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Dobbs' Sex Equality Troubles

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DOBBS' SEX EQUALITY TROUBLES

Marc Spindelman*

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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—vitally—foundations discoverable at or around the time of the amendment's enactment, to warrant judicial protection.³ *Dobbs*' conclusion that abortion rights not only

¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); Henry Austin & Max Burman, *World Shocked, Outraged and Saddened by Overturning of Roe*, NBC NEWS (June 24, 2022, 2:50 PM), <https://www.nbcnews.com/news/world/world-shocked-outraged-saddened-overturning-ro-rcna35253> [<https://perma.cc/2QD9-E5KA>]. Claims about the novelty of *Dobbs*' elimination of existing constitutional rights risk overlooking relevant precedents dismantling or eliminating previously recognized constitutional race equality protections, themselves not unimplicated in *Dobbs*. See, e.g., Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 34–65 (2022). Elaboration of the comparative point is in Marc Spindelman, *Queer Black Trans Politics and Constitutional Originalism*, 13 CONLAWNOW 93, 104–11 (2022) [hereinafter Spindelman, *Queer Black Trans Politics*]. The *Dobbs* majority opinion's failure fully to engage the intersectional arguments ventured in the case leaves the opinion vulnerable to challenge, and, at some point in the future, possibly reversal, partly or entirely on these grounds. See, e.g., Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html> [<https://perma.cc/92FK-L6KH>].

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 Scalian “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 clocks 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

originalist decision in *Dobbs* is Justice Clarence Thomas' *Dobbs* concurrence, 142 S. Ct. at 2301–03 (Thomas, J., concurring), may yet agree the *Dobbs* majority responds to conservative originalism's "gravitational force," and could wind up more fully or perfectly aligned with it. One expression of this idea is in Lee J. Strang, *A Three-Step Program for Originalism*, PUB. DISCOURSE (June 12, 2022), <https://www.thepublicdiscourse.com/2022/06/82703/> [<https://perma.cc/3UDV-NXW6>]. On originalism's "gravitational force" itself, see Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 420–25 (2013).

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

⁵ U.S. CONST. amend. XIV, § 1. For other work moving in these directions, see generally, for example, Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065 (2023), Cary Franklin & Reva B. Siegel, *Equality Emerges as a Ground for Abortion Rights In and After Dobbs* (Dec. 31, 2022) (unpublished manuscript) (available at SSRN), <https://ssrn.com/abstract=4315876> [<https://perma.cc/Q8RH-XXFR>], Darren Lenard Hutchinson, *Thinly Rooted: Dobbs, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385 (2023), Paula A. Monopoli, *Situating Dobbs*, 14 CONLAWNOW 45 (2022), Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799 (2023) [hereinafter Murray, *Children of Men*], and Robin West, *Dobbs Remarks at Georgetown University's Gender Justice Initiative Virtual Conference: After Dobbs: The Assault on Reproductive Justice and Equality* (Sept. 16, 2022) (transcript at 3–5) (on file with author) [hereinafter West, *Dobbs Remarks*]. See also Mary Ziegler, *The Surprising Second Life of the Supreme Court's Abortion Decision*, CNN (July 12, 2023), <https://www.cnn.com/2023/07/12/opinions/tennessee-trans-law-sixth-circuit-abortion-ziegler/index.html> [<https://perma.cc/WB6E-GDDF>].

⁶ An account of the kind of intersectional method being pursued in these pages is sketched in Marc Spindelman, *Tyrone Garner's Lawrence v. Texas*, 111 MICH. L. REV. 1111, 1122–44 (2013). Seeing *Dobbs* in intersectional terms, a straight line can be drawn from it to cases on established race equality and first peoples' rights decided in the Supreme Court's October 2022 Term. See generally *Merrill v. Milligan*, 142 S. Ct. 879 (2023); *Students for Fair Admissions, Inc. v. President & Fellows Harv. Coll.*, 143 S. Ct. 2141 (2023); *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023). For some context on the cases, see James Romoser, *The Court Is Poised to Set Jurisprudence on Race for Generations—and Not Just in Affirmative Action*, SCOTUSBLOG (Oct. 30, 2022, 7:00 PM), <https://www.scotusblog.com/2022/10/the-court-is-poised-to-set-jurisprudence-on-race-for-generations-and-not-just-in-affirmative-action/> [<https://perma.cc/RJ4H-U6AH>]. An historicized vision of the causal arrows here and description of some ways intersectionality is being transvalued within socially conservative legal argument is in Spindelman, *Queer Black Trans Politics*, *supra* note 1, at 110–11.

⁷ A classic account of abortion as a sex equality right is found in CATHARINE 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.⁸ 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.⁹ More dramatically, *Dobbs* could instead prefigure a larger doctrinal reversal eliminating remaining constitutional sex equality protections in one fell swoop.¹⁰

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.¹¹ Now that

STATE 184–94 (1989). Other sex equality accounts of abortion rights are collected in Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 43, 63–65 (Martha Fineman & Isabel Karpin eds., 1995).

⁸ *Dobbs*, 142 S. Ct. at 2245–46. The notation about the predominance of single-axis identity thinking within the Court's sex equality jurisprudence marks it in counterpoint to the possibility that that jurisprudence could and should become more thoroughgoingly intersectional. Relevant scholarly work that transcends and reconfigures the single-axis identity thinking found within the Court's constitutional privacy, liberty, and sex equality doctrines includes MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020), and Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021). Intersectional arguments in the *Dobbs* briefing are traced in Spindelman, *Queer Black Trans Politics*, *supra* note 1, at 106–08.

⁹ One example of these prospects arrived in *L.W. ex rel. Williams v. Skrametti*, on the constitutionality of Tennessee's and Kentucky's new bans on gender-affirming medical care for trans youth, including on constitutional sex equality grounds, in *Dobbs*' wake. No. 23-5600, 2023 WL 6321688 (6th Cir. Sept. 28, 2023). For an account suggesting the legal error the ruling made in light of *Dobbs*, see Marc Spindelman, *Trans Sex Equality Rights After Dobbs*, 172 U. PA. L. REV. ONLINE 1 (2023) [hereinafter Spindelman, *Trans Sex Equality Rights After Dobbs*].

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. Skrametti*, 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*

(May 2, 2022), <https://www.politico.com/f/?id=00000180-874f-dd36-a38c-c74f98520000> [<https://perma.cc/RJ73-VDHJ>].

¹² U.S. CONST. amend. XIV, § 1.

¹³ *Dobbs*, 142 S. Ct. at 2248 n.22. Compare *id.*, with *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010).

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.¹⁸ 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.¹⁹

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.²⁰ 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.²¹

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).

²⁰ Accord Reva B. Siegel, *Memory Games: Dobbs' Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1133 (2023) [hereinafter Siegel, *Memory Games*]; *Dobbs*, 142 S. Ct. at 2265 (quoting *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting)).

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.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.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.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.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

²² See *supra* note 3; see also David Cole, *The Supreme Court Embraces Originalism—and All Its Flaws*, WASH. POST (June 30, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-originalism-constitution/> [<https://perma.cc/D88K-MGVA>]; Julie C. Suk, *Can this Constitution be Saved?*, BALKINIZATION (Sept. 11, 2022, 9:30 AM), https://balkin.blogspot.com/2022/09/can-this-constitution-be-saved_0334264236.html [<https://perma.cc/2TH3-7WFFV>]. A critical perspective on *Dobbs* and its religious underpinnings is in Linda Greenhouse, *Religious Doctrine, Not the Constitution, Drove the Dobbs Decision*, N.Y. TIMES (July 22, 2022), <https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html> [<https://perma.cc/G42K-CZMU>]. But see *Dobbs*, 142 S. Ct. at 2240–42 (majority opinion); *id.* at 2304 (Kavanaugh, J., concurring).

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 cisheterosexual suburban women concerned about their own and their children's futures.²⁷ Chastened 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.

²⁷ See *infra* text accompanying notes 257–62; see also, e.g., REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE (2007), <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051> [<https://perma.cc/2KXX-JRD8>]; *In the Wake of the Dobbs Ruling, More Americans Are Citing Abortion or Women's Rights as Priority Issues*, AP-NORC CTR. FOR PUB. AFFS. RSCH. (July 1, 2022), <https://ap.norc.org/projects/in-the-wake-of-the-dobbs-ruling-more-americans-are-citing-abortion-or-womens-rights-as-priority-issues/> [<https://perma.cc/6VK9-7C77>]; Kylie Cheung, *Suburban Women, White Women, and 'Dads' Are Flocking to Democratic Party Over Abortion*, JEZEBEL (Aug. 18, 2022), <https://jezebel.com/suburban-women-white-women-and-dads-are-flocking-to-d-1849428477> [<https://perma.cc/76EU-GHNN>]; Aaron Zitner et al., *Most Suburban Women Support Abortion Rights. But Will It Move Their Votes?*, WALL ST. J. (July 17, 2022), <https://www.wsj.com/story/most-suburban-women-support-abortion-rights-but-will-it-move-their-votes-0a93b901> [<https://perma.cc/8HMY-JKRQ>].

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.²⁸ 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.²⁹ 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.

²⁸ One step in these directions emerged in Plaintiff's Original Petition, *Silva v. Noyola*, No. 23-CV-0375 (Galveston Cnty. Ct., Tex. filed Mar. 9, 2023), <https://www.courthousenews.com/wp-content/uploads/2023/03/marcus-silva-sb-8-lawsuit.pdf> [<https://perma.cc/2EDF-FPSC>]. For a report on the case, see Emily Bazelon, *Husband Sued Over His Ex-Wife's Abortion; Now Her Friends Are Suing Him*, N.Y. TIMES (May 4, 2023), <https://www.nytimes.com/2023/05/04/us/texas-man-suing-ex-wife-abortion.html?smid=url-share> [<https://perma.cc/9D5T-P43L>].

²⁹ See *United States v. Virginia*, 518 U.S. 515, 531–32 (1996).

I. *DOBBS*' SEX EQUALITY THREATSA. *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

³⁰ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2317 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

³¹ *Roe v. Wade*, 410 U.S. 113, 116 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843 (1992); *Dobbs*, 142 S. Ct. at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting).

³² Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) [hereinafter Tribe, *Equal Dignity*]. For some ways these ideas play out in *Dobbs*, see Laurence H. Tribe, *Deconstructing Dobbs*, N.Y. REV. (Sept. 22, 2022), <https://www.nybooks.com/articles/2022/09/22/deconstructing-dobbs-laurence-tribe/> [https://perma.cc/XZR2-MSAY].

³³ See Neil S. Siegel, “*Equal Citizenship Stature*”: Justice Ginsburg's Constitutional Vision, 43 NEW ENG. L. REV. 799, 800 (2009); *Dobbs*, 142 S. Ct. at 2239 (quoting *Casey*, 505 U.S. at 856 (opinion of the Court, delivered by O'Connor, Kennedy & Souter, JJ.)). See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1991).

³⁴ See Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143–44 (1978).

³⁵ *Dobbs*, 142 S. Ct. at 2325 (Breyer, Sotomayor & Kagan, JJ., 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

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.

³⁸ *Dobbs*, 142 S. Ct. at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting); see also, e.g., Brief of Equal Protection Constitutional Law Scholars Serena Mayeri et al. as Amici Curiae Supporting Respondents at 5–6, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) [hereinafter Brief of Equal Protection Constitutional Law Scholars].

³⁹ *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

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.⁴¹ 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."⁴²

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.⁴³ 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.⁴⁴

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.⁴⁵

⁴¹ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended 42 U.S.C. § 2000e(k)). *Dobbs* mentions the statute in passing in a footnote. 142 S. Ct. at 2258 n.42. For an account presented to the *Dobbs* Court explaining *Geduldig*'s legal status, see Brief of Equal Protection Constitutional Law Scholars, *supra* note 38, at 8–11. It may be worth noting that Title VII's protections against pregnancy discrimination have also been extended to cover abortion. See, e.g., U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2015-1, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues> [<https://perma.cc/NNX7-GP5M>]; *id.* n.58.

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).

⁴⁴ A different vision of the *Dobbs* joint dissent is in Ryan D. Doerfler & Samuel Moyn, *A Plea to Liberals on the Supreme Court: Dissent With Democracy in Mind*, N.Y. TIMES (Dec. 20, 2022), <https://www.nytimes.com/2022/12/20/opinion/supreme-court-liberal-dissent.html> [<https://perma.cc/K5FZ-38Z5>].

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.⁴⁶ Before *Dobbs*, the Court, without formally eliminating this real differences exception, had been letting it dwindle in legal significance and practical meaning.⁴⁷ Now it may be revitalized—and expanded.⁴⁸

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.⁴⁹ 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

Ct. 1731, 1739 (2020); *id.* at 1757 (Alito, J., dissenting). For a rich introduction to critical ideas of cisnormativity and sex-binarism, see generally THE TRANSGENDER STUDIES READER (Susan Stryker & Stephen Whittle eds., 2006).

⁴⁶ See, e.g., Michael M. v. Superior Court, 450 U.S. 464, 469 (1981). One still-important discussion of the cases in this series is in Katherine M. Franke, *Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995). For a similar notation of the cases as amounting to a doctrine, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 155 (2010). Implications for trans rights as sex equality rights loom large in this context. A comprehensive account of recent transgender constitutional rights litigation and the law that it has yielded is in Katie R. Eyer, *Transgender Constitutional Law*, U. PA. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4173202 [<https://perma.cc/EMG5-XE7S>]. For a tally squaring transgender rights with originalism, see Ezra Ishmael Young, *Transgender Originalism* (Apr. 15, 2022) (unpublished manuscript) (available at SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3967605 [<https://perma.cc/2WNP-A467>]. See also *infra* note 48.

⁴⁷ See, e.g., Brief of Equal Protection Constitutional Law Scholars, *supra* note 38, at 8–11. See generally Cahill, *supra* note 5.

⁴⁸ For one case in point that cites *Dobbs'* sex equality discussion as authority for what it does to trans rights as sex equality rights, see *L.W. ex rel. Williams v. Skrmetti*, No. 23-5600, 2023 WL 6321688, at *13–18 (6th Cir. Sept. 28, 2023). But see *id.* at *28–36 (White, J., dissenting). Engagement with the sex equality arguments in the case is in Spindelman, *Trans Sex Equality Rights After Dobbs*, *supra* note 9.

⁴⁹ Unfortunately, this runs into what some cases in the line actually say, including *Obergefell v. Hodges*, 576 U.S. 644, 672–76 (2015), which grounded its ruling in both Fourteenth Amendment due process and equal protection terms.

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).

⁵³ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2329–30 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (citations omitted).

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

⁵⁵ *Id.* at 2276 (majority opinion).

⁵⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–98 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.). *Dobbs* itself twice notes this aspect of *Casey* in passing. 142 S. Ct. at 2255 n.40, 2282. The potential significance of these multiple references is flagged below. See *infra* text accompanying note 61.

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.).

⁵⁸ *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 720 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

⁵⁹ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976). *Dobbs* mentions *Danforth* in passing as a case eliminating a law requiring “minors [to] obtain parental consent.” 142 S. Ct. at 2271 (majority opinion).

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.⁶¹ *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.⁶²

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.⁶³ Thanks to *Dobbs*, historical conditions that constitutionally tolerated cisheterosexual male dominance and sex-based legal subordination of women and other pregnant people are back and flourishing in the abortion realm.⁶⁴

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.⁶⁵ *Dobbs* explains that there is no need for them to fear abortion’s return to politics.⁶⁶ Women, after all, can politically look after themselves. *Dobbs* bases this

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.

⁶⁴ See, e.g., *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Aug. 18, 2023, 3:30 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/52XX-9FGR>].

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.⁶⁷ Then *Dobbs* reasons that, as a political majority, women can exercise their political power to defend whatever legal rights they wish to defend.⁶⁸

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.⁶⁹

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.⁷⁰ 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.⁷¹ 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

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

⁷² *United States v. Virginia (VMI)*, 518 U.S. 515, 519 (1996).

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.

⁷⁹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022).

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.⁸⁶ *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 *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-*Dobbs* gate.⁸⁷

Dobbs offers reasons for questioning this confidence. *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. *Dobbs*' example teaches that rulings which only yesterday appeared impossible may today be anything but.

II. *DOBBS* AND REGULAR—AND IRREGULAR—CONSTITUTIONAL ORDER

Among the other ways to describe it, *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 *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.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

⁸⁶ Examples here include judicial race-neutralization and sex-neutralization of marriage and family law rules, see, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *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, *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.

⁸⁷ One expression of the conventional sentiment is in Eric Segall, *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>].

⁸⁸ The prescription is borrowed from CHARLES L. BLACK, JR., 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.

⁸⁹ *Dobbs* itself recognizes some of these rule of law ideals. See, e.g., 142 S. Ct. 2228, 2261–78 (2022). Aspects of the gestalt are elaborated and captured by many sources, including LON FULLER, *THE MORALITY OF LAW* 33–94 (1969); JOHN RAWLS, *A THEORY OF JUSTICE* 237–40 (1971); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177, 1179 (1989). Classic left-liberal, progressive, and critical-radical legal traditions, by contrast, have various critical things to say on the rule of law as an ideal, with varying implications for the ways in which the rule of law can stymie, if not thwart, left-liberal, progressive, and critical-radical, if nonrevolutionary, social change. An engagement with important aspects of these tendencies, focused on the critical-radical legal traditions, on the way to its own normative vision of the rule of law centering politics and democracy is in ROBIN L. WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* 14, 18–58, 60–61 nn.12–14 (2003), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1981&context=facpub> [<https://perma.cc/B24L-RQZK>]. Other critical perspectives have exposed the rule of law's operation as, certainly at times, an ideological projection that in actuality entails state-managed lawlessness, including in service of historical and ongoing projects of racial supremacy. See, e.g., PAUL GOWDER, *THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION* (2021), https://rulelaw.us/downloads/gowder_rolusa_oa.pdf [<https://perma.cc/G8CJ-M494>].

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

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 re-affirmed 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.⁹⁹ 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*.¹⁰⁰ *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?¹⁰¹ 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.¹⁰² The concurrence's so-called

⁹⁹ *Dobbs*, 142 S. Ct. at 2252–53, 2254, 2259–60, 2267, 2285–300 (majority opinion); *id.* at 2324–25, 2329 (Breyer, Sotomayor & Kagan, JJ., dissenting). See generally Reed v. Reed, 404 U.S. 71 (1971).

¹⁰⁰ *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2138–39 (2020) (Roberts, C.J., concurring). See generally Marc Spindelman, *Embracing Casey: June Medical Services LLC v. Russo and the Constitutionality of Reason-Based Abortion Bans*, 109 GEO. L.J. ONLINE 115 (2020) [hereinafter Spindelman, *Embracing Casey*].

¹⁰¹ For contemporaneous American public opinion on abortion, see, for example, *Majority of Public Disapproves of Supreme Court's Decision To Overturn Roe v. Wade*, PEW RSCH. CTR. (July 6, 2022), <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/> [https://perma.cc/PJ4Y-ZZR5]. *Dobbs* does what it does while reviving moribund cases like *Geduldig v. Aiello*, 417 U.S. 484 (1974). See *supra* notes 39–42 and accompanying text.

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.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.¹⁰⁴ What is a “reasonable opportunity” after all?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.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.¹⁰⁷ This trajectory suggests to the *Dobbs* majority that the only sound position in the case is its own.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

Save Abortion Rights, CNN (July 26, 2022), <https://www.cnn.com/2022/07/26/politics/supreme-court-john-roberts-abortion-dobbs> [<https://perma.cc/7X8R-KUTR>]. Additional perspective on Roberts’ institutionalism in relation to Alito’s views is in David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court’s Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, 1:57 PM), <https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7> [<https://perma.cc/DBG3-HFA4>].

¹⁰³ For discussion of Roberts’ positions in *June Medical* which frames his about-face in *Dobbs*, see Spindelman, *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).

¹⁰⁴ *Dobbs*, 142 S. Ct. at 2283 (majority opinion).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2281–83.

¹⁰⁷ *Id.*

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.

¹¹⁰ *Dobbs*, 142 S. Ct. at 2248 n.22. A related point is in James B. Stewart, *Did the Supreme Court Open the Door to Reviving One of Its Worst Decisions?*, N.Y. TIMES (July 2, 2022), <https://www.nytimes.com/2022/07/02/business/scotus-lochner-v-new-york.html> [<https://perma.cc/9DZN-5MQJ>]. A thoughtful *Bibliographic Essay*, in PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE U.S. CONSTITUTION 149–58 (David S. Bogen ed., 2003), puts a number of classic sources on privileges or immunities into order and perspective. See generally, e.g., Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part I: 'Privileges and Immunities' as An Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010); *infra* note 152. Thanks to Les Benedict for engagement on this point.

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* rehearses 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 Reworked, *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 an 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

reflected in the majority's self-conception. See, e.g., *id.* at 2240, 2242–43, 2265–78, 2283–84 (majority opinion).

¹¹³ See generally, e.g., Siegel, *Memory Games*, *supra* note 20.

¹¹⁴ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

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 Clause 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 *Dobbs* litigation defending abortion rights in these terms.¹²² No wonder either. Before *Dobbs*, the claim was precluded by the *Slaughter-House Cases*, decided five years after the Fourteenth Amendment's enactment.¹²³ The *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 *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 *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 *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 *Dobbs*. Justice Brett Kavanaugh's concurrence gestures toward it when suggesting that, notwithstanding *Roe*'s and *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

¹²¹ *Id.* (citations omitted).

¹²² *Id.*

¹²³ *Slaughter-House Cases*, 83 U.S. 36, 80 (1873).

¹²⁴ *Id.* at 60–61.

¹²⁵ *Id.*; see, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 469 (8th ed. 2010); see also JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22 (1980) (cited by *Dobbs*, 142 S. Ct. at 2248 n.22). But cf. Evan D. Bernick, *Substantive Due Process for Justice Thomas*, 26 GEO. MASON L. REV. 1087, 1131 n.282 (2019). For an important and importantly different vision of what the Privileges or Immunities Clause might mean and do, see BLACK, *supra* note 88.

¹²⁶ For discussion of the point in the concurrence, see *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

structural individual right or as a right guaranteed by the Fourteenth Amendment's Privileges or Immunities Clause.¹²⁷ 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.¹²⁸

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."¹²⁹ 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."¹³⁰ 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.¹³¹ 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.¹³²

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

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 CHERMERINSKY, *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).

¹³⁰ Transcript of Oral Argument at 7, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521). One critical discussion is in Damon Root, *Justice Scalia's Faint-Hearted 14th Amendment Originalism*, REASON (Mar. 3, 2010, 10:28 AM), <https://reason.com/2010/03/03/justice-scalias-faint-hearted/> [<https://perma.cc/W9J2-9B7V>]. For a harsher reaction, see *Q&A: Randy Barnett and Evan Bernick*, C-SPAN, at 49:00 (Nov. 11, 2021), <https://www.c-span.org/video/?515977-1/qa-randy-barnett-evan-bernick> [<https://perma.cc/3AAJ-5QJZ>].

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.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.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.¹³⁵ Footnote 22 configures *Glucksberg* as the controlling precedent in any future Privileges or Immunities Clause jurisprudence.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.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

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.

¹³⁴ *Dobbs*, 142 S. Ct. at 2248 n.22.

¹³⁵ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). For reflections, see Cass R. Sunstein, *Dobbs and the Travails of Due Process Traditionalism* (Harv. Pub. L. Working Paper, No. 22-14, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4145922 [<https://perma.cc/55NJ-6MZ6>]. Another perspective tracking how *Glucksberg* does not provide the precedential foundation *Dobbs* both claims and needs is in Marc Spindelman, *The Gambit and the Gap: Glucksberg and the Lawlessness of Dobbs’ Originalism*, 72 CLEV. ST. L. REV. (forthcoming 2024) (on file with author).

¹³⁶ See *Dobbs*, 142 S. Ct. at 2248 n.22.

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."¹³⁸ 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.'"¹³⁹ 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.¹⁴⁰

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.¹⁴¹ 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.'"¹⁴² Thomas' *Dobbs* concurrence also re-ups this question.¹⁴³

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*' dream-scaping of transformative constitutional possibilities.¹⁴⁴

¹³⁸ *Dobbs*, 142 S. Ct. at 2248 n.22; *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). Technically, *Corfield* dealt with the meaning of Article IV's Privileges and Immunities Clause, *id.* at 550, but *Corfield* is still regularly regarded as authority on what Fourteenth Amendment privileges or immunities of national citizenship might be, as Footnote 22 shows. *Dobbs*, 142 S. Ct. at 2248 n.22. For another treatment, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1304–31 (3d ed. 2000). For context on *Corfield*, see GERARD N. MAGLIOCCA, *WASHINGTON'S HEIR: THE LIFE OF JUSTICE BUSHROD WASHINGTON* 130–42 (2022).

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

¹⁴⁰ See Josh Hammer, *Manly Originalism*, AM. MIND (May 19, 2022), <https://american.mind.org/features/a-human-event/manly-originalism/> [<https://perma.cc/RDU4-TJQ9>]. The term "Americanmen" is not from Hammer. A vital counterpoint to these gendered originalist themes is in Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431 (2014).

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 footnote's 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.

¹⁴⁵ *Dobbs*, 142 S. Ct. at 2248 n.22 (first citing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 163–80 (1998)); and then citing ELY, *supra* note 125, at 22–30. The footnote adds to those cites a citation to 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1089–95 (1953).

¹⁴⁶ *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring). Erstwhile reasons for skepticism were suggested by, among others, Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 638–39 (2007).

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.¹⁴⁷ Anchored to ancient fundamental rights of Americanmen, 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.¹⁴⁸

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.¹⁴⁹ If one possibility is that these economic and social rights might

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 Judicially 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>].

¹⁴⁸ *See, e.g.,* Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J. F. 343, 350 (2019), https://www.yalelawjournal.org/pdf/MacKinnonCrenshaw_ReconstitutingtheFuture_itrwo51.pdf [<https://perma.cc/Q737-LVCK>]; *see also, e.g., id.* at 347–50; Derrick Bell, *To Make a Nation Whole*, N.Y. TIMES, Sept. 13, 1987 (§ 6), at 43; W.E.B. DU BOIS, *Civil Rights Legislation Before and After the Passage of the 14th Amendment*, Address Before the National Lawyer's Guild (Jan. 24, 1947), in W.E.B. DU BOIS PAPERS, at 4–5, <https://credo.library.umass.edu/view/full/mums312-b198-i053> [<https://perma.cc/Z4RS-8W6Y>]; W.E.B. DU BOIS, *The Propaganda of History*, in BLACK RECONSTRUCTION IN AMERICA, 1860–1880 at 711 (1992); *cf.* ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* xxiv–xxv (2019). *See generally* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. L. REV. 480 (1990). Thanks to Tucker Culbertson for engagement on these points.

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

does not simply track, though neither does it forget, the standard, historical, tripartite division of citizens' rights into civil, political, and social rights, as helpfully described in 3 BRUCE A. ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 130 (2014). Additional sources are collected in Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. 885, 885–87, 887–88 n.9 (2023). Although this division has played in debates around the Fourteenth Amendment's original meaning, it is not engaged in Footnote 22's text, which emphasizes the idea of privileges or immunities as ancient fundamental rights.

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.

¹⁵¹ See generally, e.g., MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* (2017); MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* 162–65 (2020); JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 471–79 (2022); EVELYN NAKANO GLENN, *UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR* 93–143 (2002); Carmen G. Gonzalez & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127 (2022). These connections do not overlook the possible—and possibly bold—tension between economic and social rights understood on conservative originalist and in modernist terms.

¹⁵² See, e.g., RANDY E. BARNETT & EVAN D. BERNICK, *The Privileges or Immunities of Citizenship Clause*, in *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 39–258 (2021); see also, e.g., Randy E. Barnett, *Foreword: What's So Wicked About Lochner?*, 1 N.Y.U. J.L. & LIBERTY 325, 331–33 (2005); Brian Beutler, *The*

right to contract embraced by *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.¹⁵³

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

Rehabilitationists, NEW REPUBLIC (Aug. 30, 2015), <https://newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal> [<https://perma.cc/XRW4-E24D>]. Richard Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711 (1985), <https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1985/1/cj4n3-4.pdf> [<https://perma.cc/P2RG-PYSG>], is an important precursor to some of these developments. A larger picture is in RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006) [hereinafter EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION*]. Witness and critique of the libertarian project is in Martin H. Redish & Brandon Johnson, *The Underused and Overused Privileges and Immunities Clause*, 99 B.U.L. REV. 1535, 1540–42, 1569–72 (2019). A feminist reaction to at least some of these positions is in Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369, 380 (1994).

¹⁵³ *Lochner v. New York*, 198 U.S. 45, 64 (1905). Academic plays in these directions include BARNETT & BERNICK, *supra* note 152, at 241. Convergences are in, *inter alia*, DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011), and RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992), and historical context is supplied by Thomas Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015). For relevant observations on the potential reach of the concept of economic liberties, though not indexed to Fourteenth Amendment privileges or immunities, see Antonin Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703, 704, 707–08 (1985), <https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1985/1/cj4n3-3.pdf> [<https://perma.cc/63VY-9GU4>], which does not fail to spotlight liberally inclined natural law reversals of economic rights claims, like “[a] sort of constitutionally prescribed (and thus judicially determined) minimum wage.” *Id.* at 708. Further relevant discussion on the constitutional political economy of antitrust law and corporate law is in FISHKIN & FORBATH, *supra* note 151, at 471–79. See also, e.g., Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 720 (2020). Litigation plays in these libertarian directions include *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079–80 (2021); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478, 2486 (2018); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2012); *Abigail All. for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695, 712–14 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1159 (2008). A new jurisprudence of economic rights as privileges or immunities seems likely to raise questions about equality on predictable racialized and gendered grounds, as well as questions about the democracy of the marketplace, lined up against various anti-capitalist, including distinctively racial capitalist, projects, on which see generally Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020), and also Gonzalez & Mutua, *supra* note 151, at 127–31.

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

¹⁵⁴ See, e.g., TRIBE, *supra* note 138, at 1311–12.

¹⁵⁵ PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 54–56 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/S7N9-9GFM>].

¹⁵⁶ See *id.* See generally LAURA KALMAN: FDR'S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM (2022).

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 new-found 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

¹⁶¹ *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

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?¹⁶⁴ 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.¹⁶⁵

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

by differentiating between economic activity and inactivity, see *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 550–52, 555 (2012), making the notion of ordinary and extraordinary economic legislation perhaps more a complexifying factor than an initial step down a completely untrodden path.

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)).

¹⁶⁵ See, e.g., *Sebelius*, 567 U.S. at 580; *Lopez*, 514 U.S. at 561; *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2478, 2486 (2018); *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022). For classic examples of the coordination of economic liberty with congressional powers, see, for example, *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 44 (1922).

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

¹⁶⁶ See, e.g., *Sebelius*, 567 U.S. at 558, 575–85; *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987).

¹⁶⁷ *Sebelius*, 567 U.S. 519, and *United States v. Morrison*, 529 U.S. 598 (2000), are among the more prominent and obvious examples. Something similar could happen to aspects of the modern administrative state. Cf., e.g., *West Virginia v. EPA*, 142 S. Ct. at 2615–16; *Loper Bright Enters. Inc. v. Raimondo*, 45 F.4th 359, 370 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023) (No. 22-451).

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.

¹⁷¹ The idea here might be that, with adequate notice, even classic reliance interests do not or should not pose an insurmountable obstacle to the achievement of conservative originalist constitutional results. Cf. *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2484–85 (2018). Some possible reversals, grounded in vastly different ideas about economic freedom, are suggested by Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); see also Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/PDE4-2BUK>]. Other prospects tied more expressly

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

to older conceptualizations of poverty are in Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 677–80 (1979). For a reply to Michelman, see Robert H. Bork, *Commentary—The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695 (1979).

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.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵ 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.¹⁷⁶ 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."¹⁷⁷ 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.¹⁷⁸

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).

¹⁷⁴ *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment). If the concurrence's approach suggests the prospects of bracketing the family's and family law's relation to political economy, the topic is taken up, among other sources, in COOPER, *supra* note 151, and EICHNER, *supra* note 151. For another perspective, see generally Janet Halley, *After Gender: Tools for Progressives in a Shift from Sexual Domination to the Economic Family*, 31 PACE L. REV. 887 (2011). Different convergences of economic liberty with the family, specifically marriage, within a Privileges or Immunities Clause analysis are in Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1411 (2012). See also, e.g., *id.* at 1417–18, 1420. But see *id.* at 1462–63, 1468. Perhaps not surprisingly, *Lochner* itself ties the labor regulation at issue there to the economics of family life. 198 U.S. 45, 59 (1905).

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)).

¹⁷⁷ *Id.* at 80 (Thomas, J., concurring in the judgment); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). A similar reading of Thomas' *Troxel* concurrence is in David M. Wagner, *Thomas v. Scalia on the Constitutional Rights of Parents: Privileges or Immunities, or Just Spinach?*, 24 REGENT U. L. REV. 49, 53 (2011). The *Dobbs* majority opinion mentions *Pierce*, 268 U.S. 510, as well, along with *Meyer v. Nebraska*, 262 U.S. 390 (1923), describing them at one point as cases involving "the right to make decisions about the education of one's children." 142 S. Ct. 2228, 2257 (2022); see also *id.* at 2267–68.

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

vision onto how traditional parental rights may play out after *Dobbs*, sometimes at the intersections of modern ideas about children's and parents' rights, are in *Deanda v. Becerra*, 2:20-CV-092-Z, 2022 WL 17572093, at *12–18 (N.D. Tex. Dec. 8, 2022), and *L.W. ex rel. Williams v. Skrmetti*, No. 23-5600, 2023 WL 6321688, at *7–12 (6th Cir. Sept. 28, 2023).

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.

¹⁸⁰ See *supra* notes 135–36 and accompanying text. For possible extensions of Thomas' *Troxel* concurrence's ideas, see the critical analysis in Robin L. West, *The Harms of Homeschooling*, 29 PHIL. & PUB. POL'Y Q. 7 (2009), and the response to it in Brian D. Ray, *The Harms of Homeschooling? Where Are the Premises?*, 25 HOME SCH. RESEARCHER (July 10, 2010), <https://www.nheri.org/home-school-researcher-the-harms-of-homeschooling-where-are-the-premises/> [<https://perma.cc/HWK8-RP2K>].

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.

¹⁸² See Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 87–90 (2021).

¹⁸³ See, e.g., Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMANITIES 251, 285–86 n.167 (1999); see also *id.* at 252.

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.¹⁸⁴ 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.¹⁸⁵

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.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ These legal arrangements reflected and reinforced—and thus helped to stabilize—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.¹⁸⁹

¹⁸⁴ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. at 2228, 2248 n.22 (2022).

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).

¹⁸⁷ And in many ways still do. See generally, e.g., R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53 (2015).

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.¹⁹⁰

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: cismoman) as husband and wife.¹⁹¹ 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.¹⁹²

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.¹⁹³ 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

Fourteenth and Nineteenth Amendments, see Calabresi & Rickert, *supra* note 19, at 46–51, 66–69. This work may be expected to take on added significance in *Dobbs*' wake. Original public understandings of marriage in this era are described in Calabresi & Matthews, *supra* note 174, at 1458–69.

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.¹⁹⁴ 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.¹⁹⁵

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”?¹⁹⁶

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

¹⁹⁴ See, e.g., Ohio Defense of Marriage Amendment, OHIO CONST. art. XV, § 11, held unconstitutional by *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹⁹⁵ *N.Y. State Pistol & Rifle Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). This formulation means to take into its purview “restrictions” on the right to marry that do not themselves have historical and/or traditional roots, but that are sufficiently analogous to ones that do to satisfy *Bruen*'s new demands. See *id.* at 2126–34. Some cross-illuminating discussion of *Bruen*'s treatment of restrictions on Second Amendment rights is in David P. Kopel, *Restoring the Right to Bear Arms: New York State Rifle & Pistol Association v. Bruen*, 2022 CATO SUP. CT. REV. 305, 313–23 (2022). Additional historical context appears in AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 178–79 n.* (1999) (citing *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 651–53 (C.C. D. La. 1870) (Bradley, Circuit J.)) (source cited by *Dobbs*, 142 S. Ct. at 2248 n.22).

¹⁹⁶ See, e.g., CROSSKEY, *supra* note 145, at 1092 (cited by *Dobbs*, 142 S. Ct. at 2248 n.22). The possible definition of “abridge” comes from Calabresi & Matthews, *supra* note 174, at 1409. For descriptions of the current state of legal rules governing the physical discipline of children and their historical dimensions, see RESTATEMENT OF CHILDREN AND THE LAW § 3.24 (AM. L. INST., Tentative Draft No. 1, 2018). For important new scholarly work on children's welfare, see DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).

rights of Americanmen rest content to leave all these rules alone in the realm of ordinary politics?¹⁹⁷

Or, for another family law example, consider what the Court that issued *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 *Griswold v. Connecticut*.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-*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?¹⁹⁹ How about other laws modernizing historical and traditional spousal duties, or otherwise impacting the interpersonal or financial relations between married people?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.²⁰¹

Post-*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

¹⁹⁷ There are different ways that ancient fundamental rights of Americanmen 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 *Deanda v. Becerra*, 2:20-CV-092-Z, 2022 WL 17572093, at *12 (N.D. Tex. Dec. 8, 2022).

¹⁹⁸ *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). In *Dobbs*, Mississippi's lawyers, recognizing how their conservative constitutional originalism cast *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 *Griswold* in other terms. Brief for Petitioners at 15, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392). *Dobbs* marks *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.

¹⁹⁹ *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir.), *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, *A Right to Marital Rape? The Immorality of the Dobbs Approach to Unenumerated Rights*, 12 HOUS. L. REV. ONLINE 90, 91, 97–98 (2022), and West, *Dobbs* Remarks, *supra* note 5. The question in the text brackets challenges that anti-carceral feminist projects have raised about classic ways of attending to sex-based violence.

²⁰⁰ For doctrinal context, see AREEN ET AL., *supra* note 185, at 176–82.

²⁰¹ See generally, e.g., PHYLLIS SCHLAFELY, 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—after what *Dobbs* does—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).

²⁰³ See generally Duncan Kennedy, *Consciousness, Doctrine, and Politics in the History of American Family Law* (Harv. Pub. L. Working Paper, No. 21-40, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915535 [<https://perma.cc/DW7C-84R8>]; David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529 (2008). From very different normative directions, see Matthew Kacsmaryk, *The Inequality Act: Weaponizing Same-Sex Marriage*, PUB. DISCOURSE (Sept. 4, 2015), <https://www.thepublicdiscourse.com/2015/09/15612/> [<https://perma.cc/7Q79-QEW9>]. A notation on the feminist influence here is in Mary Anne Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, 19 AM. U. J. GENDER, SOC. POL'Y & L. 549, 560–64 (2011).

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.²⁰⁵ 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.²⁰⁶

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.²⁰⁷ 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

²⁰⁵ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022).

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.²⁰⁸ 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.²⁰⁹ 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.²¹⁰ But even as it does so, *Dobbs* resonates with and furthers contemporaneous minoritarian pro-life movement positions, satisfying their years-long yearnings for *Roe*'s complete and utter destruction.²¹¹ 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.²¹²

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.²¹³ *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.²¹⁴

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.*

²⁰⁹ Cf. Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 208–11 (2008).

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.²¹⁵ *Dobbs* tries managing that opposition by halting its conservative constitutional originalist revolution at abortion’s water’s edge—at least for now.²¹⁶ 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.²¹⁷

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.²¹⁸ Both a conservative originalist ruling and not, *Dobbs* is, more granularly, a complex and contradictory legal artifact, a crazy quilt that sews together inconsistent, oft-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-is-unique 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.²¹⁹ 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

²¹⁵ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *United States v. Windsor*, 570 U.S. 744, 774–75 (2013); *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015).

²¹⁶ See *supra* note 92 and accompanying text. But see *supra* note 98.

²¹⁷ See *supra* notes 92–93 and accompanying text.

²¹⁸ Something similar holds true for the textualism of the Supreme Court’s decision in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), as described in Marc Spindelman, *Bostock’s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 553–65 (2021). One important legal academic articulation for *Bostock*’s conceptual scaffolding—there are many—is in Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

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

²²⁰ Jonathan Easley, *Scalia: Constitution Is “Dead, Dead, Dead,”* THE HILL (Jan. 29, 2013), <https://thehill.com/blogs/blog-briefing-room/news/140572-scalia-constitution-is-dead-dead-dead/> [<https://perma.cc/WUJ9-3QLZ>].

²²¹ Perhaps most notably, though not only, Justice Neil Gorsuch. *See infra* note 233. A certain model for this approach is in JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 143 (1976), which explains Cardozo’s famous *Palsgraf* opinion as a product of Cardozo’s biography, both unmarried and childless and “the son of a Supreme Court judge” Another example is in Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1882–83 (2006), noting ways in which Chief Justice William Rehnquist’s personal biography helped explain his position in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

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.²²² 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.²²³ 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.²²⁴ 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.²³³ 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.²³⁴

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.²³⁵ Sometimes the sharp edges of

²³³ See, e.g., ROBIN POGREBIN & KATE KELLY, *THE EDUCATION OF BRETT KAVANAUGH: AN INVESTIGATION* 17–34 (Penguin Publ'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-werent/> [<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-8492-11e8-8f6c-46cb43e3f306_story.html [<https://perma.cc/J7MS-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*

these moral interdictions were practically softened by alcohol, which was, by different accounts, including Kavanaugh's own, integral to this social scene.²³⁶ Sometimes, though, the softening came in the form of the tolerant and sometimes liberalized, if still basically male-centered and male-dominant, authority of adults at school and at home who acceded to what they took to be the practical inevitability of "ordinary" male heterosexual sexual urges and the sexual relations that straight male youth coming of age might seek.²³⁷ Accepting these "natural" desires, their overt expression was, at times, more or less only loosely managed by priests, lay teachers, and parents, who all knew sex could happen—and did—but without

on Repentance as the Only Way to Be Saved, CATH. EDUC. RES. CTR. (Sept. 15, 2020), <https://www.catholiceducation.org/en/education/chastity-education/premarital-sex-is-a-mortal-sin.html> [<https://perma.cc/H84H-BYH7>], Lino Ciccone, *Is Contraception Sinful?*, CATH. NEWS AGENCY, <https://www.catholicnewsagency.com/resource/55268/is-contraception-sinful-by-fr-lino-ciccone-cm> [<https://perma.cc/A65V-AQG9>], and Lisa McClain, *How the Catholic Church Came to Oppose Birth Control*, THE CONVERSATION (July 9, 2018, 6:28 AM), <https://theconversation.com/how-the-catholic-church-came-to-oppose-birth-control-95694> [<https://perma.cc/X7Z7-GTMD>]. For context on the softening of these doctrines contemporary to Kavanaugh's upbringing, see MARK JUDGE, *A TREMOR OF BLISS: SEX, CATHOLICISM, AND ROCK 'N' ROLL* 107–48 (2010) [hereinafter JUDGE, *A TREMOR OF BLISS*].

²³⁶ For general context on alcohol in the then-contemporaneous Georgetown Prep social scene, see, for example, David McFadden & Ashraf Khalil, *Kavanaugh's Classmates at Georgetown Prep Describe Alcohol-Soaked Party Culture*, CHI. TRIB. (Sept. 20, 2018), <https://www.chicagotribune.com/nation-world/ct-kavanaugh-georgetown-prep-parties-2018-0920-story.html> [<https://perma.cc/2YKH-XV2B>], and Ronan Farrow & Jane Mayer, *Senate Democrats Investigate a New Allegation of Sexual Misconduct, From Brett Kavanaugh's College Years*, NEW YORKER (Sept. 23, 2018), <https://www.newyorker.com/news/news-desk/senate-democrats-investigate-a-new-allegation-of-sexual-misconduct-from-the-supreme-court-nominee-brett-kavanaughs-college-years-deborah-ramirez> [<https://perma.cc/Y8DR-64SM>]. For alcohol and its role in the Georgetown prep social scene, in Kavanaugh's own words, see *Confirmation Hearing*, *supra* note 234, at 686–88, 693–94.

²³⁷ Angles of vision are in: JUDGE, *A TREMOR OF BLISS*, *supra* note 235, at 25–45; JUDGE, *GOD AND MAN AT GEORGETOWN PREP*, *supra* note 233, at 50–65; POGREBIN & KELLY, *supra* note 233, at 24; Peter Feuerherd, *Kavanaugh Furor Raises Scrutiny of Georgetown Prep, Other Jesuit Schools*, NAT'L CATH. REP. (Sept. 27, 2018), <https://www.ncronline.org/news/kavanaugh-furor-raises-scrutiny-georgetown-prep-other-jesuit-schools> [<https://perma.cc/P3N4-4ESK>]; Greg Jaffe, *In the '80s, Boys' Prep Schools Like Kavanaugh's Could Be Bastions of Misogyny*, WASH. POST (Sept. 20, 2018, 12:45 PM), https://www.washingtonpost.com/outlook/in-the-80-boys-prep-schools-like-kavanaughs-could-be-bastions-of-misogyny/2018/09/20/53764bd8-bc75-11e8-be70-52bd11fe18af_story.html [<https://perma.cc/KM4W-9VD6>]. See also Jon Schwarz & Camille Baker, *Kavanaugh's High School, Georgetown Prep, Warned Parents in 1990 of "Sexual or Violent Behavior" at Parties*, THE INTERCEPT (Sept. 28, 2018, 10:03 AM), <https://theintercept.com/2018/09/28/kavanaughs-high-school-georgetown-prep-warned-parents-in-1990-of-sexual-or-violent-behavior-at-parties/> [<https://perma.cc/DCS4-9ULK>]. Additional pertinent reflection is in Bailey Pellissier, *Sex Education from the Catholic Church*, in *GENDER & SEXUALITY: A TRANSNATIONAL ANTHOLOGY FROM 1690 TO 1990* (2019), <https://librarypartnerspress.pressbooks.pub/gendersexuality1e/chapter/sex-education-from-the-catholic-church/> [<https://perma.cc/4D9A-VWT7>].

constant surveillance trying to stop it.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.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.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.,

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.

²³⁹ For some sense, see, for example, JUDGE, WASTED, *supra* note 233, at 89–90, 96, and Elliott Holt, *Christine Blasey Ford, Brett Kavanaugh, and the Performance of Adolescence*, SLATE (Sept. 28, 2018, 1:30 PM), <https://slate.com/human-interest/2018/09/dc-private-school-culture-brett-kavanaugh-elliott-holt.html> [<https://perma.cc/HS79-95XZ>]. For family context relevant to how this might now reshape Justice Kavanaugh’s views, see *The Current Court: Justice Brett M. Kavanaugh*, SUP. CT. HIST. SOC’Y, <https://supremecourthistory.org/supreme-court-justices/associate-justice-brett-m-kavanaugh/> [<https://perma.cc/ZS5V-PPPM>] (last visited Oct. 2, 2023); see also Bob Cook, *One Thing We Know About Brett Kavanaugh: He’s a Girls’ Basketball Coach*, FORBES (Sept. 5, 2018, 11:51 PM), <https://www.forbes.com/sites/bobcook/2018/09/05/one-thing-we-know-about-brett-kavanaugh-hes-a-girls-basketball-coach/?sh=36cc75103946> [<https://perma.cc/M67J-JZ2H>]; Marie Solis, *Brett Kavanaugh Is Back to Coaching His Daughter’s Basketball Team*, VICE (Nov. 28, 2018, 10:30 AM), <https://www.vice.com/en/article/7xy4xe/brett-kavanaugh-basketball-coach-christine-blasey-ford> [<https://perma.cc/Z4B9-Z236>].

²⁴⁰ See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693–94 (1977); *Bellotti v. Baird*, 443 U.S. 622, 642–44 (1979); see also Nicole Phillis, *When Sixteen Ain’t So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 MICH. J. GENDER & L. 271, 280–82 (2011); Linda Greenhouse, *Battle on Abortion Turns to Rights of Teen-Agers*, N.Y. TIMES (July 16, 1989), <https://www.nytimes.com/1989/07/16/us/battle-on-abortion-turns-to-rights-of-teen-agers.html> [<https://perma.cc/WQ7F-RHZ7>]. An important effort to preserve these prospects after *Dobbs* is in Jessica Quinter & Caroline Markowitz, Note, *Judicial Bypass and Parental Rights After Dobbs*, 132 YALE L.J. 1908, 1959–68 (2023). Some of what these rights may be legally up against is suggested by *Deanda v. Becerra*, 2:20-CV-092-Z, 2022 WL 17572093, at *12, *16 (N.D. Tex. Dec. 8, 2022). See also, e.g., Paddy Jim Baggot, *Management of Teenage Pregnancy: A Catholic Approach*, 71 LINACRE Q. 79, 80 (2004).

amidst the surge of pro-life abortion politics during the early Reagan '80s.²⁴¹ 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.²⁴² 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, if in variegated ways.²⁴³ Once more, the state may—in old patriarchal fashion—control women’s and girls’ and other pregnant people’s bodies, their reproductive choices,

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

²⁴² For additional context, see generally SUSAN KUKLIN, WHAT DO I DO NOW: TALKING ABOUT TEENAGE PREGNANCY (1991). Additional reports that help shape a relevant picture of teen pregnancy and abortion are found in Winthrop A. Burr & Kenneth F. Schulz, *Delayed Abortion in An Area of Easy Accessibility*, 244 JAMA 44, 45 (1980); Lawrence Feinberg, *Legal Abortions in District Top Births for 1976*, WASH. POST, Sept. 1, 1977, at A1; Susan B. Hansen, *State Implementation of Supreme Court Decisions: Abortion Rates Since Roe v. Wade*, 42 J. POL. 372, 381, 384 (1980); Harold L. Hirsh, *Impact of the Supreme Court Decisions on the Performance of Abortion in the United States*, 3 FORENSIC SCI. 209, 209–13 (1974). See also generally Constance A. Nathanson & Marshall H. Becker, *Physician Behavior as Determinant of Utilization Patterns: The Case of Abortion*, 68 AM. J. PUB. HEALTH 1104 (1978); Linda J. Redman & E. James Lieberman, *Abortion, Contraception and Child Mental Health*, 5 FAM. PLAN. PERSPS. 71 (1973).

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.

²⁴⁸ *See, e.g.*, Piper French, *For Thousands of Georgians, Freely Traveling Across State Lines for an Abortion Is Not an Option*, BOLTS MAG. (July 25, 2022), <https://boltsmag.org/georgia-abortion-ban-probation-parole-travel-restrictions/> [<https://perma.cc/EQ5V-HQWH>]; Associated Press, *Alabama's Attorney General Says the State Can Prosecute Those Who Help Women Travel for Abortions*, WASH. POST (Aug. 31, 2023, 4:16 PM), https://www.washingtonpost.com/national/2023/08/31/alabama-abortion-steve-marshall/3442717c-483b-11ee-b76b-0b6e5e92090d_story.html [<https://perma.cc/838E-ZBSH>]. For important works highlighting *Dobbs*' meanings for poor women and women of color, see Cecilia Lenzen, *Facing Higher Teen Pregnancy and Maternal Mortality Rates, Black Women Will Largely*

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*,

Bear the Brunt of Abortion Limits, TEX. TRIB. (June 30, 2022, 6:00 PM), <https://www.texas-tribune.org/2022/06/30/texas-abortion-black-women/> [<https://perma.cc/29U4-RTFC>], and Michele Goodwin, *The New Jane Crow*, THE ATLANTIC (May 11, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/maternal-mortality-pregnancy-deaths-overturn-roe/629816/> [<https://perma.cc/EPW8-9J43>].

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'*

²⁵³ See generally John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

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.²⁵⁶ 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.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹

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

servatism-keynote-lefts-attack-men-america [https://perma.cc/QTS3-7GMA]; Harvey C. Mansfield, *Senator Hawley’s Manliness*, NAT’L REV. (Dec. 5, 2021, 6:30 AM), https://www.nationalreview.com/2021/12/senator-hawleys-manliness [https://perma.cc/65B7-QNVP]. For convergences and additional relevant discussion, see, for example, Cassie Miller, *Proud Boys Aid the Right-Wing Assault on the LGBTQ Community and Reproductive Justice*, S. POVERTY L. CTR. (July 13, 2022), https://www.splcenter.org/hatewatch/2022/07/13/proud-boys-aid-right-wing-assault-lgbtq-community-and-reproductive-justice [https://perma.cc/TZ9R-JB9T]. Additional relevant discussion is in Trip Gabriel, *He Fuels the Right’s Cultural Fires (and Spreads Them to Florida)*, N.Y. TIMES (April 24, 2022), https://www.nytimes.com/2022/04/24/us/politics/christopher-rufo-crt-lgbtq-florida.html [https://perma.cc/RPX8-CNCT], and Alex Samuels & Monica Potts, *How the Fight to Ban Abortion Is Rooted in The ‘Great Replacement’ Theory*, FIVETHIRTYEIGHT (July 25, 2022, 6:00 AM), https://fivethirtyeight.com/features/how-the-fight-to-ban-abortion-is-rooted-in-the-great-replacement-theory/ [https://perma.cc/W5QD-ZJGL].

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.

²⁵⁷ See, e.g., Kati Perry et al., *Where So Many Republicans Voted ‘No’ on Issue 1 in Ohio*, WASH. POST (Aug. 10, 2023, 7:00 AM), https://www.washingtonpost.com/politics/2023/08/10/why-so-many-republicans-voted-no-issue-1-ohio/ [https://perma.cc/5NHC-PX92]; Jonathan Weisman & Nick Corasaniti, *First Kansas, Next Michigan and Beyond as Abortion Ballot Measures Spread*, N.Y. TIMES (Sept. 9, 2022), https://www.nytimes.com/2022/09/09/us/politics/michigan-abortion-referendum.html [https://perma.cc/EC9Y-B5M3].

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

²⁶⁰ See, e.g., Tom Bonier, *Women Are So Fired Up to Vote, I've Never Seen Anything Like It*, N.Y. TIMES (Sept. 3, 2022), <https://www.nytimes.com/2022/09/03/opinion/women-voters-ro-abortion-midterms.html> [<https://perma.cc/XCU8-5WAZ>]; see also *supra* note 27.

²⁶¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2278 (2022).

²⁶² See, e.g., Ryan D. Doerfler & Samuel Moyn, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html> [<https://perma.cc/G46Z-K3TS>].

nationwide—perhaps more robustly than *Roe* or *Casey* ever protected them.²⁶³ 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.

²⁶³ See, e.g., Ian Millhiser, *Democrats Have a High-Risk, High-Reward Plan to Save Roe v. Wade*, VOX (Sept. 8, 2022, 7:30 AM), <https://www.vox.com/20930358/codify-roe-wade-womens-health-protection-act-supreme-court-nancy-pelosi-democrats> [<https://perma.cc/7LSA-S2EK>]; Marc Spindelman, *Countering Dobbs*, AM. PROSPECT (Feb. 21, 2023), <https://prospect.org/health/countering-dobbs/> [<https://perma.cc/9W7F-PDPF>]. See generally, e.g., Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009).