Cleveland State Law Review

Volume 72 | Issue 1 Article

12-4-2023

Dobbs and the Future of Liberty and Equality

Kim Forde-Mazrui
University of Virginia, kf9j@virginia.edu

Dobbs and the Future of Liberty and Equality

KIM FORDE-MAZRUI*

Important note to reader: This piece is a keynote speech delivered at the symposium in October 2022, at Cleveland State University College of Law. I made some predictions about cases before the Supreme Court that have now been decided, most importantly about *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023). I have kept the text as delivered, but I provide updates on the Court's cases in the footnotes. *See, e.g.*, note 4, *infra* III.

ABSTRACT

This lecture critiques *Dobbs v. Jackson Women's Health Organization* and assesses its implications for liberty and equality. *Dobbs*' immediate effect was major disruption to abortion rights. In the longer term, by discarding fifty years of precedent and by basing constitutional rights exclusively on long-standing history and tradition, *Dobbs* jeopardizes liberty and equality rights that the Court has recognized in the late twentieth and early twenty-first centuries. Such modern liberty rights include contraception, interracial marriage, adult sexual intimacy and same-sex marriage. Modern equality rights include strong bars on discrimination based on race and sex, and moderate protections for LGBTQ+ status.

My first claim is that, notwithstanding the shockwaves that *Dobbs* has generated among pro-choice Americans, *Dobbs* is not as radical or unprincipled as some on the Left have claimed. *Dobbs*' holding that *Roe* was wrongly decided is within the bounds of conventional constitutional interpretation. My second claim is to predict that the negative implications of *Dobbs* for other liberty rights are unlikely to come to pass for at least some rights that *Dobbs*' methodology arguably endangers. The *Dobbs* Court left itself "off ramps" that it will likely use to preserve liberty rights already recognized, namely, by distinguishing them from abortion and by relying on *stare decisis*. My predictions rely primarily on an assumption that the Court is unlikely to issue rulings that deviate significantly from widely-held societal values, especially if held by a significant percentage of political conservatives. The Court will most likely

* Professor of Law and Mortimer M. Caplin Professor of Law, University of Virginia. I am grateful for the helpful comments I received from Naomi Cahn and Anne Coughlin. A special thanks to my research assistant, Aamer Aamer. Thank you to the Editors of the *Cleveland State Law Review* for organizing such a stimulating symposium on "The Future of The Fourteenth Amendment: Autonomy and Equality Post-*Dobbs v. Jackson*"; for inviting me to deliver the keynote address; and for their outstanding assistance with editing and sourcing this piece.

uphold access to contraception and interracial marriage. With less confidence, I expect that the Court will uphold adult sexual intimacy, including same-sex intimacy, and same-sex marriage.

My third claim is about the future of equality rights. The Court will likely maintain existing equal protection doctrines pertaining to race and sex. The exception is that the Court will likely invalidate race-based affirmative action, notwithstanding that the original meaning of the Fourteenth Amendment, history, tradition, and precedent all support the lawfulness of affirmative action. For gay rights, although the Court might cut back on recently recognized rights, I believe it will preserve them while making accommodations in some contexts for religious objections. Ultimately, the future direction of liberty and equality will depend less on *Dobbs* and more on the moral and political views of the swing Justices.

CONTENTS

I. INTRODUCTION

My lecture today will discuss *Dobbs v. Jackson Women's Health Organization* and the future of liberty and equality in its aftermath. I will make three claims. First, notwithstanding the shockwaves that *Dobbs* has generated, its holding that *Roe v. Wade* was wrongly decided is within the bounds of conventional constitutional interpretation.[1] Second, although *Dobbs* endangers other liberty interests that Court precedents have protected, the Court in *Dobbs* left itself "off ramps" to avoid overturning at least some of those precedents.[2] I believe, for example, that rights to contraception and interracial marriage are safe. For LGBTQ+ liberty rights, I am more cautious but predict that the Court will preserve existing rights, including adult sexual intimacy and same-sex marriage, with exemptions in some contexts to accommodate religious objections.[3] The Court is unlikely, however, to expand LGBTQ+ liberty rights for the foreseeable future.

---

[1] *See infra* Part I.A.

[2] *See infra* Part II.

[3] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting access to contraception); Eisenstadt v. Baird, 405 U.S. 438 (1972) (recognizing the right to engage in sexual conduct with member of the same sex); Obergefell v. Hodges, 574 U.S. 1118 (2015) (recognizing the right to same-sex marriage); *see also The Right to Contraception: Deeply Rooted In Our Laws & Society, But In Jeopardy & In Need of Policymaker's Attention*, NAT'L WOMEN'S L. CTR. (June

Third, as to equality, the Court will likely hue to politically conservative positions—even when those positions *conflict* with *Dobbs*' methodology.[4] For racial equality, the Court will likely ignore or minimize text, original meaning, history, tradition and precedent to hold that states may not consider race for the benefit of historically-underrepresented racial minorities.[5] For sex equality, I expect the Court to hold to the status quo.[6] For sexual orientation and gender identity, again *Dobbs* suggests that the Court will resist expanding protections.[7] Ultimately, my prediction of the Court's future rulings is guided as much by my sense of their moral and political ideologies than by constitutional theory or judicial precedent.

A. Dobbs

What did *Dobbs* hold and what should we make of it? The Court overturned *Roe v. Wade* and held that there is no fundamental constitutional right to terminate one's pregnancy.[8] The Court first concluded that *Roe* was wrongly decided because a right to abortion is not protected by the text nor the original understanding of the Fourteenth Amendment. The Court also concluded *Roe* was wrongly decided because there is no deeply-rooted tradition of states protecting a right to abortion.[9] Second, the Court concluded that *stare decisis*, the principle of following court precedent, was an insufficient reason to uphold *Roe* because, according to the Court, *Roe* was "egregiously" wrong, unworkable, and did not create legally significant reliance

---

26, 2023), https://nwlc.org/resource/the-right-to-contraception-deeply-rooted-in-our-laws-and-society-but-in-jeopardy-and-in-need-of-policymakers-attention/.

[4] *See infra* Part III.

[5] It's important to note that the lecture that this Article is based on was delivered prior to the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023). I have left the above-the-line text as delivered such that my references to *Students for Fair Admissions, Inc.* are in the form of predictions. I will update those references in footnotes to explain what the Court subsequently did in *Students for Fair Admissions, Inc.* To that end, the Court did invalidate race-based affirmative action that benefited Black, Latino, and Native applicants to higher education. *See id.* The Court majority barely and selectively cited evidence of original meaning and historical practice, and grossly mischaracterized precedent. *See id.*; *see also* Kim Forde-Mazrui 1, *Affirmative Action Ruling Is Perverse, Tragic, and Disingenuous*, BLOOMBERG LAW: U.S. LAW WEEK (July 5, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/affirmative-action-ruling-is-perverse-tragic-and-disingenuous. For an explanation of how text, original meaning, history, tradition, evolving consensus, and precedent support the constitutionality of race-based affirmative action, *see infra* text accompanying notes 105–25; *see also* Kim Forde-Mazrui 2, *How Originalism Supports Affirmative Action*, THE HILL (May 21, 2023, 2:00 PM), https://thehill.com/opinion/judiciary/4012501-how-originalism-supports-affirmative-action/.

[6] *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971) (holding laws that provide for the preferential treatment of males over females are unconstitutional per the Fourteenth Amendment).

[7] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022).

[8] *Id.* at 2242.

[9] *Id.* at 2252, 2266.

interests.[10] The Court also summarily rejected the argument that restricting access to abortion constitutes sex discrimination under the Equal Protection Clause because precedent had already rejected that claim.[11] The Court cautioned that abortion "is a unique act," and that its holding should not be taken to undermine other precedents upholding liberty interests, such as a right to contraception, adult sexual intimacy, or same-sex marriage.[12]

As a result of *Dobbs*, each state now has broad authority to restrict access to abortion, and many conservative states have already done so.[13] The decision has, understandably, elated pro-life Americans who view the developing life during pregnancy as a person or akin thereto.[14] The case has also, understandably, caused dismay and anger among pro-choice Americans who view access to abortion as central to women's bodily integrity, autonomy, and equality.[15]

I personally share in the dismay over *Dobbs* and the impact the case will likely have on many women—especially those living in red states without substantial financial means. At the same time, as a constitutional law scholar, I believe the disparagement of the Court from the Left[16] is not wholly justified.

I want to be clear about the extent to which I believe that *Dobbs* is arguably defensible. My claim is that the Court's holding in *Dobbs*, that *Roe* wrongly recognized a fundamental right to abortion, is supported by conventional tools of constitutional interpretation. I am not defending those tools, but merely observing that

---

[10] *Id.* at 2279 ("The dissent argues that we have 'abandon[ed]' *stare decisis*, but we have done no such thing . . . . The dissent's foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can 'point to major legal or factual changes undermining [the] decision's original basis.' . . . . The Court has never adopted this strange new version of *stare decisis*—and with good reason.". (citation omitted)).

[11] *Id.* at 2245–46.

[12] *Id.* at 2277–78.

[13] *Id.* at 2284; *see Tracking the States Where Abortion is Now Banned*, N.Y. TIMES (June 26, 2023, 12:00 PM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html; *see also* William Brangham, *Conservative States Continue to Restrict Abortion Following Overturn of Roe v. Wade*, PBS (Sept. 15, 2022, 6:35 PM), https://www.pbs.org/newshour/show/conservative-states-continue-to-restrict-abortion-following-overturn-of-roe-v-wade.

[14] *See, e.g.*, CATHY RUSE & ROB SCHWARZWALDER, THE BEST PRO-LIFE ARGUMENTS FOR SECULAR AUDIENCES 2–3 (Mary Szoch ed., 2021) ("At the moment when a human sperm penetrates a human ovum, or egg, . . . a new entity comes into existence. 'Zygote' is the name of the first cell formed at conception . . . . It is also quite clear that the earliest human embryo is biologically alive.").

[15] *See, e.g.*, *Abortion Access*, BLACK WOMEN FOR WELLNESS, https://bwwla.org/abortion-access/ (last visited Oct. 17, 2023) ("A woman can never be equal if she is denied the basic right to make decisions for herself and her family.").

[16] *See id.*

courts have used them throughout American history, such that *Dobbs* arguably reflects conventional constitutional law. Nor am I defending the Court's *stare decisis* analysis, which held that—not only was *Roe* wrongly decided—but *Roe*'s flaws are sufficiently serious as to outweigh *Roe*'s precedential value. My claim is limited to the question of whether *Roe* was correctly decided in 1973. I am also not defending *Dobbs*' holding that restricting abortion does not constitute sex discrimination—a holding that I will criticize.[17]

To understand why *Roe*'s finding of a fundamental right to abortion was arguably wrong, I will sketch some conventional methodologies or considerations for interpreting the Constitution. Courts routinely seek guidance from the Constitution's text, its original intent or meaning, tradition and historical practice, and evolving societal norms.[18] None of these considerations provide significant support for a fundamental right to abortion.

First, the Constitution's text: The interpretive methodology of *textualism* emphasizes the text as the exclusive, or at least primary, basis for constitutional rights.[19] The Bill of Rights, for example, expressly grants rights against the federal government to speak freely, to freely exercise religion, to bear arms, to be tried by jury, etc.[20] But the text of the Constitution does not mention a right to abortion, reproductive rights, or privacy.[21] The Due Process Clause does protect "liberty," but that term is too broad or "open-textured" to resolve the constitutional status of abortion.[22] As virtually all laws restrict liberty, the courts need a basis to identify which liberties warrant robust protection, and there is no textual basis to protect abortion over other liberty interests that are routinely restricted by law.[23] Although most Justices are open to finding implicit or unenumerated rights,[24] the absence of textual support for abortion necessitates finding such a right by other means.

---

17 *See infra* text accompanying notes 50–56.

18 Thomas Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL OF RTS. J. 57, 70–93 (2004).

19 *Textualism*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/textualism (last visited Oct. 31, 2023) ("Textualism is a method of statutory interpretation that asserts that a statute should be interpreted according to its plain meaning . . . .").

20 *See* U.S. CONST. amend. I–X.

21 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2304 (2022) ("The text of the Constitution does not refer to or encompass abortion.").

22 U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

23 *Dobbs*, 142 S. Ct. at 2266.

24 *See* Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 (last visited Oct. 31, 2023); *see, e.g.*, *Dobbs*, 142 S. Ct. at 2317–54 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (highlighting the Justices

A second method of constitutional interpretation is *originalism*, which holds that the meaning of constitutional text is fixed at the time that the particular text was ratified.[25] Initially framed in terms of original *intent*, most contemporary originalists determine the meaning of constitutional text by reference to its *public meaning*, how the public reasonably understood the text at the time of ratification.[26] Here, too, there is little support for a right to abortion. As the dissents in *Dobbs* acknowledge, there is no persuasive evidence that the Fourteenth Amendment, when ratified in 1868, was intended or understood to protect a right to abortion.[27] Indeed, most states criminalized abortion at that time and continued to do so thereafter.[28]

Third, *traditionalism* allows for rights to gain constitutional protection if there is a long and widespread history or tradition of legal protection of such rights.[29] Although traditionalism and originalism often lead to similar results—because deeply-rooted traditions often date back to ratification[30]—traditionalism can allow for rights to develop after ratification if such rights are protected for a sufficiently long time.[31] But traditionalism also does not support a right to abortion because states continued to

---

currently open to finding implicit or unenumerated rights, like a right to terminate one's pregnancy).

[25] *Originalism*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/originalism (last visited Oct. 31, 2023) ("Originalism is a theory of interpreting legal texts holding that a text in law, especially the U.S. Constitution, should be interpreted as it was understood at the time of its adoption.").

[26] Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation (last visited Oct. 31, 2023) ("Originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law."); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1376 (2019) ("The original public meaning approach posits that the Constitution should be interpreted based not on the intent of its authors or enactors but on the original public meaning of the language.").

[27] *Dobbs*, 142 S. Ct. at 2323.

[28] *Id.* at 2252–53 ("By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening.").

[29] Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1129 (2020) ("When the Court interprets traditionally, it focuses on the age and endurance of particular practices rather than on an abstracted idea of tradition.").

[30] *See, e.g.*, JON O. SHIMABUKURO, CONG. RSCH. SERV., LSB10768, SUPREME COURT RULES NO CONSTITUTIONAL RIGHT TO ABORTION IN *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION* at 1–2 (2022) (referencing how the Court looked to the Fourteenth Amendment's ratification date as the key date to consider).

[31] DeGirolami, *supra* note 29 ("The older and more continuous the practice has been across time, the more powerful the argument from tradition becomes, though it never becomes an indefeasible reason for an interpretation.").

prohibit abortion well into the latter half of the twentieth century and ceased doing so primarily because of *Roe*'s intervention.[32]

Fourth, courts sometimes consider constitutionally-protected a right because a societal consensus has evolved to recognize the right.[33] This approach is sometimes included under the term *living constitutionalism*.[34] Like traditionalism, living constitutionalism can protect rights not protected at the time of ratification,[35] but, unlike traditionalism, does not require that protection of a right be deeply rooted in history;[36] an emerging consensus over recent decades may suffice.[37] *Lawrence v. Texas* reflects this approach in its recognition of the right to intimacy between consenting adults, including of the same sex.[38] Living constitutionalism also fails to support the holding in *Roe* because, at the time of *Roe*, there was no emerging consensus in favor of a right to abortion. To the contrary, although there was political movement to liberalize abortion restrictions at the time of *Roe*, its broad holding overruled abortion laws of forty-six states.[39]

Some of the foregoing approaches to constitutional interpretation play a more significant role than others to different Justices and to the Court majority during different periods.[40] Where they reach different results, the more historically-based approaches tend to reach more politically conservative outcomes on questions of

---

[32] *Dobbs*, 142 S. Ct. at 2235, 2252–53.

[33] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1259 (2019) ("[L]iving constitutionalism [i]s the view that the scope of a constitutional right is defined largely by judicial perceptions of current social mores.").

[34] *See* David A. Strauss, *The Living Constitution*, THE UNIV. OF CHI. SCH. OF L. (Sept. 27, 2010), https://www.law.uchicago.edu/news/living-constitution ("A living Constitution is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.").

[35] *See id.*; *see also* William J. Brennan, Jr., *The Constitution of the United States, Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986).

[36] *See* Strauss, *supra* note 34.

[37] *See id.*

[38] Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.").

[39] *Roe v. Wade (1973)*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/roe_v_wade_(1973) (last visited Oct. 31, 2023).

[40] *See* BRANDON J. MURRILL, CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 1 (2015) (explaining common modes of constitutional interpretation employed by Supreme Court Justices).

unenumerated fundamental rights.[41] All four approaches, however, do not lend significant support to *Roe*'s holding that a woman has a fundamental abortion right under the Due Process Clause.[42]

Even if the Court in *Roe* were justified in finding that a woman has a fundamental interest in terminating a pregnancy, that would not necessarily justify the scope of the right recognized. Many rights that receive constitutional protection are nonetheless subject to restriction when the government has a sufficiently important or compelling interest in doing so.[43] Free speech, for example, can be restricted when it would cause imminent violence,[44] and, more pertinently, parental rights may be terminated to protect a child from harm.[45] *Roe* held that a state's interest in protecting the developing life becomes sufficiently compelling to restrict abortion, absent danger to the woman's health, at the point of viability.[46] But it is difficult to see on what basis the Court could reject a state's claim that preserving the developing life is compelling before viability, absent danger to the woman's health.[47] In sum, *Roe*'s holding that a woman has a fundamental abortion right as a matter of substantive due process was debatable under conventional tools of constitutional interpretation.[48] Thus, *Dobbs*' holding that *Roe* was wrongly decided does not flagrantly deviate from the historical role of the Court.

---

41 *See* Reva B. Siegel, *Memory Games: Dobb's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L.J. 1127, 1132 (2023).

42 *See supra* text accompanying notes 19–39.

43 *Compare Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Oct. 31, 2023) (strict scrutiny, requiring a "compelling governmental interest"), *with Intermediate Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Oct. 31, 2023) (intermediate scrutiny, requiring an "important government interest (lower burden than compelling state interest required by strict scrutiny test)").

44 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that a state may forbid speech that is directed to incite or produce imminent lawless action).

45 *Grounds for Involuntary Termination of Parental Rights*, U.S. DEPT. OF HEALTH AND HUM. SERV. (July, 2021), https://www.childwelfare.gov/pubpdfs/groundtermin.pdf (discussing various grounds for the involuntary termination of parental rights to protect a child).

46 Roe v. Wade, 410 U.S. 113, 163 (1973).

47 Brief for Petitioners at 3–4, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

48 Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, THE UNIV. OF CHI. SCH. OF L. (May 15, 2013), https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit (sharing Justice Ginsburg's thoughts that the *Roe v. Wade* decision was "too far-reaching and too sweeping.").

I do take issue with *Dobbs*' approach to the respondents' claim that abortion restrictions constitute sex discrimination in violation of the Equal Protection Clause.[49] In one paragraph, the Court summarily dismissed that claim on the ground that a 1974 case held that pregnancy is not a sex-based classification.[50] That case, *Geduldig v. Aiello*, reasoned in a footnote that pregnancy divides people "into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[51] The Court in *Geduldig* thus assumed—as did the Court in *Dobbs*—that all pregnant persons are female.[52] This assumption, that not all females are or become pregnant, does not persuasively establish that pregnancy is not a sex-based characteristic or classification.[53] Indeed, Congress—with overwhelming support from both political parties—promptly reversed the Court's reasoning as it applied to statutory claims of sex discrimination under Title VII.[54] In the Pregnancy Discrimination Act of 1978, Congress provided that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions. . . ."[55]

The flawed reasoning in *Geduldig* is also illustrated by the Court's reasoning in *Hernandez v. New York*, in which the Court considered whether discrimination against Spanish speakers through peremptory challenges was necessarily discrimination against Latinos.[56] The Court concluded that Spanish speakers and Latinos were not legally equivalent because being a part of either group does not require being a part of the other group.[57] That is, not all Spanish speakers are Latino *and* not all Latinos speak Spanish. With pregnancy, by contrast, although not all people born female are or

---

[49] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022) ("[W]e briefly address one additional constitutional provision that some of the respondents' *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment's Equal Protection Clause.").

[50] *Id.* at 2245–46 ("The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'" (alteration in original) (citing Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974))).

[51] Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

[52] *Id.*

[53] *See* Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 DUKE L.J. 1532, 1533–36 (1974) (arguing pregnancy is a sex-based characteristic or classification).

[54] *See* 42 U.S.C. § 2000e (amending Title VIII of the Civil Rights Act of 1964 by adding subsection (k), which explicitly includes "pregnancy" within the terms "because of sex" or "on the basis of sex"); *see also Sex Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/sex-discrimination (last visited Oct. 31, 2023).

[55] *The Pregnancy Discrimination Act of 1978*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/pregnancy-discrimination-act-1978 (last visited Oct. 31, 2023).

[56] *See* Hernandez v. New York, 500 U.S. 352 (1991).

[57] *See id.* at 370–72.

become pregnant, all pregnant people are born female. Pregnant persons are entirely a subset of people born female.

My final criticism of *Dobbs*' holding that restricting abortion is not sex discrimination is that the Court relied, without analysis, on a briefly-reasoned precedent as the basis for its holding.[58] It is ironic, to say the least, if not hypocritical, to treat *Geduldig* as binding precedent, without further analysis, in a case in which the Court overturned the fifty-year-old, repeatedly followed, precedent of *Roe*.

To be fair, had the Court in *Dobbs* recognized restrictions on abortion as sex discrimination under the Equal Protection Clause, it would not necessarily follow that abortion restrictions were unconstitutional. As previously noted, constitutional rights can be overridden by sufficiently strong justifications. If protecting the developing life of a pregnancy is plausibly an *important* governmental interest, then abortion restrictions might properly withstand equal protection scrutiny.[59]

II. THE FUTURE OF LIBERTY

What are *Dobbs*' implications for other liberty interests currently protected under substantive due process doctrine? The Court's emphasis in *Dobbs* on deeply-rooted tradition and long-standing historical practice for recognizing a fundamental right suggests that other liberty interests not deeply rooted in history or tradition may be in jeopardy.[60] Such rights include contraception, interracial marriage, private sexual conduct between consenting adults, and same-sex marriage.[61] Given that such rights were not widely protected among the states when the Fourteenth Amendment was ratified, nor until the late twentieth and early twenty-first centuries, a concern about such rights is well founded.[62] I can only speculate, but I predict that the Court will uphold at least some of these rights and will use "off ramps" of the *Dobbs* opinion to escape the full implications of *Dobbs*' history and tradition focus.

I will take each of the four rights just mentioned in turn: contraception, interracial marriage, adult sexual intimacy, and same-sex marriage. My intuition in assessing which rights will be maintained is guided by an assumption that the Justices will uphold rights that are supported by a substantial majority of the public, including mainstream political conservatives. I assume that the Court will find legal bases to protect such rights, but not necessarily to protect rights that lack broad political support. I recognize that, by predicting that the Court will reflect center-right public

---

[58] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022).

[59] For sex discrimination to withstand constitutional scrutiny under the Equal Protection Clause, the government must prove that such discrimination "substantially" advances an "important" governmental interest. *See* United States v. Virginia, 518 U.S. 515 (1996).

[60] *See Dobbs*, 142 S. Ct. at 2257 (considering the ordered liberty analysis in only one paragraph of the Court's opinion).

[61] *See id.* at 2310.

[62] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives); *see also* Lawrence v. Texas, 539 U.S. 558 (2003) (private sexual conduct between two consenting adults); *see also* Obergefell v. Hodges, 576 U.S. 644 (2015) (same-sex marriage).

opinion, I am negating the *Dobbs* Court's insistence that it cannot give effect to public opinion.[63] I do not question the Justices' good faith when they apply their constitutional-interpretive methodologies. I believe, however, that the personal values, political ideologies, and general worldview of all Justices, shaped by their upbringing in this society, significantly influence their interpretation of asserted constitutional rights.[64]

A. Contraception

Regarding contraception, the Court is not likely to overturn the right of adults to access contraception because contraception is widely viewed as a legitimate and important reproductive interest.[65] The question, then, is on what basis might the Court uphold the right if a state tried to restrict access to contraception given that such access is not a deeply rooted tradition? First, as to contraception for married couples, the majority and several concurring Justices in *Griswold v. Connecticut* emphasized the long-standing tradition of respecting the privacy of sexual intimacy of married couples: "a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[66] The Court determined that such intimacy would be burdened by enforcing a law against the use of contraception by married couples.[67] Therefore, the Court could uphold the right of married couples to use contraception—consistent with *Dobbs*' emphasis on tradition.[68]

Relatedly, 1972 saw *Eisenstadt v. Baird* extend the right to contraception on equal protection grounds to unmarried individuals. But this is more difficult to justify by tradition.[69] *Eisenstadt* was not preceded by a deeply-rooted tradition of protecting sexual intimacy between unmarried persons or their access to contraception.[70] So, the Court might conclude that, although access to contraception does not date back to the

---

63 *See Dobbs*, 142 S. Ct. at 2239.

64 Siegel, *supra* note 41, at 1183–84.

65 Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 YALE L.J. 1025, 1042 (1983).

66 *Griswold*, 381 U.S. at 486 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is the coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred.").

67 *Id.* at 485–86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

68 *See Dobbs*, 142 S. Ct. at 2304, 2309 (Kavanaugh, J., concurring) (describing the majority's reliance on tradition, and that the *Dobbs* decision does not overrule the right in *Griswold* of married couples to use contraception).

69 *See* Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) ("[B]y providing dissimilar treatment for married and unmarried persons who are similarly situated, [the statute] violates the Equal Protection Clause of the Fourteenth Amendment.").

70 *See id.*

nineteenth century, contraception became available in most states by the mid-twentieth century[71] (although many states still had laws on the books banning its use and sale).[72] By *Griswold*, in 1965, access to contraception was widely available in every state.[73] Prosecutions in the fraction of states that still banned its use were virtually non-existent.[74] Nonetheless, I doubt the Court would find a sufficiently long-standing tradition in protecting contraception for unmarried persons to qualify as a fundamental right under *Dobbs*.

B. Stare Decisis *and Contraception*

Stare decisis provides a more likely "off ramp" for the Court to uphold the right to contraception. The Court in *Dobbs* expressed the importance of upholding precedent, but found that *Roe* should nonetheless be overturned because, among other reasons, *Roe* was "egregiously" wrong and *Casey* has been unworkable.[75] With contraception, by contrast, the Court could hold that the evolving consensus in favor of contraception, if not long enough to create constitutional protection, at least supports concluding that *Eisenstadt* was not "egregiously" wrong.[76] Furthermore, there has not been the kind of complexity over regulating contraception as compared to abortion that led the Court in *Dobbs* to view *Casey*'s, and, impliedly, *Roe*'s, holdings as "unworkable."[77] The Court could also distinguish contraception from abortion by the lack of a competing state interest in protecting developing life.[78]

Regarding the right to interracial marriage recognized in *Loving v. Virginia*, some scholars question whether *Dobbs* jeopardizes *Loving* because a right to interracial marriage is not deeply rooted in American history or tradition.[79] I do not share this

---

[71] Martha J. Bailey, *Fifty Years of Family Planning: New Evidence on the Long-Run Effects of Increasing Access to Contraception*, NAT'L LIBR. MED. 341, 360 (2013).

[72] *Id.*

[73] *Id.*

[74] David J. Garrow, *The Legal Legacy of* Griswold v. Connecticut, AM. BAR ASS'N (Apr. 01, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_spring2011/the_legal_legacy_of_griswold_v_connecticut/.

[75] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248, 2265 (2022).

[76] *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[77] *See Dobbs*, 142 S. Ct. 2228, 2265 (citing problems of "workability" with the rules that *Casey*, and, impliedly, *Roe* "imposed on the country" as supporting overruling those cases); *id.* at 2272–75 (explaining why *Casey's* "undue burden" standard was unworkable); *id.* at 2273 (quoting with approval Chief Justice Rehnquist's *Casey* dissent stating that *Casey*'s undue burden standard was no more workable than *Roe*'s trimester framework).

[78] *Id.* at 2261.

[79] *See, e.g.*, Madison Hall & Yoonji Han, *Why Experts Fear SCOTUS Overturning* Roe *Could Affect Interracial Marriage*, INSIDER (June 24, 2022, 8:45 PM), https://www.insider.com/roe-wade-loving-virginia-interracial-marriage-scotus-overturns-2022-6.

concern. The Court is very unlikely to overturn *Loving*. Widespread (though not unanimous) acceptance by American society that interracial marriage should be legal suggests the Court would rule accordingly. The Court would most likely uphold interracial marriage on equal protection grounds, however, rather than by distinguishing interracial marriage from abortion in due process terms. Although the original meaning of the Fourteenth Amendment probably allowed restrictions on interracial marriage,[80] the Court's ideological commitment to "colorblindness" would most likely lead it to invalidate restrictions on interracial marriage under the Equal Protection Clause.

A right to adult sexual intimacy would be more difficult for the Court to sustain after *Dobbs* than a right to contraception or interracial marriage. There is clearly no deeply-rooted tradition of protecting such conduct outside of marital procreative intimacy.[81] Nonetheless, my intuition is that at least a majority of the Court's Justices would not overturn this right. The Court would likely rely on *stare decisis* and hold that the decriminalization of non-procreative sex between consenting adults in a strong majority of states by the time of *Lawrence*,[82] and the lack of prosecution in states that still banned such conduct,[83] make the decision in *Lawrence* less than "egregious." That conclusion would be further buttressed by the lack of an opposing state interest in protecting developing life,[84] as abortion arguably involves.[85] There is no guarantee here, and it would not be surprising if some of the most conservative Justices would vote to overturn *Lawrence*, but I suspect that at least two moderately conservative Justices would side with the liberal Justices on this issue.

C. Same-Sex Marriage

The right to same-sex marriage, which the Court recognized in *Obergefell v. Hodges*,[86] is likewise uncertain.[87] *Dobbs* suggests that the Court would view *Obergefell* as wrongly decided.[88] Recognition of same-sex marriage is not a deeply-

---

80 *See* Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624 (1985) (arguing that in nineteenth-century America, the great majority of white Americans, North and South, believed in strict separation of the races and that interracial marriage could lead to defective children and dilution of the white race).

81 U.S. CONST. amend. XIV, § 1.

82 Riccardo Ciacci & Dario Sansone, *The Impact of Sodomy Law Repeals on Crime*, J. OF POPULATION ECON. 1, 7 (2023).

83 Lawrence v. Texas, 539 U.S. 558, 569 (2003).

84 *Id.* at 578; *see also id.* at 605 (Scalia & Thomas, JJ., dissenting).

85 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

86 Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

87 *Dobbs*, 142 S. Ct. at 2319.

88 *Id.*

rooted tradition.[89] Indeed, no state recognized such a right until 2003,[90] and many states and the federal government adopted laws *against* same-sex marriage in the late twentieth and early twenty-first centuries.[91] By the time of *Obergefell*, most states would not have recognized such marriages if not for federal judicial intervention.[92] Thus, there was no substantial, emerging consensus to protect the right.[93] The precedential weight of *Obergefell* is also undermined by its having been decided less than ten years ago and its being a 5-4 decision.[94] And, as a practical reality, the Court personnel is more conservative today by two Justices.[95]

That said, my intuition is that the Court would uphold the right to same-sex marriage, but I confess that my moral assessment of same-sex marriage may influence my prediction. My intuition is based in part on an assumption that the Justices know gay people personally, which should enable them to empathize with the unnecessary denigration and harm of denying same-sex couples the right to marry. They would also likely have observed that the legality of same-sex marriage in America for almost two decades has demonstrated that the right to same-sex marriage does not cause the harms that opponents warned of, such as undermining opposite-sex marriages or causing harm to children.[96]

---

[89] *Id.*

[90] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that Massachusetts may not deny "the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry"); *see also* Liz Seaton, *The Debate Over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 127, 136 (2004) (explaining that while *Goodridge* was decided in 2003, Massachusetts did not begin accepting marriage licenses until 2004).

[91] Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1439–40 (2012).

[92] *See Same-Sex Marriage, State by State*, PEW RSCH. CTR. (June 26, 2015), https://www.pewresearch.org/religion/2015/06/26/same-sex-marriage-state-by-state-1/.

[93] *See id.* (demonstrating the disagreement among federal circuit courts regarding the status of same-sex marriage as a constitutional right).

[94] *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

[95] April Rubin, *Supreme Court Ideology Continues to Lean Conservative, New Data Shows*, AXIOS (July 3, 2023), https://www.axios.com/2023/07/03/supreme-court-justices-political-ideology-chart.

[96] Yun Zhang et al., *Family Outcome Disparities Between Sexual Minority and Heterosexual Families: A Systematic Review and Meta-Analysis*, BMJ GLOB. HEALTH (Feb. 2023), http://dx.doi.org/10.1136/bmjgh-2022-010556 (discussing how, while there are some risk factors associated with the sexual minority experience and family functioning, generally, studies show that "children of sexual minority couples are not at a disadvantage when compared with children of heterosexual couples"); *see also* Robert Hart, *Kids Raised By Same-Sex Parents Fare Same As—Or Better Than—Kids Of Straight Couples, Research Finds*, FORBES (Mar. 6,

Here, too, the Court would have to rely on *stare decisis* to uphold same-sex marriage. Two factors may allow the Court to distinguish same-sex marriage from abortion. First, the legal landscape was more favorable to same-sex marriage by *Obergefell* than it was for abortion at the time of *Roe*.[97] Second, there is not a competing state interest in protecting developing life.[98] I also suspect that Chief Justice Roberts, although dissenting in *Obergefell*, would hesitate to rescind the right to marry for same-sex couples given the social importance of the right to marry.[99] His concurrence in *Dobbs* that would have—narrowed but not overruled *Roe*—supports this intuition.[100] Another conservative Justice would need to join Roberts and the liberal Justices to reaffirm *Obergefell*.[101] Other than Justice Thomas, the conservative Justices in *Dobbs* insisted that the decision should not be understood to apply to rights other than abortion.[102] I hope that at least two of those Justices live up to that assurance.

III. THE FUTURE OF EQUALITY

Turning to the future of equality after *Dobbs*, I begin with racial equality. Here I expect the Court will ignore the approach it espoused in *Dobbs* of looking to text, original meaning, history and tradition.[103] Instead, the Court will likely rule that state

---

2023, 6:30 PM), https://www.forbes.com/sites/roberthart/2023/03/06/kids-raised-by-same-sex-parents-fare-same-as-or-better-than-kids-of-straight-couples-research-finds/?sh=31ffa7447738.

97 *Compare* Melissa McCall, *Same-Sex Marriage Law Prior to Obergefell*, FINDLAW, https://www.findlaw.com/family/marriage/developments-in-same-sex-marriage-law.html (last visited Oct. 31, 2023) (examining extensive public support for same-sex marriage prior to *Obergefell*), *with* Anna Nawaz et al., *Women Reflect on What Life Was Like Before Roe v. Wade*, PBS (June 21, 2022, 6:30 PM), https://www.pbs.org/newshour/show/women-reflect-on-what-life-was-like-before-roe-v-wade (examining the hardships experienced by women who sought to obtain safe and legal abortions prior to *Roe*).

98 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022).

99 *Obergefell*, 576 U.S. at 686 (Roberts, J. dissenting); *see also* Laurie A. Drabble et al., *Perceived Psychosocial Impacts of Legalized Same-Sex Marriage: A Scoping Review of Sexual Minority Adults' Experiences*, PLOS ONE (May 6, 2021), https://doi.org/10.1371/journal.pone.0249125.

100 *Dobbs*, 142 S. Ct. at 2311 ("But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more.").

101 *See Obergefell*, 576 U.S. 644 (5-4 decision).

102 *See Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("As I have previously explained, 'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution.'"). *But see id.* at 2277–78 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

103 *See generally id.* at 2245 ("The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that

and federal actors can virtually never take account of race. As previously noted, that means the Court would likely reaffirm a right to interracial marriage. But the Court will also likely rule that race cannot be used to aid historically-disadvantaged racial minorities—despite that such a ruling is not supported by the textual and historical factors that the Court emphasized in *Dobbs*.[104] I believe the Court will eschew those conservative *interpretive* factors because such factors would reach an outcome inconsistent with conservative *political* views,[105] whether or not the Justices would be consciously so motivated. That is, the textual and historical factors espoused by *Dobbs* would support the constitutionality of race-based affirmative action,[106] but the Court will not follow those factors when ruling on affirmative action.

A. The Text

Beginning with text, the Fourteenth Amendment no more restricts a state's authority to engage in affirmative action than it restricts a state's authority to deny access to abortion.[107] The text does not mention race.[108] It does mention "equal protection,"[109] but, as with the term "liberty," equal protection is too open-textured to resolve whether race-conscious decision-making is constitutionally permissible.

B. Originalism

With respect to originalism, the most plausible reading of the historical record is that the Fourteenth Amendment was not intended or understood to bar all race-

---

the right is somehow implicit in the Constitutional text."); *see also id.* at 2266 ("*Roe* found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution . . . .").

104 It's important to note that the lecture that this Article reflects was delivered prior to the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) [hereinafter *SFFA*]. I have left the above-the-line text as delivered such that my references to the *SFFA* case are in the form of predictions. I will update those references in footnotes to explain what the Court subsequently did in *SFFA*. To that end, the Court did invalidate race-based affirmative action that benefited Black, Latino and Native applicants to higher education. *See id.* The Court majority barely and selectively cited evidence of original meaning and historical practice, and grossly mischaracterized precedent. *See* Forde-Mazrui 1, *supra* note 5. For an explanation of how text, original meaning, history, tradition, evolving consensus and precedent support the constitutionality of race-based affirmative action, *see infra* text accompanying notes 105 to 125; *see also* Forde-Mazrui 2, *supra* note 5.

105 *See generally Dobbs*, 142 S. Ct. at 2265 (interpreting the Fourteenth Amendment using textual and historical factors).

106 *See supra* Part III.

107 *See* U.S. CONST. amend. XIV (making no explicit reference to affirmative action or abortion in the text of the Fourteenth Amendment).

108 *See id.*

109 *See id.*

conscious state decision-making. The original meaning of the Fourteenth Amendment is not "color blind." As scholars have documented, the federal government during Reconstruction enacted race-based programs for the benefit of Black people, not just former enslaved persons.[110] As scholars have also documented, most states continued to segregate schoolchildren by race.[111]

What scholars have paid less attention to is state-college admissions, the precise issue currently before the Court.[112] Every state in the South, following the adoption of the Fourteenth Amendment, continued to exclude Black people from all flagship and most other universities,[113] limiting the opportunity for Black people to seek higher education to less-resourced and less educationally-comprehensive "negro" colleges.[114]

The federal government knowingly acquiesced in this practice. First, the Reconstruction Congress left education out of civil-rights laws that prohibited discrimination in other contexts, such as property ownership, contracting, access to courts and access to public-serving businesses.[115] Second, Congress repeatedly considered whether to condition federal funding for land-grant colleges on such colleges admitting Black people on a nondiscriminatory basis, but it declined to do so.[116] Eventually, in 1890, Congress imposed a condition of federal funding—but only that states which exclude Black people from colleges must have alternative opportunities for Black students in higher education.[117] Thus, both the states and the federal government viewed the Fourteenth Amendment as permitting states to

---

110 *See, e.g.*, Michael A. Turner, *Should Race be a Factor in Law School Admissions? A Study of* Hopwood v. Texas *and How the Equal Protection Clause Makes Race-Based Classifications Unconstitutional*, 27 U. BALT. L. REV. 395, 402 (1998).

111 Hayden Smith, *Separating the Wheat from the Tares: The Supreme Court's Premature Strict Scrutiny of Race-Based Remedial Measures in Public Education*, 2019 B.Y.U. EDUC. & L.J. 95, 102 (2019); *see, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 487–88 (1954).

112 *See supra* note 4 (discussing the outcome of *SFFA*).

113 David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. OF EDUC. 236, 239 (1986).

114 *See id.* at 239–40.

115 *See id.* at 239; 42 U.S.C. § 1981 (originally enacted as Act of April 9, 1866, c. 31, §1, 14 Stat. 27).

116 *See, e.g.*, Second Morrill Act of 1890, 7 U.S.C. § 321 (1890).

117 *Id.* ("*Provided*, That no money shall be paid out under this act to any State or Territory for the support and maintenance of a college where a distinction of race or color is made in the admission of students, but the establishment and maintenance of such colleges separately for white and colored students shall be held to be a compliance with the provisions of this act if funds are received in such State or Territory be equitably divided as hereinafter set forth . . . .").

segregate adults by race in higher education, relegating Black people to materially and academically inferior schools.[118]

Additional, corroborating evidence that originalism supports affirmative action is that conservative Justices who have espoused originalism, such as Justices Scalia and Thomas, have never attempted a credible, originalist argument against race-based affirmative action.[119] These Justices have nonetheless always voted against affirmative action on constitutional grounds, and the current conservative majority, many of whom espouse originalism, will likely invalidate all race-based affirmative action by the end of this term.[120]

C. Traditionalism

Traditionalism also supports affirmative action but, again, I do not expect the Court to acknowledge fully the relevant history. State exclusion of Black people from the best quality schools of higher education is a deeply-rooted tradition of American society, one that only ended because of Supreme Court intervention in the second half of the twentieth century.[121] The tradition of race-conscious admissions by public colleges has continued since the 1970s, although the beneficiaries have become racial minorities.[122]

---

[118] *See* Gil Kujovich, *Desegregation in Higher Education: The Limits of a Judicial Remedy*, 44 BUFF. L. REV. 1, 23 (1996).

[119] The reader should be informed that in *SFFA*, Justice Thomas finally made an originalist argument against race-based affirmative action despite having issued numerous opinions in prior affirmative action cases over decades. *See SFFA*, 143 S. Ct. 2141, 2177 (Thomas, J., concurring) (stating that he has repeatedly over decades written that *Grutter v. Bollinger* was wrongly decided, and stating that he would now offer an originalist defense of that position). For reasons beyond the scope of this lecture to explain, his argument in *SFFA* is oversimplistic, inaccurate, and analytically weak. For a brief explanation, see Kim Forde-Mazrui 1, *supra* note 5. For the point that Justice Thomas and Scalia have failed to make an originalist argument for their stance against affirmative action (until Justice Thomas in *SFFA*), see, e.g., Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 81 (2013) ("Justice Thomas, like Justice Scalia, has not made a serious effort to show that the colorblindness approach is consistent with the original meaning."); ERWIN CHEMERINKSY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 164 (2023) (excerpt available at https://yalebooks.yale.edu/2023/06/22/the-dangerous-fallacy-of-originalism/) (observing that Justices Scalia and Thomas "make no effort to justify their opposition to affirmative action in originalist terms because it can't plausibly be done."); ERIC J. SEGALL, ORIGINALISM AS FAITH 128 (2018) ("Neither Justice Scalia nor Justice Thomas addressed this specific history or even the original meaning of the Fourteenth Amendment as applied to limited racial preferences.").

[120] The reader should be informed that in *SFFA*, the Court invalidated race-based affirmative action at two schools of higher education under reasoning that would make it virtually impossible for any institution to engage in race-based affirmative action. *See SFFA*, 143 S. Ct. 2141. For further observations about *SFFA*, see *supra* note 5.

[121] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[122] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

Although living constitutionalism based on evolving consensus is of limited relevance to the current Court majority, there is no substantial consensus in America that affirmative action should be illegal.[123] Rather, like the debate over abortion, the matter is intensely politically controversial with substantial support on both sides of the issue.[124] Moreover, most states and the federal government allow affirmative action, which further undermines any claim that there is a contemporary consensus *against* affirmative action.[125]

D. Stare Decisis *and Race-Based Affirmative Action*

Finally, regarding race, consider *stare decisis*. The Supreme Court has repeatedly upheld the constitutionality of some race-based affirmative action since 1978.[126] Although, as *Dobbs* illustrates,[127] the Court is willing to overturn precedent if the Justices' first principles of interpretation suggest the precedent is seriously flawed.[128] And here, those principles support affirmative action. Accordingly, precedent should give additional weight to preserving the constitutionality of race-based affirmative action.

Before concluding, I offer a few observations about the future of equality based on sex, sexual orientation and gender identity.

E. Sex-Based Equality

With respect to sex, I believe the Court will leave in place current doctrine that restricts most government-sponsored sex discrimination but allows some distinctions based on sex when they benefit women or separate the sexes for privacy purposes.[129] I predict this notwithstanding that a focus on original meaning, history and tradition, as reflected in *Dobbs*, could undermine constitutional protections against sex

---

123 *See, e.g.*, *What Americans Think About Affirmative Action in College Admissions*, PBS NEWSHOUR (June 29, 2023, 10:32 PM), https://www.pbs.org/newshour/nation/what-americans-think-about-affirmative-action-in-college-admissions.

124 *Compare* Leah Shafer, *The Case for Affirmative Action*, HARV. GRADUATE SCH. OF EDUC. (July 11, 2018), https://www.gse.harvard.edu/news/uk/18/07/case-affirmative-action, *with* David Sacks & Peter Thiel, *The Case Against Affirmative Action*, STAN. MAG. (Sept./Oct. 1996), https://stanfordmag.org/contents/the-case-against-affirmative-action.

125 The reader should be aware that the Court, in *SFFA*, 143 S. Ct. 2141 (2023), invalidated virtually all race-based affirmative action in higher education nationwide. That does not, however, undermine the point I am making above the line. My point is that federal legislation and the laws of most states do not ban affirmative action and, therefore, there is no political consensus in the United States that affirmative action is unacceptable. The Court's invalidation of affirmative action in *SFFA* is thus not justified by tradition or evolving consensus.

126 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).

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

128 *Id.* at 2242–43.

129 *See, e.g.*, Rod Paige, *Guidelines Regarding Single Sex Classes and Schools*, U.S. DEP'T OF EDUC. (May 3, 2002), https://www2.ed.gov/about/offices/list/ocr/t9-guidelines-ss.html.

discrimination. As before, I am speculating about the personal and political values of the swing justices on the Court, which I expect are comfortable with current equal protection doctrine regarding sex.

F. Sex-Orientation and Gender-Identity Equality

With respect to sexual orientation and gender identity, I believe the Court will resist increasing protections for LGBTQ+ people. The Court has already recognized some constitutional rights for gays and lesbians,[130] which I suspect will be left in place with the caveat that the Court will likely require accommodations in some contexts for people opposed to gay rights on religious grounds.[131]

An interesting question is whether the Court will evaluate discrimination based on sexual orientation and gender identity as sex discrimination? It did so when interpreting Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment.[132] In *Bostock v. Clayton County*, the Court, written by conservative Justice Gorsuch and joined by Chief Justice Roberts, held that discrimination based on sexual orientation or gender identity necessarily involves discrimination based on sex.[133] Were the Court to interpret sexual orientation and gender identity under the Equal Protection Clause in a comparable manner, it should apply the intermediate scrutiny it applies to sex discrimination to discrimination on these bases.[134]

I suspect, however, that the Court will find a way to avoid that result because it is inconsistent with politically conservative views. Strong equality protections based on sexual orientation and, especially, gender identity are resisted by many political

---

130 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 675 (2015); *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020) (recognizing statutorily-based rights for gays and lesbians).

131 The reader should note that, subsequent to this lecture, the Court held that a marriage-website creator has a First Amendment right to refuse to make a custom wedding website for same-sex couples. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023). The Court did not hold that the website creator's religious beliefs would be abridged, but rather that her right to free expression would be violated by requiring her to make a custom website. I anticipate that, in cases not involving free expression, the Court will hold that sometimes a business can refuse service to gays and lesbians based on the right to free exercise of religion under the First Amendment. Such an argument was made by a cake maker in *Masterpiece Cakeshop*. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018). Although the Court ruled in the cake maker's favor, the Court did so narrowly on the ground that the state civil rights commission had exhibited animus toward the cake maker's religion rather than because the cake maker had a free-exercise right to refuse to make a wedding cake for a same-sex couple. *Id.*

132 *Bostock*, 140 S. Ct. 1731.

133 *Id.* at 1737.

134 *See* United States v. Virginia, 518 U.S. 515, 568 (1996).

conservatives.[135] Because Title VII expressly prohibits "sex" discrimination[136] may have encouraged the textualist leanings of Justice Gorsuch to apply the Title VII literally.[137] But the Equal Protection Clause is more open textured and does not use the term "sex."[138] So, I suspect the Court will find a way to limit the protection of the Equal Protection Clause to more traditional forms of sex discrimination not involving sexual orientation and gender identity.[139]

IV. CONCLUSION

Dobbs is certainly an important decision that has potentially significant and harmful implications for reproductive rights and for both liberty and equality generally. The decision was not inevitable as the Court could legitimately have reaffirmed *Roe* both as a matter of *stare decisis* and, arguably, as a matter of equal protection.[140] I have argued, however, that *Dobbs* is not as radical or unprincipled as some on the Left have claimed[141] as its holding that *Roe* was wrongly decided is within the bounds of conventional constitutional interpretation. I have also suggested that—although the case potentially endangers important liberty interests that the Court has protected, such as contraception, interracial marriage, adult sexual intimacy and same-sex marriage[142]—I believe the Court will uphold at least some of those rights by distinguishing them from abortion and relying on *stare decisis*.

With respect to equality, *Dobbs* is unlikely to have a significant impact with respect to race and sex discrimination. Indeed, the Court will likely decide race cases under a methodology inconsistent with the historical approach taken in *Dobbs*, such as by invalidating race-based affirmative action. The Court will likewise eschew original meaning, history and tradition with respect to sex, maintaining the doctrinal status quo. For sexual orientation and gender identity, the Court's emphasis in *Dobbs* on original meaning, history and tradition[143] will likely be used to limit further protections for LGBTQ+ people. Ultimately, the future direction of liberty and

---

135 *See, e.g.*, Emily Newburger, *Conservative Backlash Threatens Global Gender Justice Efforts*, HARV. L. TODAY (Dec. 7, 2021), https://hls.harvard.edu/today/conservative-backlash-threatens-global-gender-justice-efforts/.

136 42 U.S.C. § 2000e-2.

137 *See Bostock*, 140 S. Ct. at 1741.

138 *See* U.S. CONST. amend. XIV.

139 Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1308 (2012).

140 *See supra* Part I.

141 *See supra* Part I; *Abortion Access*, *supra* note 15.

142 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2319 (2022).

143 *Id.* at 2242–43.

equality will depend less on *Dobbs* and more on the moral and political views of the swing Justices.