbs’ own terms, overruling the Slaughter-House Cases—in contrast with Dobbs’ elimination of abortion rights—would disrupt what Dobbs figures as “[t]raditional reliance interests.”169 Dobbs’ stare decisis analysis indicates that traditional economic relations are, indeed, entitled to the Court’s ongoing respect, notwithstanding constitutional conclusions otherwise indicated by its conservative originalism.170 Still, if conventional rules of constitutional order, including respect for long-standing precedents, remain subordinated to the Court’s conservative originalist project—as Dobbs instructs—then Dobbs’ own novel reliance test could prove unavailing as a check on a Court majority that has decided the Slaughter-House Cases’ time is up.171

168 Dobbs, 142 S. Ct. at 2243.
169 Id. at 2276. The larger discussion of reliance interests appears in id. at 2276–78.
170 The Court describes these classic economic relations to entail “very concrete reliance interests, like those . . . in ‘cases involving property and contract rights.’” Id. at 2276. The doctor-patient relationship involved in abortion practice is excepted from this analysis notwithstanding its ordinary contractual base. For a related point, see supra note 163. This exception may come home to roost in future litigation involving whether Congress has the authority under the Commerce Clause to regulate abortion. U.S. Const. art. 1, § 8, cl. 3.
What this all means in sex equality terms for women’s right to participate in the nation’s economic life as men’s equals, is impossible to predict with certainty at this point. So much depends on so much. Nevertheless, it is already clear that Footnote 22’s possible implications for the rehabilitation of ancient economic liberties as new privileges or immunities could entail some serious downsides for women from different walks of life. Their equality in the economic realm, including the workplace and the open marketplace, such as it is, has been legally advanced through various forms of economic legislation produced in the long wake of *Lochner’s* demise.\(^{172}\) Any new Privileges or Immunities Clause jurisprudence of ancient fundamental economic rights, reviving *Lochner* in new doctrinal terms, thus would likely place a question mark behind economically focused sex equality measures that redistribute economic opportunities, power, and wealth along sex-based and other intersectionally related lines.

The larger picture of what Footnote 22 may mean for a future jurisprudence of economic liberties under the Privileges or Immunities Clause indicates that the Court that delivered *Dobbs*, including Footnote 22, can hardly be thought to be too sheepish to deliver on the perils that *Dobbs* otherwise raises for Fourteenth Amendment equal protection-based sex equality rights. Any Court bold enough to go out of its way to include Footnote 22, with what it might mean for new constitutional economic rights, might also be bold enough to lay waste to Fourteenth Amendment equal protection-based sex equality law. Particularly when that Court, building on the foundations of Justice Scalia’s *VMI* dissent, has already installed the constitutional scaffolding to do exactly that.

Before venturing any final assessment about how likely it is that the current Supreme Court will realize those dangers, there are those social rights that could also surface within a new Privileges or Immunities Clause jurisprudence that must be considered. In their own terms, too, the social rights prospects that Footnote 22 opens up add to the constitutional pressures now facing existing constitutional and positive law sex equality guarantees. Different in form, they are of no less concern.

C. Privileges or Immunities as Social Rights—in the Family Law Setting

The prospects of a conservative originalist project of social rights under the Fourteenth Amendment’s Privileges or Immunities Clause may presently be less familiar than the prospects of a conservative originalist project of economic liberties

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\(^{172}\) In 1985, then-Judge Antonin Scalia noted that “the vast bulk of noncriminal ‘civil rights cases’ are really cases involving economic disputes. The legal basis for the plaintiff’s claim may be sex discrimination, but what she is really complaining about is that someone did her out of a job.” Scalia, *supra* note 153, at 704.
under the Clause. Understanding that economic and social rights are inextricably intertwined within our political economy, a serviceable, if somewhat simplified, starting point for recognizing the kinds of social rights that a new Privileges or Immunities Clause jurisprudence could entail, consistent with Footnote 22, is supplied by Justice Clarence Thomas’ short concurrence in *Troxel v. Granville*, a family law case involving constitutional protections for parental rights.

Thomas’ *Troxel* concurrence acknowledges that the formal arguments in the case did not include a Fourteenth Amendment’s Privileges or Immunities Clause challenge to the state visitation law before the Court. Thomas’ concurrence nevertheless approaches the constitutionality of that measure through the lens of the dissent that he filed in *Saenz v. Roe*, involving the right to interstate travel, in which he urged a “reevaluat[ion]” of the meaning of the Privileges or Immunities Clause. Thomas’ *Troxel* concurrence builds on that call to imply that the Court should, in some future case, reconceive the foundations of the parental rights announced in *Pierce v. Society of Sisters*, which the concurrence describes as holding “that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them.” Rather than continuing to treat these fundamental parental rights, per *Pierce*, as Fourteenth Amendment’s due process rights, Thomas’ *Troxel* concurrence imagines the Court redefining them as rights encompassed within the Fourteenth Amendment’s Privileges or Immunities Clause.

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173 The language of “social rights” in this context is distinctively modern. Some rights now thought of as social rights were, at earlier points in our country’s history, thought of in different terms, including as civil rights. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967). See generally ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION (2019).


175 *Troxel*, 530 U.S. at 80, 80 n.* (Thomas, J., concurring in the judgment).

176 *Id.* (citing *Saenz v. Roe*, 526 U.S. 489, 527–28 (Thomas, J., dissenting)).


178 *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in the judgment). Important angles of
The kind of parental rights that Thomas’ Troxel concurrence envisions are important in their own right, but in functional terms they look less like endpoints than touchstones for social rights within the kind of new conservative originalist Privileges or Immunities Clause jurisprudence the concurrence contemplates.179 Fairly described, these parental rights exemplify the sorts of ancient, fundamental social liberties that, in the family law setting and beyond it, the Court might now “discover” and vindicate because they satisfy the historical and traditional conditions that Footnote 22’s conservative originalism demands.180

Thinking in these directions, Thomas’ Troxel concurrence sounds distinctively—indeed, strangely—*au courant* when it speaks in gender-neutral terms about fundamental “parental rights.”181 The concurrence does not delve into their relevant history or tradition, but no archival work is needed to observe that when the Fourteenth Amendment was enacted, and both before and after that, “parental rights” were not the parental autonomy-respecting and substantively gender-neutral rights that Thomas’ opinion seemingly brings up.182 Nor, of course, were these rights historically race-neutral either. They were, rather, limited to those who did not live and suffer under slavery’s noxious yoke.183

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179 In this respect, the trajectory of a new Privileges or Immunities Clause jurisprudence of social family rights might retrace, albeit in different terms, the developmental trajectory of substantive due process decisions from *Meyer*, 262 U.S. 390, and *Pierce*, 268 U.S. 510, through to *Griswold v. Connecticut*, 381 U.S. 479 (1965), even if it then perhaps begins veering off in very different directions.


181 *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in the judgment). A different articulation, focusing at one point on “the Puritan tradition common in the New England Colonies,” according to which “fathers ruled families with absolute authority,” which is itself reconfigured by subsequent references to, and invocations of, “parental authority” that historically included “total parental control over children’s lives,” is in *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 823–35 (2011) (Thomas, J., dissenting). Thanks to Lee Strang for conversation on the point.


Surfacing these details begins to underscore the ways that any new conservative originalist Privileges or Immunities Clause jurisprudence ought candidly to acknowledge that the fundamental rights “parents” enjoyed “at all times” were historically and traditionally founded in racialized sexual conceptions of ancient, fundamental rights. Substantively, these parental rights were normatively organized around the rights of white cisheterosexual men as married fathers to exercise dominion and control over their children, and as husbands, over their wives, and as masters, over both servants and other people who were held in slavery.

Strategic reasons may strongly recommend a conservative originalist white-washing of the racialized patriarchal underpinnings of ancient, fundamental family law rights inside any modern Privileges or Immunities Clause jurisprudence, along the lines of Thomas’ short Troxel concurrence. Neither evasion nor minimization, however, can alter the relevant histories or traditions of hierarchically arranged white, male dominant, and cisheterosexist domestic life and the rights that, for ages, defined it. Confronted head-on, the ancient hierarchical arrangements of marriage and domestic life included the sex-based and racially inflected institution of coverture, under which married women’s legal existence merged with their husbands’ in ways that, as the Dobbs joint dissent notes, denied married women’s independent legal existence. These legal arrangements reflected and reinforced—the sexual and social relations between men and women, along with the social meanings that were authoritative aspects of the sex-based and sex-exclusionary original public understandings of the Fourteenth Amendment.

185 See, e.g., Dailey & Rosenbury, supra note 182, at 87–90; Janet E. Halley, What is Family Law?: Genealogy Part I, 23 YALE J.L. & HUMANITIES 1, 2–4 (2011). Rights of unmarried fathers have a different location in the Supreme Court’s family law canon. For some context, see Judith Areen, Marc Spindelman, Philomila Tsoukala & Solangel Maldonado, FAMILY LAW: CASES AND MATERIALS 424–48 (unabr. 7th ed. 2019).
186 Troxel, 530 U.S. at 80 (Thomas, J., concurring in the judgment).
188 For the Dobbs joint dissent’s notation, see 142 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting). For a brief account of coverture, see Areen et al., supra note 185, at 173–76. Additional discussion that traces Supreme Court rulings “invok[ing] equal protection principles to invalidate laws imposing sex-based inequality on marriage” and thereby eliminating coverture is in Obergefell v. Hodges, 576 U.S. 644, 660, 673–74 (2015). For some additional important contours, see generally Katherine M. Franke, Wedlocked: The Perils of Marriage Equality 12 (2015), Shani King, The Family Law Canon in a Post(?) Racial Era, 72 OHIO ST. L.J. 575 (2011), Darren Lenard Hutchinson, Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics, 47 BUFF. L. REV. 1 (1999), and Lenhardt, supra note 187. Calabresi & Matthews, supra note 174, at 1419, recognizes the historical racialized exclusions from marriage while suggesting that they were effectively reversed by the Fourteenth Amendment through the Privileges or Immunities Clause “even though almost no-one realized it at the time.”
189 For originalist arguments that overcome these obstacles through engagements with the
In the abstract, as a matter of logical entailment, it is easy to conceive of a principled conservative originalist jurisprudence of Fourteenth Amendment privileges or immunities that follows standard conservative originalist protocols to rehabilitate coverture as a matter of white cisheterosexual men’s ancient fundamental rights. In practice, by contrast, it still defies imagination—even in the Dobbs era, in which so many once-impossible things no longer are—to believe any sitting Supreme Court justice would run conservative originalist analytics in these terms.

The same cannot be said, however, for a broad run of closely related and deeply socially and culturally conservative social rights that—after the sharp edges of their racialized and male-dominant hierarchical underpinnings have been removed—could more readily become part of a new conservative originalist Privileges or Immunities Clause jurisprudence.  

Along these lines, continuing with the focus on the family law setting, imagine, for instance, a new Fourteenth Amendment Privileges or Immunities Clause right to marry that, bracketing marriage’s racialized and patriarchal underpinnings, embraces an historical and traditional definition of marriage as the union of one man (read: cisman) to one woman (read: ciswoman) as husband and wife. Consistent with Justice Thomas’ Troxel concurrence’s terms, this fundamental marriage right might be held to trigger strict scrutiny for any infringement on—or “abridgment” of—the right.  

One possibility here is that a Privileges or Immunities Clause right to marry would operate in part by displacing, hence eliminating, Obergefell v. Hodges, while allowing room in the political sphere for the modernization of marriage’s sex-based definition, much in the way the Obergefell dissents, leaving marriage’s definition to the people, figured. Another possibility, however, is that a new Privileges or Immunities Clause-based right to marry could function much as state “defense of marriage amendments” recently did: by freezing marriage’s definition in its cis-male/cis-female dyadic terms and prohibiting ordinary positive-law expansions of

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**Footnotes:**

190 Accord West, Dobbs Remarks, supra note 5.

191 For a related argument and perspective, see Calabresi & Matthews, supra note 174, at 1418–22; U.S. CONST. amend. XIV, § 1.

192 Troxel, 530 U.S. at 80 (Thomas, J., concurring); see infra note 195 and accompanying text.

193 Obergefell, 576 U.S. at 688–89 (Roberts, C.J., dissenting); id. at 714 (Scalia, J., dissenting); id. at 733–34 (Thomas, J., dissenting); id. at 741 (Alito, J., dissenting). There may be affinities here to covenant marriage rules, and how different marriage definitions can operate alongside one another under law, in this case one set of marriage rules constitutionally based and the other grounded in law reform expanding marriage’s basic definition. For brief treatment of covenant marriage, see Areen et al., supra note 185, at 850–52.
marriage’s definition in the absence of a formal constitutional amendment allowing or requiring them. Indeed, it could be the case—depending on what the Court makes of some important language from its new Second Amendment decision, *New York State Pistol & Rifle Ass’n v. Bruen*—that the only constitutionally legitimate legal modifications to the basic right to marry, short of a federal constitutional amendment, would be those that have, or like those that have, historical and traditional roots.

What else might a Supreme Court that has regrounded the right to marry in the ancient fundamental rights of Americans protected by the Fourteenth Amendment’s Privileges or Immunities Clause do if and when presented with constitutional challenges claiming that the right to marry has been “abridged,” in the sense of “diminished” or “impaired” by [take your pick]: no-fault divorce rules that have relinquished the historical and traditional moral strictures of fault-based divorce; property awards upon divorce that flout historical and traditional notions of title; modern spousal and child support rules and punishments for their violations unknown under the old common law; or child abuse and neglect rules and regimes that accord with modern sensibilities on children’s welfare, and not historical and traditional ideas of “parental rights,” including old ideas about the practical meaning and scope of the right to corporal punishment or “chastisement”?

All these measures, like other modern family law developments, have operated not to honor and preserve, but, if anything, to break with family law’s ancient past and the historical and traditional privileges and immunities that domestic relations law once entailed and protected. Would a new Privileges or Immunities Clause jurisprudence that is serious about recognizing and vindicating ancient fundamental

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rights of American men rest content to leave all these rules alone in the realm of ordinary politics.\textsuperscript{197}

Or, for another family law example, consider what the Court that issued \textit{Dobbs} might make of a line of argument presented by Mississippi’s lawyers in the case, recognizing that their conservative originalist arguments imperiled the marital privacy protections announced in \textit{Griswold v. Connecticut}.\textsuperscript{198} Shorn of its racialized, patriarchal underpinnings—marital privacy once being an expression of a racialized patriarchal jurisdiction other men were ordinarily supposed to respect—might the post-\textit{Dobbs} Court recognize an ancient marital privacy right within a new Privileges or Immunities Clause jurisprudence? If so, how would the Court respond when presented with practically inevitable next-generation constitutional challenges to laws prohibiting marital rape, domestic violence, and stalking?\textsuperscript{199} How about other laws modernizing historical and traditional spousal duties, or otherwise impacting the interpersonal or financial relations between married people?\textsuperscript{200}

These incipient outlines of what Footnote 22 might portend raise the prospect that a new Fourteenth Amendment’s Privileges or Immunities Clause jurisprudence could prove to be just the ticket that many faithful conservatives and traditional moralists have been searching for in their self-described struggles to save the American family and restore it to its lost, former glory.\textsuperscript{201} Post-\textit{Dobbs}, next acts for those who seek legally to rehabilitate conservative family values at scale might take place not, or not only, in legislatures, but also in

\textsuperscript{197} There are different ways that ancient fundamental rights of American men might be realized. They could, of course, be initiated through standard forms of policymaking or direct democracy efforts in areas where politics favor them. Alternatively, the efforts might begin in earnest through litigation and resulting Supreme Court decisions recognizing constitutional entitlements to the old legal arrangements. One example moving in natural law directions, via substantive due process notions that are capable of being translated into Privileges or Immunities Clause terms, is in \textit{Deanda v. Becerra}, 2:20-CV-092-Z, 2022 WL 17572093, at *12 (N.D. Tex. Dec. 8, 2022).

\textsuperscript{198} \textit{Griswold v. Connecticut}, 381 U.S. 479, 485–86 (1965). In \textit{Dobbs}, Mississippi’s lawyers, recognizing how their conservative constitutional originalism cast \textit{Griswold’s} general constitutional right to privacy into doubt, sought to offer a theory by which the Court could accept their arguments while preserving the substance of the marital privacy right at issue in \textit{Griswold} in other terms. Brief for Petitioners at 15, \textit{Dobbs v. Jackson Women’s Health Org.}, 142 S. Ct. 2228 (2022) (No. 19-1392). \textit{Dobbs} marks \textit{Griswold} as special in its own way, flagging the law at issue in the case as “an extreme outlier.” 142 S. Ct. at 2260 n.47.

\textsuperscript{199} \textit{United States v. Rahimi}, 61 F.4th 443, 461 (5th Cir.), \textit{cert. granted}, 143 S. Ct. 2688 (2023) (No. 22-915), a Second Amendment case implicating legal protections against domestic violence, may be suggestive in relevant ways. For other notations of some of the ties, see generally Taylor Kordsiemon, \textit{A Right to Marital Rape? The Immorality of the Dobbs Approach to Unenumerated Rights}, 12 \textit{Hous. L. Rev. Online} 90, 91, 97–98 (2022), and West, \textit{Dobbs} Remarks, supra note 5. The question in the text brackets challenges that anticarceral feminist projects have raised about classic ways of attending to sex-based violence.

\textsuperscript{200} For doctrinal context, see \textit{Areen et al.}, supra note 185, at 176–82.

\textsuperscript{201} \textit{See generally}, e.g., \textit{Phyllis Schlafly, Who Killed the American Family?} (2014).
the courts. While some of their litigation efforts, as in *Dobbs*, might entail petitions for the return of established constitutional family law–related rights to the political realm, their litigation project, after *Dobbs* and Footnote 22, could also seek family law’s constitutional reconfiguration through decisions withdrawing family law’s ancient forms, protected as privileges or immunities, from the democratic process. Bringing family law’s historical and traditional forms into the present tense like this, post-*Dobbs* constitutional developments might give conservative family-values politics a fresh and constitutionally supported upper hand, along with a renewed political fighting chance, at a time when the hopes for their democratic achievement may seem, abortion now aside, broadly lost.202

At least since the 1960s, the Supreme Court has been actively engaged in the constitutional governance of family law and intimate life—a project that has been managed largely from, and that has militated toward, left-liberal political positions.203 This constitutional governance project has been part of larger social dynamics and loosely coordinated with various left-liberal and progressive social movements and law reform efforts that have swirled around and converged upon public values of privacy, liberty, and equality.204

Now that there is a new conservative originalist sheriff in town up at the Court, should anyone believe—that the Court’s conservative justices will not at all try their hand at rewriting the constitutional rules of family law and intimate life from and toward conservative political positions? Understanding that abortion rights are intimacy rights that, after *Dobbs*, may compel unwanted maternal and parental relations, *Dobbs* and Footnote 22 suggest that this Court may not miss its chance.

202 Whether and how these rights would conform to standard modern models of negative constitutional rights, as in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 201–03 (1989), and *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766–69 (2005), as opposed to positive, constitutional rights, remains an open—and important—issue. For context on how some of these negative and positive constitutional rights ideas have been playing out in the right to marry context, and in particular *Obergefell v. Hodges*, 576 U.S. 644 (2013), see Marc Spindelman, *Obergefell’s Dreams*, 77 OHIO ST. L.J. 1039, 1090–108 (2016).


204 Deeper, cross-cutting currents in political theory are engaged in Andrew Koppelman, *Sex Equality and/or the Family: From Bloom vs. Okin to Rousseau vs. Hegel*, 4 YALE J.L. & HUMANITIES 399 (1992).
In the last analysis, the interesting and urgent question is not whether Dobbs actually places a wide array of transformative doctrinal maneuvers on the table, nor whether these maneuvers potentially implicate the partial rollback or total elimination of Fourteenth Amendment equal protection-based sex equality rights. It does. The various prospects all trace to conservative constitutional originalist ideas, their substantive politics, and the sightlines that, in Dobbs, they open up.

What must be attended to, now that Dobbs has planted the constitutional landmines that it has, is what the Supreme Court’s conservative originalist agenda and its corresponding execution strategy may prove to look like as the Court fills out and delivers on its conservative originalist vision through the power of judicial review and supremacy to “restore” the Constitution to what the Court’s current members see as its “proper” course. Whether Dobbs materializes its threats to Fourteenth Amendment equal protection-based sex equality rights—like whether and how the Court manifests the possibilities suggested by Footnote 22—looks to be a matter of how the Court believes that doing so fits in with its larger conservative originalist purposes and plans.

III. Dobbs, Judicial Fiat, and Judicial Biography (Toward a Realist Account of Dobbs’ Grounds and Its Possible Futures)

There is, however, another level on which these prospects can and should be assessed, one that situates Dobbs and its possible futures in a different and more refracted light. If Dobbs and its possible futures initially look to dwell in the realm of conservative originalist ideas and what the Court thinks useful for its conservative originalist purposes and plans, another look at the Dobbs ruling suggests that those seemingly abstract prospects may themselves be conditioned by Dobbs’ underlying relation to certain material dimensions of social life and experience that ought to be recognized as discussions of Dobbs and where the Court may take it proceed.

One of the many things that, for many people, makes Dobbs a chilling, dispiriting, and politically deflating ruling is the distinctive conservative constitutional originalism that structures the opinion. In word and by deed, Dobbs announces in a classic conservative originalist fashion that nothing that today’s American people think, say, or do on the right to abortion—short of constitutional amendment—is relevant to the Court’s constitutional work. When the Dobbs majority opinion dismisses American public opinion as an “extraneous influence[ ]” on its constitutional analysis, it is not declaring that public opinion is an unreliable source of constitutional

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206 Of course, material conditions of social life—including descriptions of them—are not innocent of normativity, theory, or ideology. The point here instead is provisionally to recognize how Dobbs is related to, and emerges from, social grounds, and so may, as it develops, return to them.

207 Dobbs, 142 S. Ct. at 2278–79. The point about constitutional amendment is by obvious implication.
judgment because it can twist and turn in ever-shifting political winds. No, Dobbs expresses this view consistent with a larger conservative originalist vision which maintains that, in the abortion setting, the Court should ignore everything but the Constitution’s text, history, and tradition when assessing abortion rights’ constitutional standing. On this account, the contemporaneous views and values of the American people—no matter how deeply held, considered, or widely shared—have no bearing on the Court’s constitutional decision-making in Dobbs, nor on what Dobbs becomes. Or so Dobbs would have its readers believe.

If Dobbs’ originalist orthodoxy is one thing, its truth is something else again. Dobbs may publicly turn its back on contemporaneous American public values of privacy, liberty, and sex equality that broadly favor robust constitutional protections for abortion rights. But even as it does so, Dobbs resonates with and furthers contemporaneous minoritarian pro-life movement positions, satisfying its years-long yearnings for Roe’s complete and utter destruction. Indeed, Dobbs serves Roe’s head on a plate with such unbridled enthusiasm that it does not temper its ruling as by announcing secular rationalist constitutional limits on pro-life, anti-abortion positions that would imperil pregnant women’s and other pregnant people’s lives and health against their will.

Given all this, it may seem counterintuitive, but Dobbs’ concordance with contemporaneous minoritarian pro-life positions actually helps contextualize the Court’s additional endorsement of present-day majoritarian privacy, liberty, and sex equality values where constitutional rights other than abortion rights are at stake. Dobbs’ acquiescence to those contemporaneous social norms and the individual constitutional rights that they support—and the national consensus that, in turn, supports them—reads as an indication that the Court believes it must submit to them, even at the price of achieving a principled originalism.

By apparent design, this sacrifice protects Dobbs’ erasure of constitutional abortion rights against the even larger swell of condemnation that would likely have

208 Id.
210 For contemporaneous American public opinion on abortion, see, for example, Pew Rsch. Ctr., supra note 101.
211 For engagement with the pro-life movements wishes for Roe, see, for example, Mary Ziegler, Abortion and the Law in America: Roe v. Wade to the Present 58–120 (2020). On the minoritarianism of pro-life views, see supra note 101.
212 Given all the ways that Dobbs stakes out positions not strictly required to decide the case, its refusal to preserve constitutional protections in cases where pregnant people’s lives and health are endangered by continuing pregnancies is striking. Not even the dissents in Roe v. Wade went this far. See 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting); id. at 221–23 (White, J., dissenting). Dobbs cites these opinions approvingly in other respects. 142 S. Ct. at 2265, 2279.
213 See supra notes 92–93 and accompanying text.
214 But see Dobbs, 142 S. Ct. at 2300–04 (Thomas, J., concurring).
crashed down upon the Court had it taken the additional, “principled” step of stripping married and unmarried heterosexuals of their sexual intimacy rights— rights that have more recently been extended to same-sex couples outside and inside of marriage. Dobbs tries managing that opposition by halting its conservative constitutional originalist revolution at abortion’s water’s edge—at least for now. In this way, Dobbs can reaffirm the expectations that countless Americans have and experience in body and mind around other sexual intimacy and marriage rights.

The resulting split-screen operation of Dobbs’ official and unofficial positions on the relevance of contemporaneous American public values to its constitutional work indicates that Dobbs is not, finally, a pure specimen of conservative constitutional originalism. Both a conservative originalist ruling and not, Dobbs is, more granularly, a complex and contradictory legal artifact, a crazy quilt that sews together inconsistent, off-warring, and experientially incommensurate views and values discoverable within the wide temporal and spatial sweep of the American experience.

On one of the quilt’s panels, Dobbs—enacting Roe’s rise and fall—interweaves conservative constitutional originalism, its test of history and tradition, along with faithful conservative and traditional moralist views and values that link the distant past to the present tense in ways that potentially open onto the realization of other conservative religious and traditional morals-based constitutional futures. Nearby, on another panel—this one enacting what is on the other side of Dobbs’ abortion-issunique line—the Court’s opinion preserves living constitutionalist rulings involving constitutional privacy, liberty, and sex equality rights that broadly result from and connect Dobbs to left-liberal and progressive social movements that hew critical social outlooks on the past and present. These privacy, liberty, and sex equality rulings, and the rights that they involve, may endure as the Court’s constitutional quilting continues—or they may yet be rewoven in ways that extend the abortion right’s patterning, causing these rulings and the rights they protect to meet the same doom as Roe’s abortion rights guarantees. At the same time, on yet another part of the quilt, Footnote 22 appropriates and admixes patterning from the first two panels. It stitches together conservative originalism’s focus on history and tradition with possibilities that join libertarian economic views with conservative family values in combinations that could either dovetail with or militate against the Court’s

216 See supra note 92 and accompanying text. But see supra note 98.
217 See supra note 92–93 and accompanying text.
219 Dobbs, 142 S. Ct. at 2248 n.22.
modern privacy, liberty, and equality jurisprudence and the left-liberal and progressive social movements defending them. The *Dobbs* Court may claim the mantle of a Constitution that is “dead, dead, dead” all that it wishes, but its opinion shows it is actively reweaving American life and experience while expounding a Constitution whose meaning has changed—and is still changing—with and across time.220

*Dobbs*’ peculiar relationship with—and its widely under-recognized responsiveness to—this breathtaking array of constitutional inputs casts in relief *Dobbs*’ failure to deliver a crisp, clear, and delimited constitutional originalist ruling on abortion rights. Instead, *Dobbs* is and does (*waving hands*) all this.

If one standard measure for the beauty of constitutional judgments is how conceptually simple, ordered, and elegant they are—involving, ideally, a single principled theme or two (or three)—the multitudes that *Dobbs* contains makes it something of a hideous jumble, but a jumble that finds grounding in the actual complexities and contradictions of American life.

That anyway is how *Dobbs* looks if one pivots away from classic legal plays that seek to explain *Dobbs*’ wildly disparate elements by means of conventions of logic and legal reason. *Dobbs*, in other terms, may be understood, if neither rationalized nor defended, as corresponding to, indeed, as emerging from, the social background and experiences of the swing-vote justice in the case whose “join” enables *Dobbs* to become the opinion for the Court.

Before venturing this explanation—focused on Justice Brett Kavanaugh’s *Dobbs* concurrence—it bears emphasis that nothing here is meant as a reductive psychological portrait of Kavanaugh, based on the social elements and the social experiences of his life, some of which he shares in common with other justices in the *Dobbs* majority.221 Nobody, after all, is properly reducible to a biographical sketch of their life.

To account for Kavanaugh’s *Dobbs* concurrence and thus for *Dobbs* itself as emerging from some aspects of Kavanaugh’s social background and life experiences is but one way to take in *Dobbs*’ jumble, and to explain how Kavanaugh and other justices in the *Dobbs* majority might imagine they have produced a sensible ruling in the case when so many others are sure that they have not. In these terms, it is


possible that Dobbs’ underlying social determinants may make the Court’s ruling in the case stickier in its positions than conventional understandings of how constitutional principles can and should work might suggest they will be. Whether they do or not, however, understanding the social underpinnings of Kavanaugh’s Dobbs concurrence also suggests that Dobbs and its future may not actually be cut off from the contemporaneous social world and its views and values. This account of Kavanaugh’s concurrence and thus of Dobbs suggests litigation opportunities for co-determining Dobbs’ meaning and the trajectory of the Court’s conservative originalist project in its wake. So long, perhaps, as Kavanaugh sits at or near the Court’s center in relation to Dobbs and what it comes to mean, Dobbs is not—and should not be thought of as—a passivating opinion. The question is what social forces it will be responsive to and in what ways.

A. Kavanaugh’s Dobbs Concurrence: Social Determinants and Drivers as Context

In important respects, Justice Kavanaugh’s Dobbs concurrence retraces lines that Dobbs’ readers first encounter when reading the Dobbs majority opinion. Like that opinion, Kavanaugh’s concurrence stakes its ultimate success on a conservative originalism that seals the abortion right’s constitutional fate. Likewise, as in the majority opinion, Kavanaugh’s concurrence maintains that its originalist-based eradication of abortion rights does not threaten the security of the other non-originalist cases in the Roe-Casey line, specifically, cases implicating rights to contraception, sexual intimacy, and marriage. Moreover, like the Dobbs majority, Kavanaugh’s concurrence highlights the limits of its originalism by drawing a bright, bold line on the other side of abortion rights. This line enables the concurrence, like the Dobbs majority, to place constitutional abortion rights under its conservative originalist axe while permitting other rights in the Roe-Casey line to live on, untouched. This line-drawing holds out the prospect of making the concurrence and thus Dobbs, if not normative rulings, then practically speaking, viable ones with the American public writ large. It is the brokered constitutional peace that, within its own registers, may be hoped to give Dobbs a fighting constitutional chance by tempering the American public’s opposition to it.

222 Dobbs, 142 S. Ct. at 2304–05, 2304 n.1 (Kavanaugh, J., concurring); see supra note 3.
223 Dobbs, 142 S. Ct. at 2309 (Kavanaugh, J., concurring). Partly anticipating a point about how the Kavanaugh concurrence omits Lawrence v. Texas, 539 U.S. 558 (2003), from an important sequence, see infra text accompanying notes 226–28, the sexual intimacy protections being contemplated here depend on Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972), which, along with Roe v. Wade, 410 U.S. 113 (1973), effectively implied constitutional consensual sexual intimacy rights for heterosexuals, which themselves, in principle, implied the consensual sexual intimacy rights for all adults that Lawrence finally recognized, 539 U.S. at 567, 578.
224 Dobbs, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).
Kavanaugh’s concurrence makes this peace offering by “emphasiz[ing] what the Court today states: Overruling Roe does not mean the overruling of those precedents [on contraception, intimacy, and marriage], and does not threaten or cast doubt on those precedents.”225 “Those precedents,” named just before the concurrence insists they are undiminished as good law, include Griswold v. Connecticut, Eisenstadt v. Baird, Loving v. Virginia, and Obergefell v. Hodges.226 Curiously, Lawrence v. Texas does not make the list.227 This omission could silently imply Lawrence’s demise, or, more likely, given how Lawrence is encompassed within Obergefell’s extension of its own equal liberty ruling, and what else Kavanaugh says both in Dobbs and elsewhere, the omission is of no particular legal moment.228

Despite the Kavanaugh concurrence’s insistence that abortion is unique among the Court’s constitutional privacy and liberty rulings—a point the concurrence makes not once, but twice, with italicized emphasis—it offers no reasons to support the position.229 The concurrence neither expressly rearticulates the majority’s reasons for saying abortion is unique nor supplies its own independent rationale for maintaining that it is.230 The concurrence thus holds together the internally roiling and riven worldviews on either side of the abortion line through what is ultimately a raw assertion of power on nothing more than Kavanaugh’s say-so.231 Resting on power, not reason, like this, Kavanaugh’s swing-vote concurrence raises the prospect that the Dobbs majority’s own explanation for abortion’s uniqueness—that it involves the taking of potential life or the life of the unborn—is a paper tiger covering up its own act of judicial fiat, along the lines that the Dobbs joint dissent condemns.232

In Kavanaugh’s concurrence at least, this act of judicial will may not be the byproduct of an internally logical or reasoned position, but it is not wholly baseless.

225 Id.
226 Id. (first citing Griswold, 381 U.S. 479; then citing Eisenstadt, 405 U.S. 438; then citing Loving v. Virginia, 388 U.S. 1 (1967); and then citing Obergefell v. Hodges, 576 U.S. 644 (2015)).
227 Lawrence, 539 U.S. 558; see Dobbs, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).
228 Id.; see id. at 2263 n.48 (majority opinion); Transcript of Oral Argument at 79, Dobbs, 142 S. Ct. 2228 (No. 19-1392); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1833 (2020) (Kavanaugh, J., dissenting). Moreover, not only does the Kavanaugh concurrence approvingly mention the Court’s decision to overrule Bowers v. Hardwick, 478 U.S. 186 (1986), which Lawrence achieved, Dobbs, 142 S. Ct. at 2307 (Kavanaugh, J., concurring), but it also reaffirms Obergefell, 576 U.S. 644, which built on and extended the sexual intimacy rights affirmed by Lawrence, 539 U.S. at 567, 578. See Dobbs, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).
229 See Dobbs, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).
230 Id.
231 Kopel, supra note 195, at 325, suggests an interesting crosstab to Justice Kavanaugh’s concurrence in Bruen, 142 S. Ct. 2111, and its alignment of itself with an ipse dixit in the Second Amendment context.
232 See supra note 92. For the joint dissent’s converging position, see Dobbs, 142 S. Ct. at 2320, 2348–49 (Breyer, Sotomayor & Kagan, JJ., dissenting).
Its foundations are found elsewhere. In its contingencies, Kavanaugh’s biography, both its social conditions and his lived experiences of them, offers an angle of vision onto, making sense out of, the high visibility positions that Kavanaugh’s Dobbs concurrence takes.

Relevant features of Kavanaugh’s biography emerged during his Senate confirmation hearings for the Court and in writings before and since. Together, they paint a portrait in silhouette of a once decently upper-middle-class smart, white, heterosexual suburban-DC teenage boy into sports and drinking who attended an elite Jesuit prep school while being brought up with traditional Catholic values at home back in the late 1970s and early 1980s.

Within the larger social milieu these details begin to conjure, Roe’s permissive constitutional law abortion rules were broadly sealed off in the amber of a religious taboo that sought to prevent them from ever being accessed. While non-marital and contracepted sex were also morally interdicted by the Catholic Church, their sharp edges had been, by contrast, relatively softened. Sometimes the sharp edges of

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233 See, e.g., ROBIN POGREBIN & KATE KELLY, THE EDUCATION OF BRETT KAVANAUGH: AN INVESTIGATION 17–34 (Penguin Pub’l’g. Grp., 2019). For additional context, see MARK G. JUDGE, WASTED: TALES OF A GEN X DRUNK (1997) [hereinafter JUDGE, WASTED], and MARK G. JUDGE, GOD AND MAN AT GEORGETOWN PREP: HOW I BECAME A CATHOLIC DESPITE 20 YEARS OF CATHOLIC SCHOOLING 50–65 (2005) [hereinafter JUDGE, GOD AND MAN AT GEORGETOWN PREP]. It is, of course, true that Justice Neil Gorsuch’s biography bears a striking resemblance to Kavanaugh’s in some ways, though reports on their school experiences marked them as quite different. See, e.g., Andrew Beaujon, “We Thought We Were Capable of Handling This Like Grownups and We Totally Weren’t,” WASHINGTONIAN (Sept. 26, 2018), https://www.washingtonian.com/2018/09/26/we-thought-we-were-capable-of-handling-this-like-grownups-and-we-totally-weren-t/ [https://perma.cc/VTP8-M3LV]. This underscores that the point of the text is not to make any inferences about a person based on a biographical sketch, but rather to show how Kavanaugh’s biography illuminates the grounds and determinants of his Dobbs concurrence.

234 For relevant information on Kavanaugh and his upbringing, as well as a wider context, see POGREBIN & KELLY, supra note 233, at 17–34, JUDGE, GOD AND MAN AT GEORGETOWN PREP, supra note 233, at 50–65, and Paul Schwartzman & Michelle Boorstein, The Elite World of Brett Kavanaugh, WASH. POST (July 11, 2018, 6:13 PM), https://www.washingtonpost.com/local/dc-politics/the-elite-world-of-brett-kavanaugh/2018/07/11/504d945e-8492-11e8-86fc-46cb43e3f306_story.html [https://perma.cc/7MS-9GPY]. For points on Kavanaugh’s adolescence, including his participation in sports and drinking in his own words, see Confirmation Hearing on the Nomination of Hon. Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm on the Judiciary, 115th Cong. 444–45, 686–88, 693–94 [hereinafter Confirmation Hearing]. There are also the allegations of sexual violence and harm that Dr. Christine Blasey Ford raised against then-Judge Brett Kavanaugh and that took center stage during his Supreme Court confirmation hearings, and what in different ways they—and Kavanaugh’s responses to them—reveal on multiple levels in sexual political terms. The hearings and allegations get coverage, among other sources, in POGREBIN & KELLY, supra note 233, at 35–53, 69–77, 115–51, 177–213. 229–74.

235 For context on traditional Catholic doctrine regarding premarital sex and contraception, see, for example, Charles Pope, Premarital Sex is a Mortal Sin: We Must Be Clear and Insist

constant surveillance trying to stop it.\textsuperscript{238} Efforts to prevent teenage sex were often times treated as the immediate responsibility of those bringing up the teenage girls whom the teenage boys might date or have sexual contact with.\textsuperscript{239} 

Sex—even non-marital and contracepted sex—happening, of course, meant unplanned pregnancies sometimes happened, too. Although marriage and single motherhood were the morally preferred options for those who had morally “lapsed,” the legal choices that Roe pronounced gave some teenage girls options about how to control their bodies, pregnancies, and futures with or without parental consent.\textsuperscript{240} Where teenage girls’ faith traditions forbade abortion, they faced—and also made—reproductive choices somewhere between abortion’s moral taboo and Roe’s constitutional values and guarantees.

For their part, the teenage boys who impregnated teenage girls might never know about the reproductive choices the teenage girls faced and reached. Still, Roe and its protections were generally within the consciousness of many smart teenage boys, particularly in and around a political company town like Washington, D.C.,

\textsuperscript{238} For contemporary accounts of the sexual behavior of teenaged boys and parental distaste for sex education, see Beaujon, supra note 233. For different accounts of sexual activity in the milieu, including sex education at Georgetown Prep, see Judge, God and Man at Georgetown Prep, supra note 233, at 60, 83–99, and Judge, Wasted, supra note 233, at 42, 50–51, 58, 77, 88.


amidst the surge of pro-life abortion politics during the early Reagan ’80s. Even then, teenage girls exercising constitutional rights might miss a day or two (or more) of school, or “go away” on an off-school-calendar “vacation,” without generating much notice. Suspicions might be roused, however, when teenage girls suddenly transferred schools or moved or when rumors circulated about pregnancy, childbirth, or both. Practically, Roe and its legal progeny ensured teenage girls’ privacy, autonomy, and equality, as well as their futures, leaving the boys’ lives, if not the girls’ lives, to go on after sex and pregnancy sometimes almost exactly as before, as if pregnancy and the choices it prompted had never been made.

B. Kavanaugh’s Dobbs Concurrence: Context, Applied

Male-identified and male-centered subjectivities like these offer a way to connect the otherwise unprincipled and seemingly irrational set-patterning of key constitutional rights within Kavanaugh’s Dobbs concurrence. Its rhetoric—generally kinder and gentler than the majority opinion’s—is as emphatic and categorical in eliminating Roe, Casey, and their constitutional protections for abortion rights. At the same time as the concurrence resupplies conservative faithful views and values with wide political berth, permitting them once again to define legal abortion rules consistent with the old religious taboos, it stops religious positions from nullifying existing rights to non-marital cross-sex sex, including contracepted sex. When Kavanaugh’s concurrence preserves constitutional caselaw vindicating sexual autonomy and contraceptive choice, it effectuates a rough doctrinal translation of the dampened moral injunctions against these practices from Kavanaugh’s youth.

Importantly, the Kavanaugh concurrence’s overall rights patterning—like the majority opinion’s—remains steadfastly male-centered and even male-dominant, in variegated ways. Once more, the state may—in old patriarchal fashion—control women’s and girls’ and other pregnant people’s bodies, their reproductive choices,

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241 For a discussion of important developments in the “period between 1980 and 1986,” see Ziegler, supra note 211, at 7, 58–87.


243 One account of a larger context against which to read this is offered by Murray, Children of Men, supra note 5.
and their lived futures. Nevertheless, the state remains blocked from deciding for these individuals whether to accept or refuse male sexual initiation or on what contraceptive-use terms.244 Sex itself, in this sense, is still evidently conceived and conditioned by male-centered and male-dominant norms.245 Aligning with them, Kavanaugh’s concurrence dramatically shrinks the space of women’s, girls’, and pregnant people’s moral agency while still preserving some limited room for it on the remaining terms that the opinion permits. These terms notably include, in instances when sex results in pregnancy, that classic Roe-era option of the right to “go away” in order to end an unwanted pregnancy. This right is no longer safeguarded by Roe or Casey, or by other decisions in their line. Now it is protected by Kavanaugh’s concurrence, and thus presumably by the Court, in the name of a right to interstate travel to obtain a lawful abortion.246

This relief is noteworthy for more than its highly constricted scope and its possible underlying grounds in the Fourteenth Amendment’s Privileges or Immunities Clause.247 The limited right to travel interstate to secure a lawful abortion that Kavanaugh’s concurrence recognizes spotlights in its own way how stunningly unresponsive the opinion is to those who, lacking in normative social privileges, including racial and economic privileges, inhabit social worlds in which this right does not provide a meaningful opportunity for equitably autonomous reproductive choice.248

244 Putting the point this way means to bring the position within the scope of Supreme Court decisions on contraceptive rights. See generally Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972). See also Carey, 431 U.S. at 693–94. While the Dobbs majority opinion cites Griswold, Eisenstadt, and Carey with evident approval as cases about “the right to obtain contraceptives,” Dobbs’ elimination of abortion rights does not stabilize their boundaries. 142 S. Ct. 2228, 2257 (2022).

245 This is in keeping with the male-centered and male-dominant approach to sex regularly found in the Supreme Court’s sexuality cases, including Lawrence v. Texas, 539 U.S. 558 (2003), on which, see Marc Spindelman, Surviving Lawrence v. Texas, 102 Mich. L. Rev. 1615, 1661–62 (2004). See also, e.g., Catharine A. MacKinnon, Toward a Feminist Theory of the State 184–94 (1989).

246 Dobbs, 142 S. Ct. at 2309 (Kavanaugh, J., concurring). For additional discussion of the Kavanaugh concurrence’s treatment of a right to non-retrospective punishment and how it maps in similar directions, see Marc Spindelman, Some Realism About Dobbs, Panel Address at the Seton Hall Law Review Symposium: Post-Dobbs: Institutionalizing Support for Women and Children (Feb. 10, 2023) (on file with author).

247 See supra note 127 and accompanying text.

Differently significant is how Kavanaugh’s concurrence reflects and embraces sexuality-based constraints and permissions that align with different patriarchal and male-dominant visions: some of them categorical, some limited, some of them religious, some secular, some of them historical, and some presentist. Post-Dobbs, some elite males practically retain the Roe-era privileges and immunities of sexual citizenship: the right to have sex without reproductive consequence. For others who are less fortunate—pregnant people most especially—those rights are effectively gone.

One thing this all means is that Kavanaugh’s concurrence is not stuck in the mud of the 1860s, as it at one point practically boasts, nor in a looping video reel of 1980s social life.249 The ruling cuts across social life and even social experiences of and in those eras, some of them Kavanaugh’s own. But as the concurrence clarifies in other important ways, it is also a ruling of a more recent vintage. The concurrence is prepared to honor and preserve Justice Anthony Kennedy’s LGBTQ constitutional rights legacy, thereby re-securing lesbian women’s and gay men’s—and others’—constitutional intimacy rights, including the freedom to marry.250 The Kavanaugh concurrence follows in Kennedy’s footsteps, and like some of Kennedy’s own rulings, the concurrence tacitly touts its own capacity for moral progress and growth.251 Its omission of Lawrence in that important sequence of constitutional privacy and liberty cases and the individual rights they protect may be nothing so much as a slip that unwittingly confesses that the concurrence regards gay sex itself, at least outside marriage—if not same-sex love in the context of marital bliss—with some ongoing ambivalence.252

If the Kavanaugh concurrence’s schedule of constitutional positions results from a complexly composed male-centric and male dominant outlook on social life that is traceable in important ways to Kavanaugh’s youthful social world and his experiences in it, as they have been updated more or less to the present tense, the judicial fiat that defines its bottom line looks like another unintended admission. This one exposes how privileged social experiences and worldviews like those operating in Kavanaugh’s life story do not require arguments to explain or defend themselves. These experiences and worldviews simply are. They comprise a way of being in the world that—empowered as it is—has no felt need to justify itself to others. In Dobbs,


249 Dobbs, 142 S. Ct. at 2306 (Kavanaugh, J., concurring).

250 See, e.g., Kyle C. Velte, The Precarity of Justice Kennedy’s Queer Canon, 13 CONLAWNOW 75 (2022); Spindelman, Queer Black Trans Politics, supra note 1, at 115–16.

251 Cf. United States v. Windsor, 570 U.S. 744, 763 (2013). Justice Kennedy was the author of the Court’s major pro-LGBTQ constitutional rights decisions.

252 For discussion of the earlier sequence in which Lawrence does not appear, see supra text accompanying notes 227–28.
this impulse even holds against the conventional constitutional and rule-of-law demands that Supreme Court rulings justify themselves in publicly accessible terms.253

C. Kavanaugh’s Dobbs Concurrence and Dobbs’ Meaning—and Its Futures

Justice Kavanaugh’s concurrence’s cool indifference to conventional constitutional and rule-of-law obligations for judicial reason-giving re-raises from a different direction the concerns about how Dobbs’ future may be set in highly insular ways—ways not subject to dialogue with the American people. This insularity is not exclusively the province of conservative constitutional originalism. As Kavanaugh’s concurrence indicates, this insularity can also result from an historically contingent, socially situated, and privileged way of living, being, and looking out onto the social world. In this respect, Kavanaugh’s concurrence may lead its readers to think that Dobbs’ future, like Dobbs itself, will be configured from the point of view of a socio-economically privileged straight white male solipsism—a solipsism apparently favorably inclined toward certain patriarchal and male dominant views and values and that is blinkered to a deep understanding of, and resonance with, the experiences of those from radically divergent, if intersecting, sexual, racial, and class positions. Given what is within Dobbs’ four corners, the expectation might be that this position is not open to—or for—discussion, education, or debate.

Silver linings being as important as they are for those still reeling from Dobbs, one may yet be found here. If Kavanaugh’s concurrence traces its roots to an historically contingent social world and a socially situated way of being in and looking back out onto it—a perspective that additionally takes pride in its own capacity for moral progress and growth—then Kavanaugh’s positions in future cases involving Dobbs’ meaning and reach may turn out not to be hermetically sealed off from contemporaneous social life and the influences that derive from lived realities of the social world.254 To the contrary, his positions in future cases may well be shaped through engagement with them.

The Kavanaugh Dobbs concurrence’s patriarchal, male-dominant worldview, privileged in other ways, might lead Kavanaugh and the Court in one of at least two diametrically opposed directions. In one direction, dialogue about Dobbs’ meaning and what it should become could be propelled by even more radically strident versions of masculinist and male dominant social ideologies that intersect with other social hierarchy ideologies, including white supremacy, that are now circulating on the populist-nationalist political right.255 These ideologies might rewrite Dobbs’


254 See Dobbs, 142 S. Ct. at 2304 n.1 (Kavanaugh, J., concurring).

255 Praise of manhood and masculinity is in, for example, Senator Hawley Delivers National Conservatism Keynote on the Left’s Attack on Men in America, JOSH HAWLEY: U.S. SEN. MO. (Nov. 1, 2021), https://www.hawley.senate.gov/senator-hawley-delivers-national-con...
versions of them, causing Dobbs—at Kavanaugh’s hands—to become an amped-up sexist version of itself through one or more of the doctrinal devices for constitutional transformation that Dobbs delivers. In more extremist male-dominant forms, Dobbs could be the ruling that, without apology, drives the constitutional reinauguration of white cisheterosexual manhood and masculinity as the pinnacle of constitutionally defined and constitutionally governed legal, political, and social life.

Militating in opposite directions and thus holding out very different and much happier prospects is the stunning and inspiring rise of women’s political voices, responding to Dobbs in states and across the nation. These voices are not simply talking about the urgent necessity of resecuring legal abortion rights via on-the-ground pro-choice political organizing and action, but also openly condemning Dobbs and the Supreme Court that forced it—and its immediate consequences—on a broadly nonconsenting nation. Inside this still-growing chorus of opposition to Dobbs are the politically centrist and progressive voices of those who have long been and are now continuing to realize different visions of reproductive rights and justice, a project that centers and builds out from the lifework of women of color.

This chorus unmistakably now also includes the voices of many white middle-class and upper-middle class suburban wives and mothers who, from the political center and toward, and even on, the political right, are finding themselves roused by


256 United States v. Rahimi, 61 F.4th 443, 461 (5th Cir.) cert. granted, 143 S. Ct. 2688 (2023) (No. 22-915), is one case to watch carefully on this front.


258 Burkean reflections on consent dovetailing with admonitions against a governance “politics of theory and ideology, of abstract absolute ideas” are in ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 18–19 (1975); see also id. at 23, 142.

259 See sources collected supra note 27.
Dobbs to new levels of political consciousness, sentiment, and action. This is true among women who never exercised Roe’s rights. Their social outlooks, like others’, have nevertheless been conditioned by Roe’s basic promises, reaffirmed by Casey, that abortion rights would always be available in cases of need and as part of their constitutional inheritance as American women.\(^{260}\) When Dobbs stripped these women, like others, of constitutional abortion rights guarantees, it violated their settled expectations of what the Constitution and the law was supposed to mean—for them, for their daughters, their sons, and their differently identified and non-gender-identified children, and the lives that they, and their own children, might someday lead. Dobbs reconfigures their present and future—and their own self-conceptions as equal citizens—in ways these women at least would not choose.

Amidst the struggles of these oppositional gender and sexual politics and the wider intersectional politics to which they relate, how will the Court—with or without Justice Kavanaugh at its center—respond? Will the Court ignore the sex equality struggles that Dobbs has unleashed and inflamed? Or will the Court continue to dismiss them as “extraneous influences” on its constitutional work, including the work of giving the Constitution a comprehensive conservative originalist glory the likes of which it has never yet enjoyed?\(^{261}\)

The answer, of far-reaching significance, is distinctively urgent, and urgent, too, for the Court’s conservative constitutional originalists to consider. Should they get the answer wrong, they may soon discover that the Court and its conservative constitutional originalism—not the contemporaneous social norms of the American people—are being sidelined within American politics and law, including American constitutional life.\(^{262}\) If and when that happens, Dobbs may prove to have contained within it the seeds of its own undoing, an undoing that may involve not only stopping conservative constitutional originalism in its tracks but also perhaps sealing its fate in political and legal oblivion.

CONCLUSION

Meantime, those committed to sex equality in politics and under law, including but not only those who ground their visions of sex equality in intersectional ideals of transformative justice, have their work cut out for them. Forging onward after Dobbs, they must—and they will—continue the hard work, now engaged, of building the political coalitions necessary to re-establish basic abortion rights.


nationwide—perhaps more robustly than *Roe* or *Casey* ever protected them. That work is vital and sure to proceed.

As it does, *Dobbs* also instructs that those who care about sex equality under law cannot afford to ignore the various troubles that *Dobbs* creates for sex equality rights. Sex equality’s defenders—understanding the social realities of the hierarchies and inequalities they engage and wish to end—must now add to their overburdened workload the challenges of navigating forward through the complex, and complexly swirling, privacy-thwarting, freedom-diminishing, and equality-denying headwinds that *Dobbs* has unleashed. These are the winds now blowing from the Supreme Court as part of our shared American life.