OBERGEFELL AFTER *DOBBS* AND THE FUTURE OF SUBSTANTIVE DUE PROCESS

Nicholas Serafin[*]

INTRODUCTION

What is the future of substantive due process? And what of the fundamental rights that the Supreme Court has recognized under this doctrine? *Dobbs v. Jackson Women's Health Organization* has generated widespread uncertainty among legal observers regarding the answers to these two questions. Such uncertainty is well founded. The decision itself—which Chief Justice Roberts described as dealing "a serious jolt to the legal system"—signaled a willingness to upend settled substantive due process precedent regardless of public opinion and regardless of the effect such a decision would have on related state and federal law, not to mention the lives of women and pregnant persons.[1] And there are signs that the Court will go further still. In his concurring opinion, Justice Thomas called for the Court "in future cases" to "reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*," suggesting that *Dobbs* is merely the first step in a dramatic overhaul of fundamental rights landscape.[2]

Some scholars argue that after *Dobbs*, much, perhaps all, of the substantive due process canon is at risk of being overturned. According to James Fleming and Linda McClain, for example, "if the Court applies Justice Alito's approach" in *Dobbs* consistently "it will conclude that all of the due process decisions protecting personal autonomy and bodily integrity" must be overturned, including those protecting access to contraception and interracial marriage.[3] For Fleming and McClain, if the Court refrains from overturning these other precedents it will be for idiosyncratic "political judgments . . . not because of any principled legal framework."[4]

Others, however, have argued that the reasoning in *Dobbs* does not pose a wider threat to other substantive due process precedents. According to law professor and former Human Rights Campaign legal director Robin Maril, "a faithful application of the *Dobbs* standard . . . should leave the

---

[*]I would like to extend my sincere gratitude to the Chase Law and the editors of the Northern Kentucky Law Review Journal.

[1] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 357 (2022).

[2] *Id.* at 332 (Thomas, J., concurring).

[3] Linda C. McClain & James E. Fleming, *Ordered Liberty After Dobbs,* 35 J. AM. ACAD. MATRIM. L. 624, 632 (2023).

[4] *Id.*

rights recognized by [*Lawrence* and *Obergefell*] undisturbed."[5] To Maril, while *Roe* was based on the recognition of a fundamental privacy interest in receiving an abortion, the right to same-sex marriage is based on "interlocking liberty and equality interests."[6] Moreover, abortion involves "third-party considerations," such as concern for "fetal life," that are not implicated by same sex marriage.[7] Thus, from Maril's point of view, a decision to overrule *Lawrence* and *Obergefell* would be driven by "political forces," not the logic of the *Dobbs* opinion itself.[8]

In this Article, I argue that *Dobbs* poses a grave threat to *Obergefell*. More precisely, as I argue in Part 1.A., the arguments advanced in *Dobbs*, and in the recent marriage law case *Department of State v. Munoz*, are straightforwardly incompatible with retaining *Obergefell*. I thus expect that the Court will overturn *Obergefell* or dramatically limit its holding. However, I do not maintain that *all* of the Court's fundamental rights decisions are at risk of being overturned. Nor do I argue that the Court would be acting hypocritically or extra-legally if it does not revisit other fundamental rights, like the right to interracial marriage.

In my view, *Dobbs* is not a frontal assault on the entirety of substantive due process doctrine. As I argue in Parts I.B. and I.C., *Dobbs* is best understood as motivated by neo-traditionalism, a religious conservative legal movement that arose primarily in response to *Roe v. Wade*. Neo-traditionalists have long objected to what I call the Court's "sexual autonomy" jurisprudence, by which I mean roughly *Griswold*, *Eisenstadt*, *Roe*, *Casey*, *Lawrence*, and *Obergefell*. These cases all provided for greater individual autonomy with respect to intimate sexual decisions; they defended a pluralistic approach to sexual ethics; and they protected the rights of sexual minorities to appear in public as equals. While I do not believe that the entirety of the Court's sexual autonomy jurisprudence is at risk of reversal, reading *Dobbs* through the lens of neo-traditionalism allows us to anticipate how the Court will seek to change sexual autonomy caselaw going forward. In short, I expect the Court to rule in ways that privilege or elevate traditional, heterosexual, childbearing marriages; and I expect the Court to find ways to limit individual sexual autonomy. In the Conclusion, I offer some thoughts on how legal scholars can defend substantive due process against this resurgent neo-traditionalist movement.

---

[5] Robin Maril, *Queer Rights After Dobbs v. Jackson Women's Health Organization*, 60 SAN DIEGO L. REV. 45, 106 (2023).
[6] *Id.* at 49.
[7] *Id.* at 80.
[8] *Id.* at 48.

I. *OBERGEFELL* AFTER *DOBBS*

In this Section, I argue that *Dobbs*' primary doctrinal arguments are straightforwardly incompatible with retaining *Obergefell*. My argument is that the Court, if it follows these arguments to their logical conclusion, will either overturn *Obergefell* or will severely undermine same-sex marriage; that is, if the Court does not overturn *Obergefell*, it will determine that married gay couples do not possess the same set of marital and familial rights as are possessed by married straight couples. In Part I.A. I discuss *Dobbs*' history and tradition test for identifying fundamental rights, and I demonstrate that the Court now applies this test in its analysis of the fundamental right to marry. I then argue that this test is incompatible with recognizing same-sex marriage rights. In Parts I.B. and I.C. I argue that *Dobbs* should be understood as motivated by neo-traditionalism, a religious conservative movement that seeks to establish heterosexual, childbearing marriage as a privileged legal and social status.

A. Dobbs as Doctrine

I begin by briefly discussing the history and tradition test as set forth in *Dobbs*. This discussion will be brief because, in my view, there is simply no plausible argument that *Dobbs*' history and tradition analysis, applied to the question of same-sex marriage, could vindicate *Obergefell*'s main arguments and holding. In short, the *Dobbs* majority examines the historical record in search of a tradition of recognizing the right to an abortion. Finding no such tradition, the *Dobbs* Court concludes that abortion is not a fundamental right. If the *Dobbs* Court is presented with a challenge to *Obergefell*, it is committed to using the same history and tradition test. Indeed, the Court has recently indicated that *Dobbs*' history and tradition test is the controlling test for analyzing the fundamental right to marriage going forward, effectively foreclosing a return to the form of analysis that resulted in the recognition of same-sex marriage.[9] Under this test, the Court must look to the historical record in search of a tradition of recognizing same-sex marriage rights. There is no such record, because, prior to the late 20th century, same-sex marriage rights were not recognized. There is thus, after *Dobbs*, no basis for a fundamental right to same-sex marriage.

Hence, the real issue governing *Obergefell*'s fate is that of *stare decisis*. Yet I am doubtful that *stare decisis* considerations will be sufficient to save *Obergefell*. As a general matter, *stare decisis* has little restraining effect upon justices intent on overturning precedent.[10] Moreover, *Dobbs*' account of *stare decisis* includes several considerations that will aid justices intent

[9] *See* discussion of *State v. Munoz*, *infra* pp. 7-10.
[10] *See* discussion *infra* Part I.B.

upon overturning or undermining *Obergefell*. In short, *Dobbs*' account of *stare decisis* invites justices to revisit cases that, in their view, erroneously decided controversial moral questions; it affords relatively greater weight to traditionalist objections to the Court's sexual autonomy jurisprudence; and it rejects as legally irrelevant the reliance interests to which *Obergefell* gave rise. In the hands of traditionalist justices, these criteria almost certainly weigh strongly in favor of overturning *Obergefell*.

To be sure, not all of the criteria set forth in *Dobbs* equally weigh in favor of overturning *Obergefell*, and some legal scholars have proposed arguments for retaining *Obergefell* that are meant to be responsive to *Dobbs*' account of *stare decisis*.[11] As I argue below, however, these arguments are inconclusive. I thus conclude that, in light of *Dobbs*' account of *stare decisis*, we should assume that the Court will overturn *Obergefell* or, at the very least, we should expect the Court to undermine *Obergefell*, with an eye toward overturning it eventually.

i. The History and Tradition Test(s)

In its substantive due process jurisprudence, the Court has long looked to history and tradition in order to identify fundamental rights. Yet the Court has not been consistent in its application of this history and tradition test. Indeed, it is more apt to think of the Court as oscillating between two history and tradition tests. As James Fleming and Linda McClain have observed, one version of the history and tradition test stems from Justice Harlan's dissent in *Poe v. Ullman*. Under Harlan's history and tradition test, history is treated as a source of evidence, but it is not necessarily determinative of which rights the Court should recognize as fundamental.[12] By contrast, the second, narrower history and tradition test is derived from Chief Justice Rehnquist's opinion in *Washington v. Glucksberg*. The *Glucksberg* test calls for a two-step inquiry: first, the asserted fundamental liberty interest must be "carefully described;" second, the Court must examine the historical record to determine whether the asserted liberty interest is "objectively, deeply rooted in this Nation's history and tradition."[13]

Much of the Court's sexual autonomy jurisprudence is based on the first version of the history and tradition test. Indeed, *Obergefell*, like *Casey* before it, drew its history and tradition analysis from Justice Harlan's

---

[11] *See* William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 687, 760 (2023).
[12] McClain & Fleming, *supra* note 3, at 632 ("Harlan made clear that elaborating the "rational continuum" of ordered liberty had "regard to what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke," in short, "that tradition is a living thing.").
[13] Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

dissent in *Poe*.[14] This looser reliance on history and tradition permitted the majority to make three crucial moves with respect to the history of marriage law. First, the lack of any historical recognition of or protection for same-sex marriage was not treated as determinative. As Justice Kennedy wrote, while "[h]istory and tradition guide and discipline this inquiry" they "do not set its outer boundaries."[15] Second, to the extent that there was a history and tradition of imposing legal burdens on gays and lesbians, this history could be rejected as discriminatory; it was thus an inappropriate basis for judicial decision-making.[16] Third, faced with no history of protection for same-sex marriage, the Court could simply ascend to a higher level of generality and lean on arguments about the historical importance of marriage, understood as a "two person union."[17] This helped the *Obergefell* majority to at least rhetorically evade the objections raised by the dissents; namely, that substantive due process protects rights that have been traditionally recognized at law, and there was simply no historical recognition of same-sex marriage before the late 20th century.

By contrast, *Dobbs* not only adopted the narrower historical test from *Glucksberg* for identifying fundamental rights, but it also established the *Glucksberg* test as the controlling test going forward, implicitly overruling the sexual autonomy cases on this point.[18] Under the *Dobbs* test, the Court will first describe the right in question in highly specific terms. The Court will then ask whether that right is "objectively, deeply rooted in this Nation's history and tradition," looking to historical evidence indicating that the purported right was recognized and protected in positive law.[19] In *Dobbs*, the majority found no history or tradition of legal protection for a right to an abortion, and thus held that no such fundamental right existed.[20] The analogous problem for same-sex marriage is obvious. There is simply no plausible historical argument that at any point in American history prior to the 21st century same-sex marriage was recognized or protected in positive law.

There are, of course, many compelling criticisms of the *Glucksberg* test. It relies on and ratifies a set of historical traditions created under conditions of widespread group inequality;[21] it is inconsistently applied in ways that favor politically conservative outcomes;[22] it is most fervently embraced by

---

[14] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
[15] Obergefell v. Hodges, 576 U.S. 644, 664 (2015).
[16] *Id.* at 671.
[17] *Id.* at 657, 666.
[18] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 260 (2022).
[19] *See id.* at 239.
[20] *Id.* at 240.
[21] *See* Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L. J. FORUM 946 (2024).
[22] *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023).

justices seeking to reverse the expansion of modern substantive due process rights.[23] While I think all of these criticisms have merit, the inescapable fact is that the current Court now views the *Glucksberg* test as controlling for analyzing substantive due process rights, and this test straightforwardly rules out protection for same-sex marriage rights.[24]

That the Court will apply the *Glucksberg* test to the right to marriage was confirmed in the 2024 case *Department of State v. Munoz*. In *Munoz*, United States citizen Sandra Munoz sought to obtain an immigrant visa for her non-citizen spouse, Luis Ascencio-Cordero.[25] After a consular interview in his home country of El Salvador, however, Ascencio-Cordero was denied a visa on grounds relating to crime and national security.[26] It would later come to light that the consular official rejected Ascencio-Cordero's application after assessing that he was affiliated with the transnational criminal gang MS-13, an assessment based on Ascencio-Cordero's tattoos, which included Catholic iconography and a portrait of Sigmund Freud.[27] While ordinarily consular officials are required to disclose the reasons for a determination of inadmissibility, no such disclosure is required when the determination is due to reasons of national security.[28] Munoz sued the Department of State, among other state actors, arguing that the failure to disclose the reasons for Ascencio-Cordero's inadmissibility infringed upon her fundamental right to marriage.[29]

The Court not only rejected Munoz's claim, but it did so in a way that bodes particularly ill for same-sex marriage. There are, to be sure, some distinctive factors at work in *Munoz* relative to a hypothetical future case challenging same-sex marriage rights. For example, as the *Munoz* majority points out, Congress has plenary authority over immigration criteria, which includes plenary authority over the terms of admission for non-citizen spouses.[30] Yet the Court's decision is not driven merely by deference to Congress's plenary power over immigration criteria. Rather, the majority argues that Munoz's argument "fails at the threshold" because she failed to establish her initial claim regarding her fundamental right to marry.[31] Most importantly, in assessing Munoz's initial claim, the *Munoz* Court confirms that *Glucksberg*'s history and tradition test is now the doctrinal test for analyzing marriage rights claims.[32] Moreover, as the *Munoz* majority's

---

[23] *See* Fleming & McClain, *supra* note 3.
[24] *Dobbs,* 597 U.S. at 231.
[25] Dep't of State v. Munoz, 602 U.S. 899, 902 (2024).
[26] *Id.*
[27] *Id.* at 928-29.
[28] *Id.* at 902.
[29] *Id.* at 905-06, 910.
[30] *Id.* at 912.
[31] *Munoz*, 602 U.S. at 903.
[32] *Id.* at 910.

analysis reveals, this test is straightforwardly incompatible with recognizing same-sex marriage rights.

The majority's analysis begins with a citation to *Glucksberg* for the proposition that the Fifth Amendment Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests."[33] The majority then turns to the first step of the two-part *Glucksberg* history and tradition test, which calls for a "careful description of the asserted fundamental liberty interest."[34] According to the majority, Munoz was not simply asserting a fundamental liberty interest in marrying; rather, her liberty interest, carefully described, is the narrower interest in "*resid[ing] with her noncitizen spouse in the United States*."[35] To establish this liberty interest as a fundamental right, the majority argues, Munoz must be able to demonstrate that the right to reside with one's noncitizen spouse within the United States is "deeply rooted in this Nation's history and tradition."[36] This, the Court held, Munoz could not do because "the through line of history is recognition of the Government's sovereign authority to set the terms governing the admission and exclusion of noncitizens," and Munoz offered no evidence of "a subsidiary tradition that curbs this authority in the case of noncitizen spouses."[37]

It is tempting to read the *Munoz* decision as driven solely by the Court's deference to Congress's plenary authority over immigration criteria. Yet it is important to see that this is not actually the majority's rationale. Ultimately what is driving the majority's analysis is the *Glucksberg* history and tradition test. The history of Congressional authority over immigration criteria is being cited *as evidence* of how the law has traditionally construed the right to marry. Because there is no evidence of a tradition of recognizing a right to reside with one's noncitizen spouse within the United States, the majority reasons, there is no basis for a corresponding fundamental right.

The dissent's opening citation to *Obergefell*, and its citation to *Dobbs*' reassurance that no other substantive due process rights were at risk, is surely intended to make clear the significance of *Munoz* for same-sex marriage claims.[38] As the dissent points out, *Munoz* will fall harder on same-sex couples, since many countries still ban same-sex marriage. If, for example, Munoz and Ascencio-Cordero were a same-sex couple, not only would they be barred from living together in the United States, but they

---

[33] *Id.* at 909-10.
[34] *Id.* at 910.
[35] *Id.*
[36] *Id.* at 909.
[37] *Munoz*, 602 U.S. at 911-12.
[38] *Id.* at 920 (Sotomayor, J., dissenting).

would also not have the option of living together as a married couple in El Salvador.

Yet while this is unfair to same-sex couples in which one partner is a non-citizen, *Munoz* ultimately threatens to undermine the right to marriage for all same-sex couples. The threat comes from the fact that, even though narrower grounds for a decision were available, the *Munoz* majority bases its decision on *Glucksberg*'s history and tradition test, thereby establishing *Glucksberg* as the controlling test for evaluating marriage rights claims. And the *Glucksberg* test simply forecloses some of the key argumentative moves that yielded the outcome in *Obergefell*.

For example, in light of *Glucksberg*'s requirement that a purported fundamental right be based on a "careful description of the asserted fundamental liberty interest," presumably future courts will take a similarly narrow approach to describing the liberty interest underlying the right to same-sex marriage. After *Munoz*, claims to same-sex marriage rights, or to associated rights like adoption, will be assessed more narrowly, as rights to *same-sex* marriage or rights to adoption by *same-sex* couples. Additionally, the *Glucksberg* test requires justices to examine the historical record in search of legal recognition of the liberty interest at issue. The *Glucksberg* test does not grant justices the discretion to disregard the historical record or dismiss traditional practices as mere prejudice. Justices applying the *Glucksberg* test will be bound by what the historical record reveals regarding recognition of or protection for same-sex marriage rights. Because there is simply no historical record or tradition of protection for same-sex marriage rights, same sex marriage claims will fail.

ii. Stare decisis

To sum up the argument thus far: *Dobbs* confirmed that, in its substantive due process jurisprudence, the Court now relies on *Glucksberg*'s two-part history and tradition test. *Munoz* then confirms that the Court will apply the *Glucksberg* test to the fundamental right to marriage. If it is consistent, the Court will also apply the *Glucksberg* test in future cases involving the rights of married same-sex couples. But there is no history or tradition of recognizing same-sex marriage rights; at least, not a tradition of sufficient vintage to satisfy this Court. Thus, if the Court applies *Glucksberg* to a future case involving same-sex marriage rights, consistency with *Dobbs* and *Munoz* precludes the Court from recognizing a right to same-sex marriage.

If this is correct, then the longevity of *Obergefell* as precedent will turn on considerations of *stare decisis*. Yet here as well, the news is grim. There are two general problems. First, as a general matter, *stare decisis* poses no serious barrier to Court majorities intent upon overturning past precedents.

Indeed, as William Baude has argued, *stare decisis* grants justices a surprising amount of discretion.[39] Second, *Dobbs* has articulated criteria for overturning past precedent that are amenable to justices intent on overturning *Obergefell*. Indeed, given the flexibility of *stare decisis* criteria, justices seeking to overturn or limit *Obergefell* will be able to advance a number of arguments that are consistent with the *stare decisis* criteria established in *Dobbs*. In this Part, I will layout these arguments. My point is to demonstrate not that the case for overturning *Obergefell* is legally sound; rather, it is to demonstrate that considerations of *stare decisis* are likely not sufficient to deter justices who believe the Court erred by recognizing same-sex marriage.

Stare decisis grants justices enormous discretion over how, why, and when to overturn past precedent. Justices retain tremendous discretion over whether to characterize a past precedent as erroneous, whether to revisit an erroneous precedent and, most importantly, how to resolve a case involving an erroneous precedent.[40] Originalist Justices are hardly immune to this discretion, sometimes citing history as justification for overturning doctrine, other times citing doctrine as justification for disregarding history.[41] Baude's analysis of precedent was published prior to *Dobbs* and, in his estimation, whether the Court would decide to extend *Roe* or overrule it reflected the "arbitrary, nonlegal discretion" that modern *stare decisis* has made available to the Court.[42] Of course, the arbitrariness inherent in the decision to overrule *Roe* ultimately did not dissuade the Court from doing so. There is thus little reason to think that the principle of *stare decisis* will act as a restraint upon justices determined to overturn *Obergefell*.

At the same time, the *Dobbs* opinion contains extended reflections on the nature of *stare decisis* and the justifications for overturning past precedent. And there are some genuine differences between the reliance interests at stake in abortion and those at state in same-sex marriage; differences that, some legal scholars have argued, distinguish *Obergefell* from *Roe*.[43] Thus, it is worth considering whether these considerations would be sufficient to prevent a future Court from overturning *Obergefell*. As I argue in this Part, the answer to this question, at least for the *Dobbs* majority, is almost certainly 'no.'

Dobbs sets forth five criteria for overturning erroneous precedent: the quality of the reasoning; the nature of the error; the effect on other areas of

---

[39] William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 334 (arguing that modern *stare decisis* doctrine "introduces elements of the arbitrary discretion it was once meant to constrain").
[40] *Id.* at 320-24.
[41] *Id.* at 319.
[42] *Id.* at 333.
[43] *See* Eskridge Jr., *supra* note 11, at 760.

law; the precedent's workability; and finally, the reliance interests at stake. Additionally, individual justices have put forward their own theories of *stare decisis*, some of which include other criteria or other considerations regarding whether a decision should be overturned.[44] Nonetheless, while I will occasionally note how different justices might approach the problem, I will primarily apply the *Dobbs* criteria, as *Dobbs* is the most significant recent precedent dealing with *stare decisis*.

Additionally, I will attempt to offer a reconstruction of how justices opposed to *Obergefell* likely view *stare decisis*. Thus, I will draw largely upon *Obergefell*'s dissenting opinions, especially those authored by Justices Roberts, Alito, and Thomas. As I will argue below, four out of the five *Dobbs* criteria, as construed by the Court's conservative justices, strongly weigh in favor of overturning *Obergefell*, and the remaining fifth criterion only weakly supports retaining *Obergefell*. While there is no clearly defined formula or threshold for determining when there are enough reasons for overturning a past precedent, I suspect that the threshold has almost certainly been met for the Court's conservative justices, many of whom have repeatedly and strongly denounced the legal recognition of same-sex marriage.

The Quality of the Reasoning. According to traditional *stare decisis* criteria, an initial condition for overturning a precedent is that the precedent's reasoning must be "demonstrably erroneous."[45] While Justice Thomas is the only justice among the *Dobbs* majority to explicitly reference the demonstrably erroneous standard, the majority is plainly united in viewing the quality of the reasoning in *Roe* and *Casey* as deeply compromised. Yet there is no clear standard for just how erroneous a past decision must be, and in what ways; nor is there a clear rule regarding whether a justice *must* overrule an erroneous precedent. Justice Thomas maintains in his *Dobbs* concurrence that justices have not just the discretion to overturn erroneous precedents but an affirmative *duty* to do so.[46] In public remarks Justice Alito has suggested something similar, albeit in slightly less categorical terms.[47] The discussion of several other criteria in the *Dobbs* majority opinion indicates that, for the remaining justices,

---

[44] *See* Baude, *supra* note 39, at 313-14 (discussing Justice Thomas's and Justice Alito's differing views on revisiting precedent).
[45] Ramos v. Louisiana, 590 U.S. 83, 133-34 (2020).
[46] Dobbs v. Jackson Women's Health Org., 597 U.S. 2[1]5, 332 (2022) (Thomas, J., concurring).
[47] Adam J. White, *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33, 55 (2009) ("[I]f the Court has gone down a wrong path and the wrong path is creating bad consequences then what the Court should do is say, 'Well, we made a mistake. We took a wrong turn. We're going to go back and correct the mistake.'").

erroneous reasoning is only the first among several criteria that must be met in order to overcome *stare decisis*.

With respect to the kinds of errors that render a precedent infirm, here, too, there is no consensus account. Nonetheless, it seems likely that, for the *Dobbs* majority, the weaknesses that (in their view) characterize *Roe* and *Casey* arguably apply to *Obergefell* with equal force. For example, according to the majority, *Roe* and *Casey* lacked "any grounding in the constitutional text, history, or precedent" and usurped the role of state legislatures in balancing the competing interests at stake.[48] Concerning history, as I noted above, there is plainly no history of protection for same-sex marriage rights. Regarding constitutional text, despite occasional forays into "penumbras and emanations," the textual hook for most fundamental rights has been found in the Fourteenth Amendment's protection of "life, liberty, or property."[49] Yet this is an extremely weak textual basis upon which to rest a defense of *Obergefell*. Indeed, Chief Justice Roberts, in his *Obergefell* dissent, accuses the majority of "rel[ying] on its own conception of liberty," not that embodied in the text of the due process clause.[50] It is not at all difficult to imagine several other justices agreeing with Roberts on this point.

On *Obergefell*'s grounding in precedent, it seems clear that, for Justices Roberts, Alito, and Thomas, *Obergefell* is highly vulnerable. First, in their *Obergefell* dissents, each justice strenuously objects to the notion that *Obergefell* is rooted in the Court's marriage jurisprudence.[51] Rather, Justices Thomas and Roberts in particular view *Obergefell* as relying on *Griswold* and *Griswold*'s identification of a privacy right.[52] Yet, as Chief Justice Roberts argues, *Griswold*'s right to privacy cannot lend support to same-sex marriage, for same-sex couples do not seek privacy but "public recognition of their relationships, along with corresponding government benefits."[53]

In other words, Roberts construes *Griswold*'s privacy right not as a positive right to personal autonomy but as a negative right to be free of state interference, and, he argues, the Court has generally rejected claims to "positive entitlements from the State."[54] According to this view, previous litigants, like those in *Loving*, were merely asking the state to remove impediments to the exercise of their existing right to marry; same-sex

---

[48] *Dobbs,* 597 U.S. at 219 (arguing that "[t]he scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body").
[49] U.S. CONST. amend. XIV, § 1.
[50] Obergefell v. Hodges, 576 U.S. 644, 695 (2015) (Roberts, J., dissenting).
[51] *Id.*; s*ee also id.* at 717 (Alito & Thomas, JJ., dissenting).
[52] *Id.* at 700-01.
[53] *Id.* at 702.
[54] *Id.*

couples, by contrast, were asking for the state to recognize their claims by creating a right out of whole cloth. Regardless of whether one finds this purported distinction convincing, it is indicative of the fact that at least three current justices view *Obergefell* as bereft of sound precedent and that these justices view *Loving* and *Obergefell* as fundamentally distinct, such that overturning the latter would pose no threat to the former.

But there is a more worrying argument about precedent in Chief Justice Roberts' *Obergefell* dissent. For Roberts, it is not simply that *Obergefell* lacks precedent; it is that *Obergefell* is grounded in *anti*-precedent. Perhaps the most striking language in Roberts' dissent comes in his comparison of *Obergefell* to anti-precedents like *Lochner v. New York*, which he claims was similarly "unprincipled."[55] Indeed, Roberts goes further, linking *Obergefell* to the skeleton deepest in the Court's closet, *Dred Scott v. Sanford*. The common error, Roberts suggests, is that in each case the Court "relied on its own conception of liberty."[56]

This somewhat drastically understates the differences between *Dred Scott* and *Obergefell*, but it is an analogy with a long history among the Court's conservative jurists. Justice Scalia had first raised the specter of *Dred Scott* in his *Casey* dissent, with the same disturbing inability to appreciate the differences between a past Court denying freedom to millions and a present Court doing precisely the opposite. Nonetheless, it is telling that justices opposed to *Roe* and *Obergefell*, including two among the *Dobbs* majority, invoke *Dred Scott* to diagnose the depth of the Court's purported error in *Obergefell*.

The Nature of the Error. I suspect that, for Justices Thomas and Alito, *Obergefell* is sufficiently erroneous on its own to warrant reversal. However, Thomas's view of *stare decisis* is idiosyncratic, and the *Dobbs* majority opinion sets forth several further criteria that must be satisfied before a precedent may be overturned, implying that while some erroneous decisions should be overturned, others may be left undisturbed.[57] One such criterion concerns questions of democratic accountability and the Court's interventions in controversial moral issues. According to the *Dobbs* majority, the problem with *Roe* and *Casey* was not just that they were wrong, it was also that they "wrongly removed an issue from the people and the democratic process."[58] By overturning *Roe* and *Casey* the *Dobbs* Court

---

[55] *Id.* at 694.
[56] *Obergefell*, 576 U.S. at 695 (Roberts, J., dissenting)
[57] *See, e.g.*, Amy C. Barrett, & John C. Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 20 (2016) (arguing that "[i]nstitutional features of Supreme Court practice permit all Justices to let some sleeping dogs lie, and so far as we are aware, no one has ever argued that a Justice is duty-bound to wake them up").
[58] Dobbs v. Jackson Women's Health Org., 597 U.S 147, 219 (2022).

"return[ed] the issue of abortion to the people's elected representatives."[59] Stated more abstractly, the argument seems to be that the principle of *stare decisis* is in tension with the principle of democratic self-governance, as upholding past precedent often prevents other, more democratically accountable institutions, such as state legislatures, from resolving the underlying legal question. By preventing individual states from adopting their own abortion policies, *Roe* and *Casey* usurped the role of state legislatures in setting policies that were locally acceptable; upholding *Roe* and *Casey* would only compound the error.

Of course, this argument, broadly construed, would effectively undermine *stare decisis* as a whole, since virtually all precedents remove some legal questions from resolution via democratic processes. The *Dobbs* opinion thus adds the following qualifier: only a subset of erroneous precedents require revisiting, namely, those that "address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."[60] The view seems to be that, for substantive due process precedents at least, the Court should overturn precedents that identify a fundamental right if there is profound moral disagreement over the practice protected by the right and the right is not clearly enumerated in the Constitution.

The *Dobbs* majority repeatedly castigate *Roe* and *Casey* on these grounds. Both decisions, the majority claims, "short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect."[61] Adding insult to this democratic injury was the fact that the *Casey* majority not only removed the abortion question from the democratic process, they also "call[ed] both sides of the national controversy to resolve their debate" and "in doing so . . . necessarily declar[ed] a winning side."[62] Repeatedly throughout the opinion, both within the section on *stare decisis* and in other unrelated portions of the decision, the *Dobbs* majority takes issue with these prior attempts to settle the abortion issue, at one point suggesting that such claims were extra-legal.[63]

According to this second *stare decisis* criterion, then, a decision ought to be overturned if it is plainly erroneous *and* if it purports to settle a morally controversial issue that the Constitution leaves to other, more

---

[59] *Id*. at 232.
[60] *Id*. at 269.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 291 ("The *Casey* plurality call[ed] the contending sides of a national controversy to end their national division and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. That unprecedented claim exceeded the power vested in us by the Constitution") (citations and quotations omitted).

democratically accountable branches of government. One immediate problem with this qualifier is that any decision that purports to settle a morally controversial issue will face dissent, and the *Dobbs* majority does not offer a clear standard for determining when there is 'enough' dissent to warrant revisiting an opinion.

Consider, for example, that the right to interracial marriage cannot be found in the Constitution, nor was it among the original intentions of the drafters of the Fourteenth Amendment, and for roughly three decades following *Loving v. Virginia* the overwhelming majority of Americans opposed the practice, many on religious grounds.[64] Perhaps at any point before 2017, when support for interracial marriage finally surpassed the 90% threshold, one could have made an equally strong case for overturning *Loving* by citing widespread, deeply felt opposition to the practice.[65]

While I think this objection is compelling and that the Court does not even begin to address it, I will largely set it aside because comparisons between the Court's sexual autonomy jurisprudence and its racial inequality jurisprudence, however plausible, simply obscure how the *Dobbs* majority views the former line of cases. However deeply one might disagree with the political morality of the *Dobbs* majority, the suggestion that these justices will call for revisiting *Loving*—or would have called for revisiting *Loving* a decade ago, when public polling on interracial marriage more closely matched current polling on same-sex marriage—is mercifully implausible. As I demonstrate in Parts I.B. and I.C., the Courts conservative justices, and the neo-traditionalist movement they represent, are united by an opposition to sexual autonomy and sexual pluralism in a way that they are simply not with respect to laws that contain explicit racial classifications.[66]

As I discuss in Part I.C., neo-traditionalist legal scholars and activists have long disputed the idea that questions surrounding the morality of contraception, abortion, and same-sex marriage have been settled. Neo-traditionalist justices dissenting from the Court's sexual autonomy jurisprudence have echoed these arguments, vehemently contesting claims of moral settlement on issues of sexual morality. Recall, for example, the vituperative character of Justice Scalia's dissent in *Lawrence* where he accuses the Court of taking sides in the culture wary by signing on to "the

---

[64] Justin McCarthy, *U.S. Approval of Interracial Marriage at New High Of 94%*, GALLUP (Sept. 10, 2021), https://news.gallup.com/poll/354638/approval-interracial-marriage-new-high.aspx.
[65] *Id.*
[66] ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICA 119 (1st ed. 2016) ("Throughout the 1980s and into the early 1990s, the struggle against any legal recognition of gay rights was central to the Christian Right's mission, and formed a cornerstone of white evangelicals' political character.").

so-called homosexual agenda."[67] Similarly, and advancing arguments that would reappear in his *Dobbs* majority opinion, Justice Alito argues in his *Obergefell* dissent that the decision "usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage," a theme also taken up by Justices Roberts and Thomas.[68]

There are a few lessons we can draw from these claims, one narrower with implications specific to *Obergefell* and one broader with implications for the Court's sexual autonomy jurisprudence as a whole. First, the narrower lesson is that three justices among the *Dobbs* majority have argued that both *Dobbs* and *Obergefell* are effectively anti-democratic, in that both decisions 'short-circuited' the democratic process and wrongly attempted to settle a controversial moral question on behalf of the public. Whether the rest of the *Dobbs* majority accepts this view is unclear, though Justice Barrett has expressed apparent sympathy with the *Obergefell* dissenters' view that same-sex marriage should be left to state legislators.[69] At the very least, it is reasonable to conclude that, according to this criterion, *Obergefell* is highly vulnerable.

Second, the broader lesson pertains to how the *Dobbs* majority views public debate over gay rights and sexual autonomy. With respect to the dissent's claims about democratic legitimacy, public opinion polling would seem to contradict the idea that the *Obergefell* Court was running far out ahead of the public, or that the public rejected the *Obergefell* Court's proposed settlement. In the roughly twelve years between *Lawrence* and *Obergefell*, public support for gay marriage underwent a complete inversion, from a large majority opposing to a large majority supporting.[70] Moreover, after *Obergefell*, and likely in part because of the Court's decision, support for gay marriage has only increased, albeit this trend has slowed and even slightly reversed course over the last few years.[71] Nonetheless, that the vast majority of Americans support same-sex marriage and the *Obergefell* decision would seem to vindicate the majority's claim that the Court's gay rights jurisprudence reflected a public that was coalescing around settled support for gay rights.[72]

---

[67] Lawrence v. Texas 539 U.S. 558, 602 (2003).
[68] Obergefell v. Hodges, 576 U.S. 644, 695 (2015) (Alito, Scalia & Thomas, JJ., dissenting).
[69] Matthew Lavietes, *How Trump's Supreme Court nominee applies the law to LGBT+ rights,* REUTERS (October 19, 2020) (noting Amy Coney Barrett's argument that "[t]hose who want same-sex marriage, you have every right to lobby in state legislatures to make that happen, but the dissent's view was that it wasn't for the court to decide").
[70] *LGBTQ+ Rights*, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx (last visited Mar. 31, 2025).
[71] *Id.*
[72] *Obergefell*, 576 U.S. at 676 (arguing that "[j]udicial opinions addressing the issue . . . reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades").

Yet triumphalist narratives about the public acceptance of gay marriage and of LGBTQ+ individuals more broadly conceals lingering divisions among the general public. Although figures vary from poll to poll, there remains a broad segment of the American public – depending on the question asked, somewhere between one-quarter and one-third – opposed to same-sex marriage.[73] According to one survey, for example, roughly 30% of the public maintains that same-sex marriage should not be recognized; one-quarter of the public believes that gays and lesbians should not be able to adopt, while one-fifth believes that gays and lesbians should not be teachers; finally, one-fifth of respondents believes that same-sex intimacy should not be legal, and approximately one-third maintain that same-sex intimacy is morally wrong.[74]

But numbers alone do not fully capture the nature of this debate. Opposition to same-sex marriage, and to non-traditional sexual identities more generally, is largely driven by adherents of or sympathizers with Christian nationalism, a conservative political movement vehemently opposed to the secularization of American public life.[75] According to one study jointly conducted by the Brookings Institution and the Public Religion Research Institute, for example, approximately 20%-30% of the American public agrees with statements such as "God has called Christians to exercise dominion over all areas of American society," "[t]he U.S. government should declare America a Christian nation," and "U.S. laws should be based on Christian values."[76] Crucially, there is a close relationship between sympathy for or adherence to Christian nationalist beliefs and opposition to same-sex marriage.[77] Christian nationalist adherents, regardless of race, oppose same-sex marriage by overwhelming majorities, while smaller but still definitive majorities of Christian nationalist sympathizers also oppose the practice.[78]

For justices opposed to both *Roe* and *Obergefell*, the problem with both decisions is not simply that they foreclosed further democratic debate. Again, many Supreme Court decisions do precisely this. Rather, the problem is that these decisions foreclosed the possibility of traditionalist religious believers enacting their moral views into law.

---

[73] *See, e.g.*, Jeffrey M. Jones, *Fewer in U.S. Say Same-Sex Relations Morally Acceptable*, GALLUP (June 16, 2023), https://news.gallup.com/poll/507230/fewer-say-sex-relations-morally-acceptable.aspx.
[74] *LGBTQ+ Rights*, *supra* note 70.
[75] *Views on LGBTQ Rights In All 50 States: Findings from PRRI's 2023 American Values Atlas* 29, PRRI (Mar. 12, 2024) https://www.prri.org/wp-content/uploads/2024/03/PRRI-Mar-2024-LGBTQ.pdf (demonstrating that "[t]he link between Christian nationalism and support or opposition to policies affecting LGBTQ populations is stark").
[76] *Id.* at 38.
[77] *Id.* at 34.
[78] *Id.*

Indeed, in light of the intense focus on the abortion debate, it is easy to overlook just how much of an affront *Obergefell* posed to traditionalist Christians. As the religious scholar and public opinion researcher Robert Jones observes, "[b]ecause evangelical leaders made opposition to gay rights so central to their movement's identity, no issue captures White Christian America's loss of cultural power better than the rapid rise in public support for same-sex marriage."[79] Paradoxically, then, the rapid and substantial increase in public support for same-sex marriage may be one of *Obergefell*'s greatest liabilities, as this support reflects the broader displacement of traditionalist Christianity from cultural and political power.

On my view, the *Dobbs* majority's discussion of the "nature of the error" in *Roe* is not primarily about democratic accountability per se, nor does it pose a challenge to substantive due process as a whole. Rather, the *Dobbs* majority's concerns lie with the balance of political power between traditionalists and pluralists with respect to sexual morality. By returning issues like abortion and same-sex marriage to states, the Court is also returning these issues to venues in which, for a substantial portion of the country, traditionalist moral views have far more political power.

Workability and the effects on other areas of the law. It seems fairly clear that, for the *Dobbs* majority, *Obergefell* would score poorly on the first two *stare decisis* criteria. Somewhat less clear is its score on the remaining three. Even for justices resolutely opposed to the legal recognition of same-sex marriage, there are serious arguments in favor of retaining *Obergefell* that must be addressed. Here I will address *Obergefell*'s workability and its effects on other areas of the law, and then I will conclude my *stare decisis* analysis by discussing the reliance interests at stake. While these *stare decisis* criteria yield some qualified support for retaining *Obergefell*, I am ultimately doubtful that they will be sufficient to persuade *Obergefell*'s judicial opponents.

A precedent's workability depends upon whether the legal norm created by the precedent "can be understood and applied in a consistent and predictable manner."[80] In its workability analysis of *Casey*, the *Dobbs* majority focuses primarily on *Casey*'s "undue burden" standard, which, the majority argues, was so ambiguous as to be effectively no standard at all.[81] Moreover, the *Casey* opinion's attempt to resolve the ambiguity, by introducing three "subsidiary rules" to guide the application of the undue

---

[79] *See* JONES, *supra* note 66, at 120.
[80] *See id.* at 120.
[81] *Id.* at 281 ("Problems begin with the very concept of an 'undue burden.' As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is 'due' or 'undue' is 'inherently standardless.'").

burden standard, introduced yet more ambiguity.[82] Because the undue burden standard as well as its implementing rules were shot through with ambiguity, so the *Dobbs* majority found that *Casey* generated many conflicting holdings about abortion law, both at the Supreme Court and among the circuit courts.[83]

This criterion would seem to weigh in *Obergefell*'s favor, as it would be difficult to argue that the legal rules set forth in its opinion are ambiguous. There is little room for competing interpretations of *Obergefell*'s central holding that states may not deny marriage licenses to same-sex couples and must recognize same-sex marriages legally licensed by other states. On the other hand, the *Dobbs* majority does not assert that ambiguity is necessary for a finding of unworkability. Rather, the majority seems to hold that the ambiguities attending the undue burden standard are what led to circuit splits, which are a separate measure of unworkability. Moreover, as law Professor Mary Ziegler has shown, in addition to ambiguity and circuit splits, the Court has put forward several other definitions of unworkability. The Court has found unworkable precedents that "encouraged litigation," precedents that were undermined by later precedents, and precedents that, in the Court's view, were inconsistent with the broader goals served by a particular area of the law.[84]

This plurality of criteria for unworkability opens up two separate but complementary lines of attack on *Obergefell*. The first, coming from the *Dobbs* majority, takes aim at *Obergefell*'s workability by noting that it is in conflict with other precedents and legal rules. For example, as I argued above, *Obergefell* has been undermined by later precedents, such as *State v. Munoz*, which changed the basic doctrinal test for the fundamental right to marriage in a way that precludes same-sex marriage rights.[85] Additionally, states may continue to enact laws and regulations that are inconsistent with *Obergefell* in order to generate conflicts and undermine *Obergefell*'s workability, which was precisely the strategy adopted by religious conservatives opposed to *Roe* and *Casey*.[86]

For example, an early—likely too early—attempt at generating inconsistencies in understanding *Obergefell*'s reach came in the [2017] case *Pavan v. Smith*, which involved an appeal from an Arkansas state Supreme Court decision that permitted the Arkansas Department of Health to exclude

---

[82] *Id.* (asserting that "[t]he *Casey* plurality tried to put meaning into the 'undue burden' test by setting out three subsidiary rules, but these rules created their own problems").
[83] *Id.* at 284 (claiming that "*Casey* has generated a long list of Circuit conflicts").
[84] *See* Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1235, 1244-49 (2018).
[85] *See id.*
[86] As Ziegler argues, conservatives set about to "generat[e] inconsistent interpretations" of abortion caselaw in order to "set the stage for the overturning of *Roe*." *See id.* at 1243.

same-sex partners from birth certificates.[87] Though the Court overturned the Arkansas state Supreme Court in a per curium opinion, Justices Gorsuch, Thomas, and Alito dissented, claiming that "nothing in *Obergefell* spoke (let alone clearly) to the question whether" Arkansas could exclude same-sex parents from birth certificates in some cases.[88] While none of these suggestions have been taken up by the Court, neither did the per curium opinion in *Pavan* definitively settle matters, thus leaving *Obergefell* liable to the charge that it generates legal conflict and encourages litigation.[89]

A second line of attack will yield similar trouble for *Obergefell*. Whereas workability broadly concerns a precedent's internal coherence, the "effect on other areas" prong concerns a precedent's coherence with other laws and legal doctrines.[90] According to the *Dobbs* majority, *Roe* was vulnerable on this count because *Roe* and its predecessors "require[d] courts to engineer exceptions to longstanding background rules" which disrupted the 'principled and intelligible' development of the law that *stare decisis* purports to secure."[91] While the *Dobbs* majority does not identify a standard for determining just how much external conflict a precedent must generate in order to warrant reversal, it cites a number of areas, including Federal Rules of Civil Procedure and First Amendment law, in which abortion jurisprudence purportedly wrought havoc.[92]

To be sure, the negative external effects of a precedent are often a problem of the Court's own making, often aided by litigants seeking to undermine a past decision. For example, Justice Alito's claim in *Dobbs* that abortion law distorted the application of "standard *res judicata* principles" is backed merely by a citation to his dissent in *Whole Women's Health v. Hellerstadt*. In *Hellerstadt*, the Court struck down Texas' House Bill 2, which placed various restrictions on abortion clinics and was part of a broader legal strategy seeking to overturn *Roe*.[93] The res judicata issues

---

[87] Pavan v. Smith, 582 U.S. 563 (2017).
[88] *Id*. at 567.
[89] Steve Sanders, *Pavan v. Smith: Equality for Gays and Lesbians in Being Married, Not Just in Getting Married*, 161, 176 AM. CONST. SOC'Y. SUP. CT. REV. (2017) ("[F]or the foreseeable future we are likely to see, at best, a passive-aggressive neglect of important family law questions in America's red states by the conservative Republicans who control the governments in those states. These elected officials will feel no particular incentive to modernize their codes, and same-sex couples may need to continue engaging in costly and wasteful litigation to fully vindicate the "equal dignity" they were promised in *Obergefell*.").
[90] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 220 (2022) (asserting that "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines").
[91] *Id.* at 287.
[92] *Id*. at 286-87.
[93] Mary Ziegler, *Substantial Uncertainty: Whole Woman's Health v. Hellerstedt and the Future of Abortion Law*, SUP. CT. REV. 77, 99 (2017) ("[P]ro-lifers contended that these

involved in *Hellerstadt* are nuanced and revolve around whether a pre-enforcement facial challenge bars a later, post-enforcement as-applied challenge.[94] The core disagreement between Alito and the majority is whether new material facts arose post-enforcement such that the as-applied claim was not barred. While one might have thought that the *Hellerstadt* holding—that the provider's claim was not barred—settled the res judicata question, Alito's resurrection of this argument in *Dobbs* suggests that a precedent's negative effects on other areas of the law exists largely in the eye of the beholder.[95] In other words, *Dobbs* indicates that a single justice's opposition to a prior holding may suffice to satisfy the "effects on other areas" prong.

Given the flexibility of the external effects criterion, the possibility of future litigation challenging same-sex marriage rights, and the existence of current conflicts between *Obergefell* and other areas of the law, such as public accommodations anti-discrimination doctrine, it is reasonable to conclude that *Obergefell* is vulnerable on this score as well.[96] Already in *Lawrence*, Justice Scalia, joined by Justices Thomas and Roberts, warned of how many conflicts the Court's same-sex jurisprudence had created between state and federal law.[97] Moreover, the post-*Obergefell* landscape has seen doctrinal conflicts between the Court's same-sex marriage jurisprudence and its freedom of expression and free exercise jurisprudence in addition to Justice Gorsuch's complaint in *Pavan* that the Court was misapplying the rules for granting summary reversal.[98] Arguably, the Court itself has distorted antidiscrimination law in order to grant exemptions to religious believers.[99] But the external effects criterion does not take into account the reasons why a precedent has distorted other areas of the law, it

---

regulations advanced the state's interest in protecting women's health—a governmental purpose explicitly recognized by *Roe*. Although the courts often struck down these laws, emphasizing that they singled out abortion clinics, incrementalists refused to give up on a court-centered strategy.").

[94] *See* Whole Woman's Health v. Hellerstadt, 579 U.S. 582, 647 (2016) ("The Court concludes that petitioners' prior facial attack on the admitting privileges requirement and their current facial attack on that same requirement are somehow not the same cause of action or claim. But that conclusion is unsupported by authority and plainly wrong.").

[95] *See* Dobbs, 597 U.S. at 286-87.

[96] *See generally* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

[97] Lawrence v. Texas, 539 U.S. 558, 590 (2003) ("State laws against bigamy . . . adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision.").

[98] Pavan v. Smith, 582 U.S. 563, 568 (2017) (Gorsuch, J., dissenting) (stating that "whatever else we might do with this case, summary reversal would not exactly seem the obvious course").

[99] *See, e.g.*, Robert Post, *Public Accommodations and the First Amendment: 303 Creative and "Pure Speech,"* SUP. CT. REV. 1, 20 (2023) (arguing that the 303 Creative opinion "confuse[s] free speech and Free Exercise doctrine" in a way that "makes hash of basic First Amendment principles").

merely directs justices to look for such distortions. And for justices already inclined to view *Obergefell* as unsound, they will not be difficult to locate.

The reliance interests at stake. While *Obergefell* arguably is vulnerable to the first four *stare decisis* criteria, I suspect that the reliance interests criterion is the only *stare decisis* consideration that will give the *Dobbs* majority real pause. Some have argued that the reliance interests that married same-sex couples possess in their marriages will ultimately save *Obergefell*. As William Eskridge Jr. has argued, overturning *Obergefell* would "impose upon the judiciary the embarrassing task of adjudicating claims for the more than 1.4 million Americans in same-sex marriages" whose legal rights would suddenly be uncertain in a good deal of the country.[100] Eskridge believes that the reliance interests at stake in maintaining same-sex marriage will shield *Obergefell* from "a flat, publicity-generating overruling."[101]

While there is much to be said for the reliance interest defense of *Obergefell*, I am not fully convinced by this argument, since the reliance interests at stake in *Roe* and *Casey* were just as weighty, if not more so, than those implicated by same-sex marriage. Millions of women had planned their lives around the reality of being able to access abortion care when needed, and the consequences of having that access revoked have been profound and, for some women, horrifying.[102] Moreover, in many areas, *Dobbs* foreseeably led to hospitals, local courts, and state governments taking on not the embarrassing task of adjudicating marriage claims, but the awful task of determining how close a woman must come to dying before she is permitted an abortion.[103] Lastly, Chief Justice Roberts' concurring opinion in *Dobbs* offered the majority a way to effectively overturn *Roe* without the publicity and backlash that *Dobbs* ultimately generated, with Roberts going so far as to call the majority's decision "dramatic" and "unnecessary."[104] Yet even presented with this off-ramp, the *Dobbs* majority declined to moderate its holding.

But comparisons between *Dobbs* and *Obergefell* aside, there are two further problems with the reliance interest defense for *Obergefell*. First, while cases like *Griswold*, *Roe*, and *Obergefell* gave rise to a new set of reliance interests centered around personal autonomy and sexual intimacy, *Dobbs* dismisses reliance interests of this sort. For example, Justice Alito

---

[100] Eskridge Jr., *supra* note 11, at 760.
[101] *Id.* at 759.
[102] *See* Nadine El-Bawab, *Woman Said She Went into Sepsis Before She Could Get Lifesaving Abortion Care in Texas*, ABC NEWS (May 15, 2023, 3:57 PM), https://abcnews.go.com/US/woman-sepsis-life-saving-abortion-care-texas/story?id=99294313.
[103] *See id*.
[104] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 349 (2022) (Roberts, J., concurring).

argues in *Dobbs* that autonomy-based notions of reliance "find[] little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in cases involving property and contract rights."[105] Additionally, he claims, autonomy-based reliance interests "depend[] on an empirical question that is hard for anyone—and in particular, for a court—to assess."[106] In other words, the Court lacks the institutional expertise to evaluate autonomy-based reliance claims and so ought to defer to state legislatures with respect to the competing reliance interests at stake.

Thus, although Eskridge is surely right in counseling advocates for same-sex marriage to "demonstrate (in the record, their briefs, and the amicus briefs they can line up) the broadest and deepest array of reliance interests that would be disrupted" by a decision to overturn *Obergefell*, these arguments will be hamstrung by the fact that, in light of *Dobbs*, many of the most significant reliance interests at stake in same-sex marriage have been preemptively excluded from consideration.[107] By contrast, Robin Maril has argued more specifically that the best strategy for advocates of same-sex marriage is to construct their reliance interest arguments around "contractual and financial components where advanced planning is essential," as these reliance interests are most conformable to *Dobbs*' assertion that the Court will consider only concrete reliance interests.[108] Such arguments would be quite strong since, as Maril points out, "[e]verything from businesses who cover spouses on employee-based health plans, to federal agencies like Social Security and the IRS, to hospitals with uniform visitation forms would be faced with potential uncertainty and cost countless worker hours to resolve."[109]

But whether these arguments will be strong enough to save *Obergefell* is an open question. As Eskridge has shown the Court's reliance interest jurisprudence is highly indeterminate, leaving a great deal of discretion to justices to elevate or ignore categories of reliance at will.[110] For example, whereas *Dobbs* rejects autonomy-based reliance interests in favor of property and contract-based reliance interests, previous Supreme Court decisions struck precisely the opposite balance.[111] What is likely most

---

[105] *Id*. at 288.
[106] *Id*.
[107] Eskridge Jr., *supra* note 11, at 768.
[108] Maril, *supra* note 5, at 95.
[109] *Id*. at 96.
[110] *See* Eskridge Jr., *supra* note 11, at 735 (concluding that "reliance interests do not eliminate judicial discretion in statutory cases and do not entirely prevent result-oriented judging").
[111] *Id.* at 734 (demonstrating that "private, societal, and public reliance interests play a prominent role in the Supreme Court's law of interpretation" and that "*Dobbs* was flat wrong to say that only classic private (contract and property) reliance has pressed the Court to follow and not throw over long-standing precedents, rules, and legal practices").

significant for *Obergefell* going forward is that, as Eskridge demonstrates, the Roberts Court has acted "primarily to protect corporate, state, and religious reliance" interests from interference,[112] emphasizing the corporate reliance interests that would be upset by overturning *Obergefell* thus may be one way to find traction with the current Court.

On the other hand, the *Dobbs* majority would surely weigh any such arguments against competing reliance-based claims, especially religiously-grounded reliance claims. In *Lawrence*, traditionalist justices described the Court's sexual autonomy jurisprudence as "a massive disruption of the current social order," because of the various state reliance interests that had risen from laws permitting discrimination against LGBTQ+ individuals.[113] Traditionalist religious organizations and state legislatures or attorneys general sympathetic to traditionalist views of marriage would likely make similar arguments. Drawing on Justice Alito's *Obergefell* dissent, opponents of same-sex marriage could argue that *Obergefell* interfered with their reliance interests in upholding traditional, heterosexual childbearing marriages.[114] Given the traditionalist justices' repeated emphasis on allowing states to make their own judgments with regard to marriage policy, and their (occasional) deference to state legislatures in weighing reliance interests, this is also an argument that is likely to gain some traction with the current Court. How many justices it persuades may determine the extent to which *Obergefell* is overruled.

B. The Court's Sexual Autonomy Jurisprudence

In the previous section, I argued that in light of *Dobbs* and *Munoz* the Court has doctrinally committed itself to overturning *Obergefell*. To be sure, this is not to make a predictive claim about what the Court will actually do when confronted with the opportunity to do so. Perhaps concern for upset reliance interests or for the Court's public legitimacy will deter the conservative supermajority from claiming yet another victory. While I am doubtful that these factors will suffice, the point of my argument in the previous section was less to ground a prediction and more to motivate the idea that the Court overturning *Obergefell* is very much a live possibility. In other words, if the arguments in Part I.A. do not convince you that the Court will overturn *Obergefell*, at the very least they establish that such an outcome is worth taking seriously.

---

[112] *Id.* at 744.
[113] Lawrence v. Texas, 539 U.S. 558, 591 (2003).
[114] Obergefell v. Hodges, 576 U.S. 644, 739-40 (2015) (Alito, Scalia & Thomas, JJ., dissenting) ("States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage's further decay.").

This reflection alone is somewhat shocking. For many years following the decision it would have been unthinkable to suggest that the Court would get anywhere close to overturning a decision that sophisticated legal observers hailed as an "instant classic."[115] To understand why the Court has undergone such a dramatic turnabout on LGBTQ+ rights, it is necessary to consider the broader political dynamics underlying this apparent reversal. Thus, in Parts I.B and I.C, I want to identify some of the political movements and arguments that appear to be motivating those justices on the Court who are most hostile to *Obergefell*.

I argue in Parts I.B. and I.C. that cases like *Griswold*, *Eisenstadt*, *Roe*, and *Obergefell* comprise what I call the Court's "sexual autonomy" jurisprudence, and that the Court's interventions in these decisions generated a powerful backlash among religious traditionalists opposed to secular, pluralistic sexual moral norms. In this section I make the case for thinking of the Court's sexual autonomy cases as a distinct jurisprudence. In the next section, I demonstrate how this jurisprudence has given rise to a neo-traditionalist opposition, and I examine some of the key neo-traditionalist arguments for reexamining the Court's sexual autonomy cases.

The primary cases in the Court's sexual autonomy jurisprudence share three key similarities. First, they endorsed a pluralistic, secular approach to sexual morality, thereby creating a civic space in which non-traditional sexual identities and relationship structures could be normalized. Second, often in these cases the Court explicitly rejects the notion that the state may legally enforce traditionalist views of sexual morality. Third, these cases put pressure on other areas of the law, especially antidiscrimination law, in ways that reinforced the exclusion of traditionalist sexual ethics from public institutions.

The most obvious way that the Court's sexual autonomy jurisprudence advanced pluralism for sexual morality is that, in each case, the Court restrained the state from intervening in personal decisions concerning consensual sexual intimacy, relationship structure, the meaning and value of sex and marriage, and the decision to bear (or not bear) children. The language of the cases reflects the shift: while *Griswold* defines the right to use contraception as protecting "the sacred precincts of marital bedrooms," and draws its privacy arguments from cases concerning parental rights, by *Obergefell* the Court had come to see marriage as "a two-person union" that was not "conditioned on the capacity or commitment to procreate."[116] In

---

[115] Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. LAW. REV. 147 (2015).
[116] Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *Obergefell*, 576 U.S. at 646.

other words, rights to marriage and sexual intimacy were no longer confined to heterosexual, childbearing couples.

Yet the *Obergefell* Court did not simply offer a broader conception of the nature of marriage. It went further, depicting the liberty to engage in sexual intimacy as a matter of "defining [one's] personal identity and beliefs."[117] By describing sexual intimacy as a matter of individual identity and personal autonomy, the Court was creating space for individuals to discover their own approaches to sexual intimacy, marriage, and procreation. No longer would traditional views of sexual purity, obscenity, promiscuity, or of the importance of childbearing, heterosexual relationships receive the state's imprimatur. Individuals in the post-*Obergefell* world would be free—in the sense of being unrestrained by the state—to fashion their own sexual identities and intimate relationships. Pluralism in sexual ethics would reign.

One final way that these decisions advanced pluralism concerning sexual morality stems from the Court's increasingly robust First Amendment protections for expressive content that, in an earlier era, would have been regulable as obscene.[118] The Court's sexual autonomy jurisprudence, in conjunction with its First Amendment jurisprudence, thus helped to create a discursive culture in which non-traditional sexual mores and intimate relationships could be discussed and even openly celebrated. This, too, advanced the idea that sexual intimacy and sexual morality were ultimately matters of individual expression. Non-traditional sex and gender identities could be not just expressed but would be affirmatively celebrated in the public sphere.

A second theme uniting the Court's sexual autonomy jurisprudence concerns the Court's attempt to definitively settle the underlying normative disputes. In *Casey v. Planned Parenthood*, for example, the majority claimed that the issue of abortion was "settled now, as it was when the Court heard arguments in *Roe v. Wade*," and that it was henceforth beyond dispute that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."[119] That is, the Court would refrain from weighing in on the morality of abortion itself. Instead, it would definitively settle the question of the state's authority to enforce prohibitions on abortion.

This was a remarkable claim, especially because *Casey* was widely understood to have stemmed from decades of legal activism and judicial

---

[117] *Id.* at 663.
[118] *See, e.g.*, Jenkins v. Georgia. 418 U.S. 153, 160 (1974) (limiting the ability of juries to determine "what is 'patently offensive.'").
[119] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 849 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

appointments specifically aimed at overturning *Roe*. The idea that the issue of abortion was settled, or that the Court even possessed the power to settle it, was fanciful. Yet I suspect that, for Justice Kennedy, the "settlement" that these cases struck was less about public debates over the morality of abortion or homosexuality and more about the Court's rejection of traditionalist religious principles as determinative with respect to the law of sexual autonomy.

Consider for example that, in *Lawrence*, Justice Kennedy cites *Casey* to affirm the Court's role in affording "constitutional protection to personal decisions relating to marriage, procreation, contraception, [and] family relationships." But in *Lawrence*, Kennedy is more explicit about the implication. Those hostile to gays and lesbians, Kennedy argues, are motivated by "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."[120] Yet while Kennedy is appropriately respectful of the sincerity of these beliefs, he is no less adamant that they cannot determine the Court's decision-making.[121] It is not the Court's role, in other words, to enforce traditionalist sexual morality.[122]

Third, many of the cases in the Court's sexual autonomy jurisprudence would go on to influence other areas of the law, especially antidiscrimination law, in ways that reinforced the Court's pluralistic, secular approach to matters of sexual ethics. As conservative members of the Court were wont to complain, traditionalist views of sexual morality were now viewed as discriminatory.[123] Corporations that espoused anti-LGBTQ+ views would be subjected to boycotts.[124] Public schools could no longer inculcate within students a religious approach to sexual ethics.[125] Thus, it was not simply that traditionalist views of sexual morality were dethroned from their place of social and legal prominence. Rather, and despite Justice Kennedy's respectful treatment of religious opponents of

---

[120] Lawrence v. Texas, 539 U.S. 558, 571 (2003).

[121] Obergefell v. Hodges, 576 U.S. 644, 672 (2015) (observing that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here").

[122] The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. But as the Court said in *Casey*: "Our obligation is to define the liberty of all, not to mandate our own moral code." *Casey*, 505 U.S. at 850 (1992).

[123] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 741 (2015) (Alito, J., dissenting) (asserting that traditionalist opponents of same se marriage "risk being labeled as bigots and treated as such by governments, employers, and schools").

[124] Jon Schuppe, *Corporate Boycotts Become Key Weapon in Gay Rights Fight*, NBC NEWS (March 26, 2016) https://www.nbcnews.com/news/us-news/corporate-boycotts-become-key-weapon-gay-rights-fight-n545721

[125] *See* Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1520 (2017) (arguing that, in light of *Obergefell*, public schools cannot impose a stigma upon homosexuality).

same sex marriage in *Obergefell*, they were rejected as bigoted and discriminatory.

Overall, the Court's sexual autonomy jurisprudence did far more than protect the rights of individuals to make intimate personal decisions relating to sex and childbearing free from state intervention. These cases collectively reflected and reinforced a broader cultural and legal shift away from religious traditionalism as the predominant approach to matters of sexual ethics. Moreover, each case could be seen to further entrench this shift. As childbearing became detached from marriage and sex, as new sexual minorities entered the public sphere without shame or stigma, and as pluralistic principles came to govern sexual morality, society came to retreat further and further from the traditionalist ideal of the heterosexual, childbearing marriage. As I shall argue in the next Part, the neo-traditionalist challenge to *Dobbs* and *Obergefell* represents a concerted effort to reverse these trends.

C. Dobbs as neo-traditionalism

In this Part, I offer a framing device through which to understand the Court's shift away from protecting the rights of sexual minorities. In my view the Court has adopted an approach to sexual autonomy cases that I will refer to as "historical neo-traditionalism." By "historical neo-traditionalism" I do not mean simply the fact that the Court has adopted *Glucksberg*'s "history and tradition" test, though that is true. Rather, I am referring to the Court's usage of history to achieve aims consonant with neo-traditionalism, a religious conservative political and legal movement that initially took shape during the 1960s and 1970s, largely in response to *Griswold* and *Roe*.

Across a range of cases, the Roberts Court has adopted historical tests that tend to yield legal outcomes that favor religious plaintiffs, especially conservative Christians, and which tend to disfavor newer rights claimants, particularly women and LGBTQ+ individuals.[126] Moreover, many of the justices who comprise the *Dobbs* majority have advanced neo-traditionalist arguments, and each one has emerged from the neo-traditionalist legal movement. Applying a neo-traditionalist framing to the current Court allows us to contextualize *Dobbs* as part of a broader effort to insert traditionalist values into constitutional law, especially with respect to laws surrounding sexual autonomy and the rights of sexual minorities.

---

[126] *See, e.g.*, Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1537 (2024) (describing the Roberts Court as "revisiting long-settled precedents and doctrines to craft a new vision of the First Amendment in which religious conservatives are recast as minorities whose claims for religious freedom are prioritized" over the rights of LGBTQ+ individuals).

As I discuss below, neo-traditionalists have argued for decades that the Court's sexual autonomy jurisprudence, spanning from *Griswold* to *Obergefell*, is harmful to American society and constitutes a collective affront to religious conscience.[127] Neo-traditionalists also object to the broader displacement of traditionalist sexual morality by secular, pluralistic principles.[128] While *Dobbs* was an important legal victory for this movement, overturning the right to an abortion is by no means its only aim. Ultimately, neo-traditionalists are seeking to reverse the transformation of sexual morality that began around the time of *Griswold*, accelerated after *Roe*, and culminated in *Obergefell*. In this light, *Dobbs* can be seen as consistent with recent attacks on birth control, adoption rights for LGBTQ individuals, transgender rights, no-fault divorce, access to pornography and, of course, same-sex marriage itself.

Although neo-traditionalist views of sexual morality represent a relatively small minority of Americans, over the last several years neo-traditionalism has made a surprising number of inroads into mainstream legal and political discourse. One such inroad came in May of 2024, when the professional football player Harrison Butker delivered a commencement address at Benedictine College, a small Catholic university in Atchison, Kansas. Butker denounced what he saw as "growing support for degenerate cultural values" and for "things like abortion, IVF, surrogacy, [and] euthanasia," while encouraging the male graduates to be "unapologetic in [their] masculinity" and the female graduates to "embrace one of the most important titles of all: homemaker."[129] Butker's address sparked a great deal of media commentary regarding the rise of Catholic neo-traditionalism, which one historian of religion has described as one of "the fastest-growing religious movements in the country."[130]

Some commentators focused on Butker's traditionalist conception of gender roles and his implicit rebuke of his more liberal teammates, whereas others sought to portray Butker simply as a private individual speaking on behalf of his religious values.[131] Yet both interpretations of the address omit vital political context. Just before his speech at Benedictine, Butker had appeared in an anti-abortion political ad funded by the Concord Fund, one

---

[127] *See generally* Jeremy Kessler, Article, *The Legal Origins of Catholic Conscientious Objection*, 31 WM. & MARY BILL OF RIGHTS J. 361, 399 (2022).
[128] *See id.*
[129] Rachel Looker, *Harrison Butker 'Homemaker' Speech Sparks Backlash*, BBC NEWS (May 16, 2024), https://www.bbc.com/news/world-us-canada-69021543.
[130] Katherine Kelaidis, *The Religious Battle Behind Harrison Butker's Culture-War Speech*, NEW REPUBLIC (May 21, 2024), https://newrepublic.com/article/181700/harrison-butker-benedictine-trad-catholicism.
[131] *See id.*; *see also* Samantha Lehman, *Harrison Butker's Speech Wasn't For You*, NAT'L. REV. (May 17, 2024), https://www.nationalreview.com/corner/harrison-butkers-speech-wasnt-for-you/ (arguing that "the speech was used to smear my college and a man who was giving a speech on a Catholic campus to Catholic students on Catholic beliefs").

of the many conservative non-profit groups associated with Leonard Leo, a traditionalist political activist and judicial advisor to former president Donald Trump.[132] Leo had provided the commencement address at Benedictine the year before Butker, and while he received considerably less media attention his speech was broadly of the same key. Leo condemned the "modern day barbarians" who require "fealty to the woke idols of our age" as well as the "secularists" who, as he claimed, were seeking to eliminate the right to engage in religious practice not only publicly but also privately.[133]

As has been widely reported, Leo was tremendously influential in the nomination and confirmations of every justice who joined the *Dobbs* majority opinion, as well as the nominations and confirmations of several religious conservative judges appointed to lower federal courts.[134] Moreover, as the vignette described above suggests, Leo's non-profit organizations have been highly successful not just at promoting neo-traditionalist jurists but at elevating traditionalist rhetoric in public discourse. Given Leo's influence on the current Court and the broader political culture, understanding the neo-traditionalist movement he represents should provide some insight into where the Court is likely headed next.

A full account of the neo-traditionalist movement is outside the bounds of this Article. Instead, I will focus on two key moments in the movement's rise to prominence. The first occurred in response to *Roe*. As the legal historian Jeremy Kessler has shown, *Roe* was a turning point for neo-traditionalism. Kessler argues that it was *Roe* and abortion "more than any other single issue" that "triggered the rise of the neo-traditionalist block within the Catholic laity" during the 1960s and 1970s.[135] Yet the targets of the neo-traditionalist movement were broader than *Roe*, extending to contraception as well, at least when it was being funded by the state and utilized outside of the marital relationship.[136] According to Kessler, the neo-traditionalist legal movement "characterized *Roe* as part of a larger effort to

---

[132] Andrew Perez, *The Dark Money Behind Kansas' Misleading Anti-Abortion Campaign*, LEVER (May 31, 2023), https://www.levernews.com/the-dark-money-behind-kansass-misleading-anti-abortion-campaign/.

[133] Heidi Schlumpf, *Leonard Leo, Architect of Conservative Supreme Court, Takes on Wider Culture*, NAT'L. CATH. REP. (Jan. 4, 2024), https://catholiccitizens.org/news/l05574/leonard-leo-architect-of-conservative-supreme-court-takes-on-wider-culture/.

[134] *Id.*

[135] *See* Jeremy Kessler, Article, *The Legal Origins of Catholic Conscientious Objection*, 31 WM. & MARY BILL OF RIGHTS J. 361, 399 (2022)

[136] *Id*. at 395 ("[L]eading Catholic clergy and lawyers settled on a strategy tied to *Griswold*'s identification of a "zone of privacy" surrounding marital affairs . . . . According to this approach, while family planning was commendable to the extent that it facilitated the exercise of the intimate rites of marriage, it must remain "noncoercive.")

impose a particular version of family planning on the general population" and depicted traditionalists as "a conscientious minority who struggled to resist it."[137] Neo-traditionalists often couched their arguments in terms of religious conscience and resistance to state coercion, a framing that the Roberts Court has adopted for religious liberty claims involving conservative Christians.[138]

While Kessler's historical analysis covers the traditionalist legal movement's emergence in response to *Griswold* and *Roe* during the 1960s and 1970s, this movement would gain further momentum in response to the Court's gay rights jurisprudence and the gay marriage debates of the 2000s. Such debates pushed traditionalists to broaden their critique of the Court's sexual autonomy jurisprudence.

Traditionalist opposition centered around two broad sets of arguments. The first concerned the impact of contraception, abortion, and the acceptance of homosexuality on American society in general, and the American family in particular. As law professor Amy Wax described the view, moral traditionalists view heterosexual, childbearing marriage as a foundational social institution that the law should not just protect but also champion.[139] According to this view, heterosexual childbearing marriages provide for social stability, because, according to traditionalists, these marriages are the ideal forum for socializing children into the "dominant norms" of American society.[140] Moreover, heterosexual, childbearing marriages provide stability and meaning for individual heterosexuals themselves, partly by placing social constraints on individual sexual autonomy.[141]

For neo-traditionalists, single or divorced parents, gay and queer couples, "blended" or "chosen" families, and all other deviations from the married, heterosexual, childbearing norm simply cannot provide for the same sort of social or individual stability. "Married [heterosexual] couples," according to traditionalists, "are most likely to provide for

---

[137] *Id*. at 400.
[138] *Id*. at 393 (arguing that traditionalist legal activists "helped to frame the imminent struggle against reproductive rights in terms of coercion, conscience, and religious equality").
[139] Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 380 (2007) (explaining that, for traditionalists, "the biological, heterosexual 'nuclear' family . . . should continue to be regarded, in law and custom, as the ideal model for our society").
[140] *Id.* at 381-82 ("For traditionalists, marriage's central purposes are providing social stability, fostering commitment, and creating the best setting for socializing children to constructive and dominant norms.")
[141] *Id*. at 382 ("Traditionalists embrace a 'social ecology' view of customary institutions such as marriage which regards them as essential to a workable social and moral order. By establishing expectations and defining roles, these institutions promote virtue. They shape, guide, and constrain human action towards socially constructive goals.").

children's proper socialization."[142] Moreover, traditionalists maintain that weakening the institution of heterosexual, childbearing marriage, whether by enacting policies or adopting social norms that legitimate other types of intimate relationships, imposes various sorts of harms. According to this view, the recognition of non-traditional relationships harms children, who will suffer in non-traditional family structures, harms individual adults who will descend into vice and anomie outside of the moral scaffolding that marriage provides, harms traditional heterosexual couples who will no longer view entering a childbearing marriage as socially normative, and harms society as a whole, which will fail to inculcate its dominant norms across generations.[143] Thus, the aim of marriage law should be to "channel[] heterosexuals toward behaviors," like monogamous, childbearing marriage to prevent these social ills from arising.[144]

The second set of arguments traditionalists put forward in opposition to same-sex marriage raises claims of religious conscience and resistance to state coercion. Just as traditionalists responded to *Griswold* and *Roe* by advancing claims of religious conscience and religious liberty, so too did traditionalists make the case against *Lawrence* and, later, *Obergefell*. In 2009, for example, the influential traditionalist legal scholar Robert George, along with former White House council Chuck Colson and the theologian Timothy George, published the "Manhattan Declaration: A Call of Christian Conscience," a manifesto decrying same-sex marriage as jeopardizing "the religious liberty of those for whom this is a matter of conscience."[145] According to this view, the state's recognition of a right to same-sex marriage would "lock into place the false and destructive belief that marriage is all about romance and other adult satisfactions and not, in any intrinsic way, about procreation."[146] For neo-traditionalists like George, the legal recognition of same-sex marriage was a wrong inflicted upon the conscience of traditionalist believers.

My point in highlighting these claims is not to suggest that they are morally or empirically plausible; in my view, they are dubious on all counts. But if we are to understand *Dobbs* and how it bears upon *Obergefell*, then we must first view these cases through a neo-traditionalist's lens. In response to increasing public acceptance of same-sex intimacy and marriage, neo-traditionalists advanced a broad-ranging critique of the Court's sexual autonomy jurisprudence as a whole. According to this view, same-sex intimacy and marriage, like abortion, and widely available birth

---

[142] *Id*. at 386.
[143] *See id*. at 384-99.
[144] *Id*. at 389.
[145] Robert George et al., *Manhattan Declaration: A Call of Christian Conscience*, MANHATTAN DECLARATION (Nov. 20, 2009), https://www.manhattandeclaration.org/.
[146] *Id*.

control, infringed upon religious conscience and led to the "erosion" of a "healthy marriage culture."[147] For neo-traditionalists, the state has overwhelming reason to promote a healthy marriage culture; yet the Court's sexual autonomy jurisprudence consistently undercut the state's ability to do so.

Neo-traditionalists thus take aim at the Court's sexual autonomy jurisprudence, root and branch. As George argued, the Court's sexual autonomy jurisprudence all sprung from the same corrupt source: *Griswold*.[148] It was *Griswold*'s conception of the "right to marital privacy" that ultimately laid the groundwork for the rights to abortion, same-sex intimacy, and same-sex marriage, and the general weakening of marriage as an institution. According to George, while the *Griswold* opinion emphasized the importance of marital privacy, subsequent Courts, beginning with *Eisenstadt*, separated the privacy interests at stake from the marital relationship. *Griswold* thus came to stand for a more general, *individual* right to sexual autonomy, which ultimately would be used to sanction widespread contraception, abortion, same-sex intimacy, and same-sex marriage, among other social ills.[149]

Moreover, in George's view, the right of marital privacy discovered in *Griswold* and then individualized and expanded in *Eisenstadt* served to distract from what the Court was really doing; namely, rejecting traditionalist arguments for regulating sexual morality. As George put it, Justice Douglas's reference to a right of privacy was merely a "euphemism for immunity from those public-morals laws deemed by the justices to reflect benighted moral views."[150] The *Griswold* majority's purported identification of a right to privacy was "nothing other than the Court's desire to place its imprimatur on "enlightened" views about human sexuality," to the neglect of "parental duties, public health, and the welfare of children."[151] In other words, the discovery of an individual, and not just marital, right to privacy simply served to exclude traditionalist sexual morality from public consideration.

This is a partial and one-sided reading of *Griswold*. Justice Douglas's privacy argument is far more substantial than George's reading allows, and the opinion plausibly links the right of marital privacy to other privacy-related rights that the Court had previously recognized. At the same time, however, as its post-*Griswold* jurisprudence developed, the Court would

---

[147] *Id.*
[148] *See* Robert George & David Tubbs, *The Bad Decision That Started It All*, NAT'L. REV. (July 8, 2005), https://www.nationalreview.com/2005/07/bad-decision-started-it-all-robert-p-george-david-l-tubbs/.
[149] *Id.*
[150] *Id.*
[151] *Id.*

become more and more explicit about the fact that it was setting the boundaries for permissible legislation of sexual morality, boundaries that excluded overtly religious and traditionalist viewpoints. In its sexual autonomy jurisprudence the Court had claimed that debates over the legal regulation of individual sexual conduct had been "settled."[152] That members of the Court claimed this while denying that they were advancing a moral position concerning matters of sexual ethics surely only incensed their neo-traditionalist critics further.

Neo-traditionalist justices and legal scholars have argued for decades that they did not accept this purported settlement, and that the Supreme Court's institutionalization of secular sexual morality only deepened their sense of dispossession and division. George, along with a number of traditionalist co-authors, argued just one year after *Obergefell* that the decision "did not settle anything about the nature of marriage or people's beliefs about it."[153] In these neo-traditionalist's view, "*Obergefell*, as with *Roe* before it, has spawned not peaceful coexistence but more rancor and conflict."[154]

Indeed, it is worth recalling that immediately following *Obergefell*, George and his traditionalist allies formed a political action committee whose purpose was "to convince judges, legislators, and executive officials to engage in "constitutional resistance" by defying *Obergefell*."[155] George had similarly called for widespread civil disobedience just after *Lawrence*.[156] While general public acceptance of same-sex marriage might suggest that this constitutional resistance failed to materialize, to neo-traditionalists, *Dobbs* is a new source of hope. As George wrote after the decision, "[j]ust as the pro-life movement . . . prevailed in its nearly 50-year-long battle to overturn *Roe v. Wade* . . . the battle for marriage reality and sexual sanity can be won."[157]

---

[152] *See, e.g.*, Jenkins v. Georgia. 418 U.S. 153, 160 (1974).
[153] Ryan T. Anderson, Tony Evans & Robert P. George, *One Year after Obergefell*, ROBERT P. GEORGE (June 25, 2016 8:00 AM), https://robertpgeorge.com/articles/one-year-after-obergefell/.
[154] *Id.*; *see* Rod Dreher, *After Obergefell: A First Things Symposium*, FIRST THINGS (June 27, 2015) ("[A]s Justice Samuel Alito pointed out in his [*Obergefell*] dissent, forces in our culture that wish to smash all dissent from LGBT orthodoxy will use the Supreme Court's constitutional imprimatur as license to marginalize and persecute we who believe in Biblical teaching.")
[155] James M. Oleske, Jr., *A Regrettable Invitation to "Constitutional Resistance," Renewed Confusion Over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1347 (2017).
[156] *Id.*
[157] Robert P. George, *Perspective: The Tables Can Still Be Turned on the Marriage Debate*, DESERET NEWS (Aug. 31, 2022, 9:00 PM), https://www.deseret.com/2022/8/31/23327017/obergefell-v-hodges-same-sex-marriage-roe-v-wade-respect-for-marriage-act/.

In comparing of the fight against same-sex marriage to the fight against legal abortion, George presages a political and legal strategy that is likely to gain momentum going forward. Neo-traditionalists will continue to bring legal challenges seeking to undermine *Obergefell* with an eye towards its eventual demise, just as they did with *Roe*.[158] And, just as with *Roe*, these challenges will increasingly be presented as claims of religious conscience. Such claims have already found success with the Roberts Court, as religious business owners and religious institutions are now able to exempt themselves from anti-discrimination laws that protect sexual minorities.[159] Given the Roberts Court's sympathy towards religious conservatives, it is reasonable to assume that, going forward, claims for exemptions will only grow, and that states governed by religious conservatives will begin testing the Court's appetite for undermining same-sex marriage rights. Ultimately, I think it is inevitable that the Court will be confronted with the question of whether to overturn *Obergefell* outright. As I argued above, *Dobbs* has laid the doctrinal groundwork for doing just this.

CONCLUSION: DEFENDING SUBSTANTIVE DUE PROCESS

Legal scholars remain flummoxed over what *Dobbs* presages for substantive due process, with some arguing that the Court has committed itself to revisiting and perhaps reversing all existing substantive due process fundamental rights, and others arguing that *Dobbs* will have limited effect on the rights of sexual minorities.[160] Legal scholars also disagree over a set of related questions; namely, if the Court does not follow the apparent logic of *Dobbs* to its conclusion, will it be out of legal principle or for mere political expediency? The range of plausible answers to these questions can provide both a rough sense of where the current Court may be headed, as well as resources for critiquing the Court's normative trajectory and democratic legitimacy.

As I have argued in this Article, it is unlikely that *Dobbs* signals an attack on substantive due process as a whole. Rather, I have argued that *Dobbs* is the first step in a neo-traditionalist attempt to reverse the Court's sexual autonomy jurisprudence. Progressive critics of the Court must reckon with the deep-seated opposition to *Roe* and *Obergefell* that motivates many neo-traditionalists, a hostility that is simply not aroused by other substantive due process cases, like *Loving* or *Meyer v. Nebraska*.[161] Neo-traditionalists oppose the revolution in sexual morality that the Court has

---

[158] *See, e.g.*, Jo Yurcaba & Brooke Sopelsa, *Lawmakers in 9 States Propose Measures to Undermine Same-Sex Marriage Rights*, NBC NEWS (Feb. 25, 2025, 5:24 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/lawmakers-9-states-propose-measures-undermine-sex-marriage-rights-rcna193743.
[159] *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).
[160] *See* McClain & Fleming, *supra* note 3, at 632.
[161] *See supra* Part I.C.

partly helped usher into being, and thus it is the Court's sexual autonomy jurisprudence that, in my view, is currently most at risk.

Rather than conclude on a note of despair, however, I think it is important to consider how those of us supportive of the Court's sexual autonomy jurisprudence might combat neo-traditionalist efforts to return us all to a time when religious conservativism was predominant in American public life. First, I believe that jurists and legal scholars have not identified a plausible justification regarding *why* the Court as an institution should possess the authority to decide questions of intimate sexual behavior for the country as a whole. To be clear, I think the Court's sexual autonomy jurisprudence is broadly correct, as a matter of political morality. I am grateful to live in a country where states cannot ban contraception, same-sex intimacy, or non-traditional relationships and marriages.

Yet the most common justifications for granting the Court this authority are surprisingly underdeveloped. Consider, for example, that in *Dobbs* the majority and dissent engage in a heated back and forth over the threat that the decision poses, or does not pose, to *Obergefell*. While the majority explicitly argues that the *Dobbs* opinion does not "cast doubt on precedents that do not concern abortion," the dissenters point out that the history and tradition test upon which the *Dobbs* majority relies could be used to overturn many modern fundamental rights, such as access to contraception and same-sex marriage.[162] At one point the dissent suggests that the thread running from *Griswold* through *Roe* and on to *Obergefell* is the principle that individuals ought to be free from government coercion in matters involving intimate questions of "bodily integrity, familial relationships, and procreation."[163]

This is a popular characterization of substantive due process, which is often depicted as protecting an individual's right to shape their own "destiny."[164] As McClain and Fleming argue, substantive due process protects the individual right "to make certain unusually important decisions fundamentally affecting their identity, destiny, or way of life . . . the kinds of decisions that hardly anyone, conservative or liberal, wants the government to tell them how to make."[165] On this "destiny-defining" view of substantive due process, what connects *Roe* to *Obergefell*, and what unifies the entire substantive due process canon, is that these decisions protect the individual's right to define their own approach to life without undue government interference.

---

[162] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 221 (2022); *id.* at 363 (Breyer, Sotomayor & Kagan, JJ., dissenting).
[163] *Id.* at 367-68.
[164] *Id.* at 369.
[165] McClain & Fleming, *supra* note 3, at 630.

While this destiny-defining account of substantive due process may be descriptively true at a general level, there are two problems with categorizing *Roe* and *Obergefell* as cases about individual destiny. First, as Justice Alito points out, this conception of substantive due process is far too abstract to do the analytical work needed by the *Dobbs* dissenters.[166] Many choices implicate bodily integrity and personal autonomy, but the destiny-defining account cannot explain why only some of these choices should comprise fundamental rights on its own. As Justice Alito argues, decisions to use illicit drugs or hire sex workers implicate bodily integrity and personal autonomy, yet these are arguably not the sort of decisions that substantive due process ought to protect.[167] Surely, they are not decisions that the *Dobbs* dissenters view as properly falling within the ambit of substantive due process.

To be clear, my point is not to endorse Justice Alito's reasoning, or even to suggest that he his argument is particularly compelling. Plainly, there are significant differences between access to contraception and access to illicit drugs such that government interference in the latter is considerably easier to justify than government interference in the former. Nonetheless, he is surely correct in pointing out that the destiny-defining conception of substantive due process falls several steps short of grounding the fundamental rights to contraception, abortion, and same-sex marriage. An account of substantive due process that invokes personal destiny simply lacks the resources to explain why some destiny-defining choices warrant Court protection and others do not.

In other words, what the destiny-defining account lacks is principled criteria for explaining why the particular personal decisions at issue in cases like *Roe* and *Obergefell* warrant Court protection. It is telling that, while the dissent argues that Alito is "flat wrong" about the nature of substantive due process, they nonetheless fail to provide an answer to his objection.[168] Rather, the dissent simply claims in response that decisions like *Obergefell* are "part of the fabric of our constitutional law" and "of our lives[,]" and that they "safeguard a right to self-determination."[169]

This response, while descriptively true, is insufficient. The claim that *Obergefell* is part of our constitutional fabric simply begs the question. Moreover, while the dissenters suggest that *Obergefell* rests upon a right to

---

[166] *Dobbs*, 597 U.S. at 257 (2022) ("[A]ttempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.").
[167] *Id.*
[168] *Dobbs*, 597 U.S. at 378 (Breyer, Sotomayor & Kagan, JJ., dissenting).
[169] *Id.*

self-determination, this right, without further specification, is simply too abstract to explain and justify the Court's intervention in sexual autonomy cases.

Another problem with destiny-defining accounts of substantive due process as is that they often beg the question against traditionalist critics. Consider, for example, the common argument that substantive due process protects individual autonomy over intimate personal questions; the kinds of questions that, according to one popular account, "hardly anyone, conservative or liberal" wants the state to intervene in.[170] In fact, such claims simply ignore the Court's longstanding traditionalist critics, who view marriage and sexual intimacy as crucial sites of political regulation.[171] In other words, likely almost everyone can agree, regardless of political orientation, that some choices ought to be shielded from state intervention in the name of personal autonomy. Yet there remains substantial disagreement over precisely which choices count as "personal," and thus to be shielded from state intervention, and which count as "public," and thus liable to state regulation.

Offering a new account of substantive due process is, of course, outside the bounds of this Article. But I believe that any future defense of substantive due process will need to begin from a clear-eyed account of the political morality espoused by the Roberts Court. The Roberts Court is deeply traditionalist, which is to say, deeply opposed to the pluralism and respect for difference that has characterized the Court's sexual autonomy cases. My suggestion in closing is that a new account of substantive due process must begin by defending both the importance of pluralism as a political value and the Court's role in facilitating pluralistic approaches to life.

---

[170] McClain & Fleming, *supra* note 3, at 630.
[171] *See supra* Part I.C.