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A Tough Roe to Hoe: How the Reversal of Roe v. Wade Threatens to Destabilize the LGBTQ+ Legal Landscape Today

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# A Tough Roe to Hoe: How the Reversal of *Roe v. Wade* Threatens to Destabilize the LGBTQ+ Legal Landscape Today

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*For the first time in nearly thirty years, in the case of Dobbs v. Jackson Women’s Health Organization, the United States Supreme Court was asked, again, to overturn its landmark ruling in Roe v. Wade finding a constitutional right to an abortion. And with three new Trump appointees and a 6-3 conservative majority, it was finally able to do just that. The Court’s decision in Dobbs has called into question not just the safety of abortion but of other constitutional rights grounded in similar tradition and legal doctrine. This Note considers the effects that the Dobb’s decision could have on LGBTQ+ rights in particular and proceeds in four parts. Part I analyzes the cultural similarities underlying the issues of abortion and LGBTQ+ rights. Part II surveys the current Court’s attitude toward abortion and LGBTQ+ rights, as well as its attitude toward the doctrine of stare decisis. Part III analyzes the analogous legal doctrines utilized by the majorities in landmark abortion and LGBTQ+ rights cases. Part IV considers the effects that the overruling of Roe could have on existing LGBTQ+ precedent today and suggests that—to the extent those precedents are put at risk—modern practitioners going before the Court should seek to actively decouple these issues in the eyes of the Justices.*

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“[I]n constitutional law, as in the world generally, there is always the potential for a butterfly effect. Although nothing is certain, no one should doubt that a decision overturning *Roe v. Wade* would be the constitutional equivalent of a very large butterfly.”<sup>1</sup>

### INTRODUCTION

On December 1, 2021, the United States Supreme Court heard oral arguments in the matter of *Dobbs v. Jackson Women’s Health Organization*.<sup>2</sup> The case involved the constitutionality of Mississippi’s Gestational Age Act,<sup>3</sup> a 2018 law banning abortions after fifteen weeks of pregnancy. The question presented to the Court was “whether all pre-viability prohibitions on elective abortions are unconstitutional.”<sup>4</sup> On June 24, 2022, the Court responded with a resounding “No,” holding that the Constitution does not confer a right to abortion and expressly overturning its landmark rulings in *Roe v. Wade* and *Planned Parenthood v. Casey*, which found that women have a constitutional right to abortion prior to fetal viability.<sup>5</sup>

In choosing to hear *Dobbs*, the United States Supreme Court “put *Roe* on the docket,”<sup>6</sup> with many correctly positing that it would be overturned.<sup>7</sup> Concerns

1. Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 652 (2007).

2. 597 U.S. \_\_\_\_ (2022).

3. H.R. 1510, 2018 Leg., Reg. Sess. (Miss. 2018).

4. Petition for Writ of Certiorari at i, *Dobbs v. Jackson Women’s Health Org.*, 597 U. S. \_\_\_\_ (No. 19-1392).

5. *Dobbs*, 597 U.S. at 69 (“We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”).

6. Amy Davidson Sorkin, *The Supreme Court Looks Ready to Overturn Roe v. Wade*, NEW YORKER (Dec. 2, 2021), <https://www.newyorker.com/news/daily-comment/the-supreme-court-looks-ready-to-overturn-roe> [perma.cc/P4U4-SHHY].

7. See, e.g., *id.*; Mary Ziegler, Opinion, *The End of Roe Is Coming, and It Is Coming Soon*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/opinion/supreme-court-abortion-mississippi-law.html> [https://perma.cc/P4HX-GWLJ]; Nina Totenberg, *Roe v. Wade’s Future Is in Doubt After Historic Arguments at Supreme Court*, NPR (Dec. 1, 2021, 5:35 PM), <https://www.npr.org/2021/12/01/1060508566/roe-v-wade-arguments-abortion-supreme-court-case-mississippi-law> [perma.cc/33DU-L5BG]; John Wagner, Ann E. Marimow, Amy B. Wang, Mariana Alfaro & Robert Barnes, *Fate of Roe v. Wade in the Hands of the Supreme Court After Spirited Arguments*, WASH. POST (Dec. 1, 2021, 2:29 PM), <https://www.washingtonpost.com/politics/2021/12/01/supreme-court-mississippi-abortion-live-updates/> [perma.cc/V6B2-U2T8]; David G. Savage, *Supreme Court Justices Sound Ready to Restrict the Right to Abortion*, L.A. TIMES (Dec. 1, 2021, 3:38 PM), <https://>

stemming from the Court's decision to take up *Dobbs*, however, are not limited to abortion rights. Almost immediately after the Court announced its intent to hear the case, legal and political commentators began to question the continued viability of established LGBTQ+ precedent in the face of a Court willing to square against *Roe*.<sup>8</sup> Indeed, Justice Sonia Sotomayor warned during oral argument of the potential for challenges to LGBTQ+ rights cases if the Court were to overturn *Roe*.<sup>9</sup> But why is this? On their face, abortion and LGBTQ+ rights embody two separate and distinct issues. Indeed, diverging public opinion on the two has led even some religious commentators to claim that these classic “values” issues have been decoupled.<sup>10</sup> Assertions like this, however, while representative of the current cultural climate outside of the Court, have yet to permeate the walls of an institution made up entirely of Justices from a different generational zeitgeist—one that has historically viewed issues of abortion and LGBTQ+ rights in tandem.<sup>11</sup> These assertions thus conflate “popular opinion” with the opinion of the Court<sup>12</sup> and overlook the extent to which abortion and LGBTQ+ precedent inform one another under the Court's present jurisprudence. The Supreme Court's decision in *Dobbs*

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[www.latimes.com/politics/story/2021-12-01/supreme-court-weighs-future-of-abortion-rights-and-roe-vs-wade](http://www.latimes.com/politics/story/2021-12-01/supreme-court-weighs-future-of-abortion-rights-and-roe-vs-wade) [perma.cc/V6WW-FVS6].

8. See, e.g., Matt Laviertes, *As High Court Signals Roe v. Wade Reversal, States Eye Same-Sex Marriage Protections*, NBC NEWS (Jan. 11, 2022, 8:45 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/high-court-signals-roe-v-wade-reversal-states-eye-sex-marriage-protect-rcna11645> [perma.cc/K7KB-DRMG]; Kimberly Robinson, *Sotomayor Says Abortion Case Imperils LGBTQ Rights*, BLOOMBERG EQUAL (Dec. 1, 2021, 1:59 PM), <https://www.bloomberg.com/news/articles/2021-12-01/abortion-case-puts-gay-rights-at-risk-liberal-justice-warns> [https://perma.cc/X9WX-9A33]; Wynne Davis, *As the Supreme Court Weighs the Future of 'Roe v. Wade', Experts Look Beyond Abortion*, NPR (Dec. 10, 2021, 5:00 AM), <https://www.npr.org/2021/12/10/1062702221/supreme-court-weighs-mississippi-abortion-law-experts-look-further> [perma.cc/2LVP-6R3R].

9. Transcript of Oral Argument at 22–28, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. argued Dec. 1, 2021) (“All of those other cases—*Griswold*, *Lawrence*, *Obergefell*—they all rely on substantive due process. You're saying there's no substantive due process in the Constitution, so they're just as wrong according to your theory. . . . I just think you're dissimulating when you say that any ruling here wouldn't have an effect on those. . . . Do you think . . . that no state is going to think otherwise, that no people in the population aren't going to . . . challenge those cases in court?”); see also Robinson, *supra* note 8.

10. See, e.g., Linda Feldmann, *Culture Wars: Why Gay Marriage and Abortion Have Been 'Decoupled'*, CHRISTIAN SCI. MONITOR (June 29, 2013), <https://www.csmonitor.com/USA/Politics/DC-Decoder/2013/0629/Culture-wars-Why-gay-marriage-and-abortion-have-been-decoupled> [perma.cc/V8F9-HJZ5].

11. See *infra* Part I; see also Ted G. Jelen, *Public Attitudes Toward Abortion and LGBTQ Issues: A Dynamic Analysis of Region and Partisanship*, SAGE OPEN, Jan.–Mar. 2017, at 1, 4–5 (“[I]ssues involving aspects of sexual morality, such as abortion, LGBTQ rights, and same-sex marriage, seem likely to remain fertile sources of party polarization, even as mass attitudes on these issues may be becoming more permissive over time.”). Given that the nomination of Supreme Court Justices is perhaps the purest form of party politics, it seems fair to posit that the opinion of the Court would lag behind that of the public.

12. The same ethos demanding insulation of the Court from public opinion calling for the restriction of certain constitutional rights would also seem to insulate it from public opinion calling for those same rights' expansion. See Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 62 (2017) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016)) (“[J]udicial deference to democratic majorities is ‘misguided and inconsistent with the most basic premises of the Constitution.’”). Thus, the only “opinion” that stands to affect a ruling is the opinion of the Justices themselves.

thus threatens LGBTQ+ precedent governing everything from same-sex sex<sup>13</sup> and gay marriage<sup>14</sup> to legal protections in the workplace.<sup>15</sup>

Part I of this Note analyzes the cultural similarities underlying the issues of abortion and LGBTQ+ rights. Part II surveys the current Court's attitude toward abortion and LGBTQ+ rights, as well as its attitude toward the doctrine of *stare decisis*.<sup>16</sup> Part III analyzes the analogous legal doctrines utilized by the majorities in landmark abortion and LGBTQ+ rights cases. Part IV considers the effects that the overruling of *Roe* could have on existing LGBTQ+ precedent and suggests that—to the extent those precedents are put at risk—modern practitioners going before the Court should seek to actively decouple these issues in the eyes of the Justices.

#### I. CULTURAL SIMILARITIES BETWEEN ABORTION AND LGBTQ+ RIGHTS

In 1991, sociologist James Davison Hunter popularized the term “culture wars” to describe the conflicts over the so-called values issues that have increasingly engendered political debate in contemporary America.<sup>17</sup> These include issues regarding the family, art, education, law, and politics.<sup>18</sup> And while it would be a mistake to say that any one issue “is the beginning and end of the contemporary culture war,”<sup>19</sup> the term has perhaps most often been understood to denote the conflicts over abortion and LGBTQ+ rights.<sup>20</sup> Cultural and sociological research placing the two rights, and the social movements that gave rise to each, in concert with one another is rich and extensive,<sup>21</sup> and the numerous similarities and differences that exist between the two cannot be addressed in a Note of this scope. Rather, this Part limits its discussion to those similarities underlying abortion and LGBTQ+ rights that are most determinative in leading to the coupling of the two issues in popular parlance.

Perhaps the most fundamental similarity between the two, both abortion and LGBTQ+ rights “challenge deeply held social norms about gender and sexuality,”<sup>22</sup>

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13. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

14. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

15. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

16. This Note limits its discussion of *stare decisis* to “horizontal” *stare decisis* (that is, whether, and under what circumstances, the Court should overrule itself). This is contrasted with “vertical” *stare decisis*, whereby a lower court is obligated to follow the precedent of a higher court.

17. See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

18. *Id.*

19. *Id.* at 187.

20. See *id.* (“In many ways, the family is the most conspicuous field of conflict in the culture war. Some would argue that it is the decisive battleground. The public debate over . . . the moral legitimacy of abortion, the legal and social status of homosexuals . . . .”); *id.* at 189 (“Perhaps with the exception of abortion, few issues in the contemporary culture war generate more raw emotion than the issue of homosexuality.”); see, e.g., David G. Savage, *The Constitutional Divide*, 86 A.B.A. J. 36, 36 (2000) (“The culture wars are coming to the U.S. Supreme Court this spring. Late this month, the Court will consider whether partial-birth abortions can be outlawed and whether the Boy Scouts of America can exclude openly gay men from its leadership ranks.”).

21. See, e.g., Suzanne B. Goldberg, *Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights*, 29 COLUM. J. GENDER & L. 1, 18–32 (2015).

22. Katrina Kimport, *Divergent Successes: What the Abortion Rights Movement Can Learn from Marriage Equality's Success*, 48 PERSPS. ON SEXUAL & REPROD. HEALTH 221, 224 (2016).

specifically “normative constructions of sexuality as primarily procreative.”<sup>23</sup> It is for this reason that both issues have faced significant faith-based opposition from religious conservatives. Indeed, speaking of sexual relations between same-sex couples, former Chief Justice of the United States Supreme Court Warren Burger wrote, “Condemnation of those practices is firmly rooted in Judeo-Christian [sic] moral and ethical standards.”<sup>24</sup> This type of religious opposition to the two issues, grounded in biblical doctrine, is perhaps best exemplified in the Manhattan Declaration, released in 2009 by Eastern Orthodox, Catholic, and Evangelical Christian leaders, to affirm support for “the sanctity of human life, the dignity of marriage as a union of husband and wife, and the freedom of conscience and religion.”<sup>25</sup> The document states broadly that:

we will not comply with any edict that purports to compel our institutions to participate in abortions . . . nor will we bend to any rule purporting to force us to bless immoral sexual partnerships, treat them as marriages or the equivalent, or refrain from proclaiming the truth, as we know it, about morality and immorality and marriage and the family.<sup>26</sup>

It is within this conceptualization of morality—one informed by religion and which has historically viewed abortion and LGBTQ+ rights as immoral counterparts—that popular attitudes toward the two issues have been framed.

While abortion and LGBTQ+ rights possess this foundational commonality, it is important to acknowledge some of the key differences between the two that would, at least on their face, lend support to contentions that LGBTQ+ rights can be sufficiently distinguished from abortion, so as to be immunized from reversal despite the current Court’s decision to overturn *Roe*. Perhaps the most oft cited distinction between abortion and LGBTQ+ rights today is the varying levels of public support for each. While public opinion behind abortion has stayed relatively constant, public opinion in support of LGBTQ+ rights has grown dramatically in recent years.<sup>27</sup> Trust in public opinion polls as reliable indicators of the safety of LGBTQ+ rights, however, may ultimately be misplaced.<sup>28</sup> The annual number of anti-LGBTQ+ bills filed across state legislatures has skyrocketed from forty-one bills in 2018 to 238 bills in less than three months of 2022.<sup>29</sup> As of the time of the

23. *Id.*

24. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

25. *Manhattan Declaration: A Call of Christian Conscience*, MANHATTAN DECLARATION (Nov. 20, 2009), <https://www.manhattandeclaration.org> [perma.cc/538D-5D8T].

26. *Id.* It is unsettling how similar this language is to a letter signed by current Supreme Court Justice Amy Coney Barrett and discussed *infra* Part II.

27. *Compare Gallup Historical Trends: Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> [perma.cc/3PJJ-K9BY] (last visited Mar. 2, 2023), *with Gallup Historical Trends: LGBTQ Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> [perma.cc/MJE7-Z49W] (last visited Mar. 2, 2023).

28. After all, if public opinion polls were always correct, Hilary Clinton would have been elected the 45th president of the United States. *See* W. JOSEPH CAMPBELL, *LOST IN A GALLUP: POLLING FAILURE IN U.S. PRESIDENTIAL ELECTIONS 183–204* (2020).

29. Matt Lavietes & Elliot Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC NEWS (Mar. 20, 2022, 3:00 AM), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418> [perma.cc/BQ44-VQRG].

writing of this Note, fifteen so-called “Don’t Say Gay” bills are under consideration in nine states, which seek to ban instruction on LGBTQ+ people and issues in K-12 schools.<sup>30</sup> Still more, the constitutions and statutes of dozens of states continue to contain language defining marriage as being between a man and a woman,<sup>31</sup> and seventeen states still have anti-sodomy laws in their state codes that criminalize engaging in consensual same-sex sex.<sup>32</sup> Even messaging that has its origins in conservative, and arguably sensationalist, news media is finding its way to the mouths of top state officials. In a 2020 segment on *Tucker Carlson Tonight*, Fox News Channel host Tucker Carlson called the concept of a transgender child “grotesque”<sup>33</sup> and said that supportive parents are “abusing their children.”<sup>34</sup> Appearing to heed this call, Texas Governor Greg Abbott, less than two years later, issued a directive to the Texas Department of Family and Protective Services, ordering the agency to investigate instances of gender-affirming health care for transgender minors as “child abuse.”<sup>35</sup> Actions like these, as well as others recently taken by democratically elected officials purporting to espouse the beliefs of a majority of their state,<sup>36</sup> run counter to the assertion that public opinion so

30. Jeffrey Sachs & Jonathan Friedman, *Educational Gag Orders Target Speech About LGBTQ+ Identities with New Prohibitions and Punishments*, PEN AM. (Feb. 15, 2022), <https://pen.org/educational-gag-orders-target-speech-about-lgbtq-identities-with-new-prohibitions-and-punishments/> [perma.cc/ZYS6-CZLS]; see, e.g., H.R. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (prohibiting K-12 school districts from encouraging “classroom discussion about sexual orientation or gender identity” and allowing parents to sue schools if they believe the school violated these laws); H.R. 800, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022) (banning textbooks and instructional materials “that promote, normalize, support, or address controversial social issues, such as lesbian, gay, bi-sexual, or transgender (LGBT) lifestyles” in K-12 schools); H.R. 2662, 2021–2022 Leg., Reg. Sess. (Kan. 2022) (amending the state’s obscenity law to make using classroom materials depicting “homosexuality” a Class B misdemeanor); H.R. 1040, 122d Gen. Assemb., Reg. Sess. (Ind. 2022) (barring educators from discussing in any context “sexual orientation,” “transgenderism,” or “gender identity” without permission from parents).

31. Julie Moreau, *States Across U.S. Still Cling to Outdated Gay Marriage Bans*, NBC NEWS (Feb. 18, 2020, 7:44 AM), <https://www.nbcnews.com/feature/nbc-out/states-across-u-s-still-cling-outdated-gay-marriage-bans-n1137936> [perma.cc/H54E-5W7A]. While constitutionally null-and-void following the Supreme Court’s landmark *Obergefell v. Hodges* decision, “a number of conservative lawmakers are happy to keep [this language] for both symbolic and political reasons . . . hop[ing] *Obergefell* will be overturned, and then their state [will] go back to banning same-sex marriage.” *Id.* (quoting Jason Pierceson).

32. EQUALITY MATTERS, STATES THAT STILL CRIMINALIZE SODOMY (2022), <http://cloudfront.equalitymatters.org/static/images/eqm-20110808-sodomy.jpg> [perma.cc/J56E-JZLL]. Again, while constitutionally moot following the Supreme Court’s *Lawrence v. Texas* decision, conservative lawmakers keep these laws on the books for the reasons stated above.

33. Stagepost Live Shot Guests, *Matt Walsh—Fox News—Tucker Carlson—12.3.2020*, YOUTUBE, at 1:47 (Dec. 3, 2020), <https://www.youtube.com/watch?v=XPM91hMd9dg&t=107s> [perma.cc/C3GW-5HMT].

34. *Id.* at 1:57.

35. Press Release, Office of the Texas Governor Gregg Abbott, Governor Abbot Directs DFPS to Investigate Gender-Transitioning Procedures as Child Abuse (Feb. 22, 2022), <https://gov.texas.gov/news/post/governor-abbott-directs-dfps-to-investigate-gender-transitioning-procedures-as-child-abuse> [perma.cc/KJ8M-LF3P].

36. See, e.g., Grant Gerlock, *Transgender Girls and Women Now Barred from Female Sports in Iowa*, NPR (Mar. 3, 2022, 3:19 PM), <https://www.npr.org/2022/03/03/1084278181/transgender-girls-and-women-now-barred-from-female-sports-in-iowa> [perma.cc/6MAW-UYCS] (“Iowa Gov. Kim Reynolds has signed a law that bans transgender girls and women in the state from competing in sports according to their gender identity.”).

sufficiently distinguishes LGBTQ+ rights from abortion as to remove it from the “zone of danger.”

A more compelling distinction centers around the view that “marriage equality concerns the right to choose a loving partner and that abortion disrespects and endangers the sanctity of human life.”<sup>37</sup> And while by no means a “better” argument,<sup>38</sup> this distinction does lead to a seemingly rational conclusion: an individual “can support [LGBTQ+ rights] because [they] believe in the dignity and equality of all human life—and oppose abortion for the same stated reasons.”<sup>39</sup> The obvious counter to this is that access to abortion respects the sanctity of a woman’s life<sup>40</sup> and that abortion does not harm a viable human being but denial of abortion does;<sup>41</sup> however, this distinction must be viewed under the assumption, held by those who support it, that life begins at conception.<sup>42</sup> With this understanding, the two rights appear to be capable of separation—with a valid case to be made for why one can remain tenable even given the destruction of the other.

Whatever differences exist between the two that would support the contention that LGBTQ+ rights have been—or, more properly, should be—removed from today’s modern conceptualization of the “culture wars,” and thus decoupled from issues involving abortion, opponents of LGBTQ+ rights on the Court have expressly grounded their opposition in the understanding that no such decoupling has occurred.<sup>43</sup>

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37. Goldberg, *supra* note 21, at 25.

38. Indeed, the Author does not personally agree with this distinction.

39. Mark Joseph Stern, *It’s Perfectly Logical to Oppose Abortion and Support Gay Marriage*, SLATE (May 15, 2014, 3:39 PM), <https://slate.com/human-interest/2014/05/its-logical-to-oppose-abortion-and-support-gay-marriage.html> [<https://perma.cc/8ZPS-ITCX>]. The majority in *Dobbs* appears to adopt this very view. *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_, 71 (2022) (“[R]ights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed ‘potential life.’”).

40. Goldberg, *supra* note 21, at 25.

41. *Id.*

42. To the extent that this view could still be rebutted on the grounds that both abortion and LGBTQ+ rights find legal support based in substantive due process, *see infra* Part III, so that a person cannot support one while opposing the other, “support for [LGBTQ+ rights] goes far beyond constitutional exegesis: It is entirely possible to support [LGBTQ+ rights] in principle without believing that the [C]onstitution commands its legalization nationwide.” Stern, *supra* note 39.

43. *See, e.g., Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., with whom Rehnquist, C.J., and Thomas, J., join dissenting) (stating of the Court’s decision to hold unconstitutional a law prohibiting anti-discrimination protections for gay, lesbian, and bisexual individuals, that “it [is] no business of the courts . . . to take sides in this culture war.”); *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (“One of the most revealing statements in today’s opinion is the Court’s grim warning that the criminalization of homosexual conduct is ‘an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.’ It is clear from this that the Court has taken sides in the culture war . . . .”); *see also infra* Part II.



## II. THE ROBERTS COURT POST-TRUMP: ATTITUDE TOWARDS ABORTION, LGBTQ+ RIGHTS, AND STARE DECISIS

With the retirement of the Supreme Court's "swing vote,"<sup>44</sup> Justice Anthony Kennedy, in 2018, and the death of one of its most liberal<sup>45</sup> Justices, the late Justice Ruth Bader Ginsburg, in 2020, the already conservative-leaning Supreme Court has moved even further to the right.<sup>46</sup> The Court now has a 6-3 conservative supermajority,<sup>47</sup> with the ostensible attitudes of the Justices<sup>48</sup> towards abortion and LGBTQ+ rights, for the most part, falling squarely along party and ideological lines.

### A. Abortion

During his campaign for Presidency of the United States, former President Donald Trump vowed to nominate Justices to the Supreme Court who would help to overturn *Roe v. Wade*.<sup>49</sup> With the subsequent appointments of Justices Neil

44. See Colin Dwyer, *A Brief History of Anthony Kennedy's Swing Vote—And the Landmark Cases It Swayed*, NPR (June 27, 2018, 7:00 PM), <https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed> [perma.cc/Y82A-ERGY].

45. Justice Ginsburg's most recent Martin-Quinn score following the 2019–2020 term was –2.836. *Martin-Quinn Scores: Measures*, U. MICH., <https://mqscores.lsa.umich.edu/measures.php> [https://perma.cc/2NXN-EF4S] (last visited Mar. 2, 2023) (select "2020 MQ Scores Data" hyperlink; then open "court.xls" file). The Martin-Quinn scale begins at zero and measures each Justice along an ideological continuum; the further "left" a Justice is (so the higher a Justice's negative number), the more liberal they are, and the further "right" a Justice is (so the higher a Justice's positive number), the more conservative they are. See generally Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002).

46. See Sidhant Wadhwa, *Replacing Ginsburg Will Pull Court Right*, CHI. POL'Y REV. (Sept. 23, 2020), <https://chicagopolicyreview.org/2020/09/23/replacing-ginsburg-will-pull-court-right/> [perma.cc/Z9HY-F5WF] ("According to the Martin-Quinn score, the Court's center prior to Justice Ginsburg's passing was close to the overall ideological center. If Barrett, the most likely nominee, were to be confirmed, she would shift the center of the Court to the right."); Laura Bronner & Elena Mejía, *The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), <https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/> [perma.cc/KL3C-FPF7] ("[T]he replacement of the late Justice Ruth Bader Ginsburg by Barrett, whose ideological score this [T]erm is estimated to fall to the right of that of Roberts and Kavanaugh, has shifted the center of the court—and shifted it in a more conservative direction.").

47. As of the time of the writing of this Note, Senate confirmation hearings are underway for President Biden's first nominee to the Supreme Court, Ketanji Brown Jackson, who has been tapped to replace Clinton appointee Justice Stephen Breyer following his announcement that he will retire from the bench at the end of this year's [T]erm. Jackson's confirmation, however, would not change the ideological composition of the Court.

48. The three liberal Justices on the Court—Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan—have voted in favor of abortion and LGBTQ+ rights in almost every case that has come before the Court during their respective times on the bench. As such, this Note limits its discussion to the attitudes of the conservative Justices making up the Court's current majority.

49. Press Release, Senate Democrats, *What's at Stake: President Trump Promised to Nominate Justices to Overturn Roe* (June 28, 2018), <https://www.democrats.senate.gov/imo/media/doc/Whats%20At%20Stake%20President%20Trump%20Promised%20To%20Nominate%20Justices%20To%20Overturn%20Roe.pdf> [perma.cc/N2FD-JUTH] ("Well, if we put another two or perhaps three [J]ustices on, that's [overturning *Roe v. Wade*] really what's going to be—that will happen. And that'll happen automatically in my opinion, because I am putting pro-life [J]ustices on the court." (quoting

Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, Trump delivered on that promise.

In her acceptance speech following her nomination to the United States Supreme Court, Justice Amy Coney Barrett, a former clerk for the late Justice Antonin Scalia, described her approach to the law in a single sentence: “A judge must apply the law as written.”<sup>50</sup> Adherence to this brand of judicial interpretation, known as “textualism” or “originalism,” presents unique challenges with regards to *stare decisis*. Justice Barrett, in her own words, has acknowledged the “tension between *stare decisis* and originalism,”<sup>51</sup> admitting that “[J]ustices who subscribe to text-based theories are more likely than others to encounter conflict between precedent and jurisprudential commitment.”<sup>52</sup> When such a conflict occurs, according to Justice Barrett, a Justice’s literal interpretation of the text should prevail.<sup>53</sup> It is perhaps for this reason that Justice Barrett has argued that “a more relaxed form of constitutional *stare decisis*”<sup>54</sup>—that is, one that makes it easier for Justices to “reject[] a predecessor majority’s methodological approach in favor of their own”<sup>55</sup>—is “both inevitable and probably desirable.”<sup>56</sup> Providing us with a clue as to the types of cases she would consider to be beyond reproach, Justice Barrett, in a *Texas Law Review* article published in 2013, cited to a list of cases commonly regarded as “super precedents” by legal academics and scholars. These are decisions that are “so woven in the fabric of law”<sup>57</sup> that “no serious person would propose to undo [them] even if they are wrong.”<sup>58</sup> Noticeably absent from this list is *Roe v. Wade*.<sup>59</sup> Although insisting in 2017, during her Senate confirmation hearings for her seat on the United States Court of Appeals for the Seventh Circuit,

Donald Trump, Final Presidential Debate (Oct. 19, 2016), <https://www.rev.com/blog/transcripts/donald-trump-vs-hillary-clinton-3rd-presidential-debate-transcript-2016> [perma.cc/CE9S-Z4JQ]).

50. Amy Coney Barrett, USSC Nomination Acceptance Address, at 2:53 (Sept. 26, 2020), <https://www.americanrhetoric.com/speeches/amyconeybarrettusscnominationacceptance.htm> [perma.cc/6KMP-VLU3].

51. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1922 (2017).

52. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1724 (2013); *see also id.* (“It makes sense that one committed to a textualist theory would more often find precedent in conflict with her interpretation of the Constitution than would one who takes a more flexible, all-things-considered approach.”).

53. *See id.* at 1728 (“I tend to agree with those who say that a [J]ustice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.”); Barrett, *supra* note 12, at 81–82 (describing how originalism “requires judges to uphold the original [C]onstitution” and that “the measure of a court . . . is its fidelity to the original public meaning” (internal quotations omitted)). The obvious flaw with this form of judicial interpretation is that it fails to account for modern issues that could not possibly have been anticipated by the original drafters of the Constitution.

54. Barrett, *supra* note 52, at 1715.

55. *Id.* at 1723.

56. *Id.* at 1715.

57. Barrett, *supra* note 51, at 1928 (quoting 13 ROY M. MERSKY & J. MYRON JACOBSTEIN, *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE*, 1916–1986, at 132 (1989)).

58. Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 J. CONST. L. 1, 2 (2016).

59. Barrett, *supra* note 51, at 1928.

that she had “not offered [her] own definition of superprecedent,”<sup>60</sup> but merely “used a definition articulated by other scholars, as well as the examples they offered,”<sup>61</sup> when asked three years later during her confirmation hearings for the United States Supreme Court whether she, herself, would include *Roe* in this list, Justice Barrett declined to do so.<sup>62</sup> Indeed, in the past, Justice Barrett questioned whether the Court should have taken up *Roe* at all<sup>63</sup> and indicated that it was ripe for re-examination.<sup>64</sup> This is consistent with Justice Barrett’s personal beliefs, as a Catholic judge, that abortion is “always immoral.”<sup>65</sup> In the only abortion case that she ruled on prior to the Court’s decision in *Dobbs*, Justice Barrett voted with the majority to deny an emergency application submitted to the Court’s so-called shadow docket,<sup>66</sup> seeking an injunction to prevent enforcement of controversial Texas abortion law S.B. 8<sup>67</sup> while a challenge to its constitutionality could be litigated

60. SENATE COMM. ON THE JUDICIARY, NOMINATION OF AMY CONEY BARRETT TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, QUESTIONS FOR THE RECORD, QUESTIONS FROM SENATOR WHITEHOUSE 1 (2017), <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Whitehouse%20QFRs.pdf> [perma.cc/FKC9-8R3T].

61. *Id.*

62. See Brian Naylor, *Barrett Says She Does Not Consider Roe v. Wade ‘Super-Precedent’*, NPR (Oct. 13, 2020, 3:55 PM), <https://www.npr.org/sections/live-amy-coney-Barrett-supreme-court-confirmation/2020/10/13/923355142/Barrett-says-abortion-rights-decision-not-a-super-precedent> [perma.cc/6FCL-BLZG] (noting that, when asked whether *Roe v. Wade* could properly be considered a super precedent, Justice Barrett responded, “*Roe* doesn’t fall in that category.”).

63. Christian Myers, *Law Professor Reflects on Landmark Case*, OBSERVER (Jan. 21, 2013), [https://archives.nd.edu/Observer/v46/2013-01-21\\_v46-072.pdf](https://archives.nd.edu/Observer/v46/2013-01-21_v46-072.pdf) [https://perma.cc/5RXX-SKMX] (“It brings up an issue of judicial review: Does the Court have the capacity to decide that women have the right to obtain an abortion or should it be a matter for state legislatures? Would it be better to have this battle in the state legislatures and Congress rather than the Supreme Court?” (quoting Amy Coney Barrett, Professor of Law, Univ. of Notre Dame, Lecture: *Roe* at 40: The Supreme Court, Abortion and the Culture War that Followed (Jan. 18, 2013))).

64. See Barrett, *supra* note 52, at 1735 n.141 (“*Roe v. Wade* has acquired no immunity from serious judicial reconstruction, even if arguments for overruling it ought not succeed.” (quoting Richard H. Fallon, Jr., Keynote Address, *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116 (2008))).

65. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 316 (1998).

66. The term “shadow docket” refers to the emergency orders and summary decisions that are outside the Court’s main docket of argued cases and decisions. Mark Walsh, *The Supreme Court’s ‘Shadow Docket’ Is Drawing Increasing Scrutiny*, A.B.A. (Aug. 20, 2020, 9:20 AM), <https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny> [perma.cc/P7KU-ZZSH]. To get on the shadow docket, any litigant can apply to a single Justice, who decides whether to forward the dispute to the full Court. Lawrence Hurley, Andrew Chung & Jonathan Allen, *The ‘Shadow Docket’: How the U.S. Supreme Court Quietly Dispatches Key Rulings*, REUTERS (Mar. 23, 2021, 3:29 AM), <https://www.reuters.com/article/legal-us-usa-court-shadow-video/the-shadow-docket-how-the-u-s-supreme-court-quietly-dispatches-key-rulings-idUSKBN2BF16Q> [perma.cc/RR23-7L4K]. Five votes among the nine justices are needed to grant a request. *Id.*

67. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021). The Texas law, like other so-called “heartbeat bills” that have been enacted by Republican legislatures across the country, bans abortions after six weeks of pregnancy. *Id.* The law is unprecedented, however, in its enforcement scheme—which was explicitly drafted to immunize the law from judicial review prior to the law’s taking effect. Rather than relying on government officials to enforce the ban, the law instead deputizes private individuals to bring lawsuits against anyone who either provides or “aids or abets” an abortion, establishing an award of \$10,000 for a successful lawsuit. *Id.*

in the lower courts.<sup>68</sup> This decision by the Court to allow the law to take effect served as “a strong signal that it [was] poised to overturn *Roe v. Wade*.”<sup>69</sup>

Like Justice Barrett, Justices Gorsuch and Kavanaugh subscribe to Justice Scalia’s particular brand of originalism.<sup>70</sup> Since joining the Court, each Justice voted twice in abortion cases prior to *Dobbs*—both times in favor of restrictions. In 2020, each Justice dissented in *June Medical Services, LLC v. Russo*,<sup>71</sup> a case striking down a Louisiana abortion law that would have forced all but one of the state’s abortion providers to close,<sup>72</sup> and in 2021, they voted with the majority to allow S.B. 8 to take effect.<sup>73</sup> Justice Kavanaugh ruled on only one other case involving abortion as a federal judge on the United States Court of Appeals for the District of Columbia Circuit. In that case, *Garza v. Hargan*,<sup>74</sup> Justice Kavanaugh, sitting on a panel of three judges, ruled that blocking an undocumented immigrant held in federal custody from receiving an abortion and forcing her to continue her pregnancy for multiple more weeks until such time as she was able to obtain a sponsor, did not unduly burden the woman’s right to an abortion under existing precedent.<sup>75</sup> The argument can certainly be made that cases like this, which involved nuanced and unique circumstances, while implicating *Roe*, were not targeted at its central holding. Indeed, in his dissent to the court’s decision upon rehearing to overturn his initial ruling, Justice Kavanaugh takes care to note that “all parties to this case recognize

68. See *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (2021) (decision on application for injunctive relief). Ordinarily, it is not known which Justices voted with the majority, as decisions on the shadow docket are made “without providing signed opinions or detailed explanations.” Hurley, Chung & Allen, *supra* note 66. However, because five votes are needed to grant a request, *id.*—and because Chief Justice Roberts, along with Justices Breyer, Sotomayor, and Kagan, filed dissenting opinions in this matter—we know that Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett voted in the majority.

69. Erwin Chemerinsky, Opinion, *Op-Ed: Supreme Court Decision on Texas Abortion Law Puts All of Our Constitutional Rights in Jeopardy*, L.A. TIMES (Dec. 10, 2021, 11:07 AM), <https://www.latimes.com/opinion/story/2021-12-10/supreme-court-decision-texas-abortion> [perma.cc/HXJ2-FURL].

70. See NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 106–07 (2019) [hereinafter GORSUCH, A REPUBLIC] (describing how he was won over by Justice Scalia’s views on originalism and textualism rather than those of legal scholars espousing beliefs in a “living constitution”); Neil Gorsuch, Address at the Federalist Society’s National Lawyers Convention (Nov. 16, 2017), <https://fedsoc.org/conferences/2017-national-lawyers-convention> [https://perma.cc/GTJ8-ZCBD] [hereinafter Gorsuch Address] (“Tonight, I can report that a person can be both a publicly committed originalist and textualist and be confirmed to the Supreme Court of the United States. Originalism has regained its place at the table of constitutional interpretation, and textualism in the reading of statutes has triumphed. And neither one is going anywhere on my watch.”); Brett M. Kavanaugh, 2017 Walter Berns Constitution Day Lecture From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist 2 (Sept. 18, 2017), <https://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf> [https://perma.cc/SJ2R-EB7U] (“It is sometimes said that the Constitution is a document of majestic generalities. I view it differently. As I see it, the Constitution is primarily a document of majestic specificity, and those specific words have meaning. Absent constitutional amendment, those words continue to bind us as judges, legislators, and executive officials.”).

71. 140 S. Ct. 2103 (2020) (finding that requiring abortion providers to have hospital admitting privileges poses an undue burden on women in violation of *Casey*).

72. *Id.* at 2129.

73. See *supra* note 68 and accompanying text.

74. No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct. 20, 2017).

75. *Id.* at \*1.

that *Roe v. Wade* and *Planned Parenthood v. Casey* are precedents we must follow.<sup>76</sup> And while words like these, upon first glance, would have seemed to quell any suggestion that *Roe* was at risk, the *Dobbs* decision ultimately revealed them for what they truly were: mere platitudes, rather than any kind of sincere acknowledgment of, or reverence toward, established precedent. Showing his hand, Justice Kavanaugh, during oral argument in *Dobbs*, presented a list of cases in which the Court overturned long-held precedents and asked counsel for Jackson Women's Health Organization why the "right answer," with regards to *Roe* and *Casey*, was not to "return to the position of neutrality . . . and not stick with those precedents in the same way that all those other cases didn't?"<sup>77</sup> This suggestion that the Court ignore its longstanding abortion precedent stands in stark contrast with Justice Kavanaugh's statement in *Garza* and suggests that Justice Kavanaugh had no intention of being constrained by the Court's past rulings in *Roe* and *Casey*.

The attitudes of the remaining conservative Justices toward abortion and *stare decisis* fare no better. Justice Thomas, the Court's longest-serving and most conservative<sup>78</sup> Justice, has expressed his philosophy regarding *stare decisis* as follows: "When faced with demonstrably erroneous precedent, my rule is simple: We should not follow it."<sup>79</sup> One such example of "demonstrably erroneous" precedent, according to Justice Thomas, is the Court's rulings on abortion.<sup>80</sup> Justice Thomas voted to overturn *Roe* in 1992, in his first term on the Court, when he dissented in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>81</sup> and he continues to maintain that the Court's abortion jurisprudence is "grievously wrong."<sup>82</sup> His closest ideological counterpart on the Court, Justice Alito, has expressed similar views towards abortion. In a 1985 application to become deputy assistant to U.S. Attorney General Edwin Meese, III, Justice Alito made reference to certain "legal positions in which [he] personally believe[s] very strongly,"<sup>83</sup> one of which being that "the Constitution does not protect the right to an abortion."<sup>84</sup> While insisting that he

76. *Garza v. Hargan*, 874 F.3d 735, 753 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting).

77. Transcript of Oral Argument, *supra* note 9, at 78–80.

78. Justice Thomas's most recent Martin-Quinn score following the 2019–2020 Term was 3.168. *Martin-Quinn Scores: Measures*, *supra* note 45.

79. *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J. concurring).

Stated differently, Justice Thomas's view of *stare decisis* is that "when our prior decisions clearly conflict with the text of the Constitution, we are required to privilege the text over our own precedents." *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2151 (2020) (Thomas, J. dissenting).

80. *June Med. Servs., LLC*, 140 S. Ct. at 2151 (Thomas, J., dissenting) ("Roe and its progeny are premised on a 'demonstrably erroneous interpretation of the Constitution.'").

81. 505 U.S. 833, 944 (1992) (Rehnquist, C.J., with whom White, J., Scalia, J., and Thomas, J., join, concurring in part and dissenting in part); *id.* at 979 (Scalia, J., with whom Rehnquist, C.J., White, J., and Thomas, J., join, concurring in part and dissenting in part).

82. *June Med. Servs.*, 140 S. Ct. at 2142 (Thomas, J., dissenting) ("Our abortion precedents are grievously wrong and should be overruled."); *see also* *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 635 (2016) (Thomas, J., dissenting) ("I remain fundamentally opposed to the Court's abortion jurisprudence."); *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution." (internal citation omitted)).

83. Samuel A. Alito, Attachment to PPO Non-Career Appointment Form (Nov. 15, 1985).

84. *Id.*

was “simply an advocate seeking a job,”<sup>85</sup> when he wrote this statement, Justice Alito has since voted to uphold every law restricting abortion during his fifteen years on the bench.<sup>86</sup> Chief Justice Roberts offers a more tempered, albeit decidedly conservative, record regarding abortion jurisprudence. In 2007, the Chief Justice joined the majority in *Gonzales v. Carhart*,<sup>87</sup> which upheld the Partial-Birth Abortion Ban Act of 2003.<sup>88</sup> While joining with the liberal justices to author a concurring opinion in *June Medical Services*,<sup>89</sup> Chief Justice Roberts dissented in *Whole Woman’s Health v. Hellerstedt*<sup>90</sup> just four years earlier, voting to uphold a nearly identical Texas abortion law. The Chief Justice made clear in his concurrence in *June Medical Services* that he continued to disagree with the majority’s decision in *Whole Woman’s Health*, but that under the principle of *stare decisis*, the cases should be treated alike.<sup>91</sup>

### B. LGBTQ+ Rights

In addition to his promise to nominate “pro-life” Justices to the Court, President Trump also stated that he would “strongly consider” nominating Justices who would reverse *Obergefell v. Hodges*.<sup>92</sup> That case, which found a constitutional right to same-sex marriage,<sup>93</sup> was decided by a narrow 5-4 ruling, with Justice Kennedy casting the deciding vote. While the Court’s opinion represented a victory for LGBTQ+ rights advocates, the thin margin on which it was decided serves as a stark reminder that the Court’s attitude towards such rights is anything but unanimous.

Following Justice Kennedy’s retirement, today’s Court, with its 6-3 conservative majority, has a new median Justice in the form of Justice Kavanaugh.<sup>94</sup> A former clerk for Justice Kennedy, Justice Kavanaugh is more conservative than his “median Justice” predecessor.<sup>95</sup> Prior to his time on the Supreme Court, very little was known about Justice Kavanaugh’s attitude toward LGBTQ+ rights.

85. Editorial Board, Opinion, *Judge Alito and Abortion*, N.Y. TIMES (Dec. 3, 2005), <https://www.nytimes.com/2005/12/03/opinion/judge-alito-and-abortion.html> [https://perma.cc/UH4A-MDUT].

86. Mark Sherman & Jessica Gresko, *Justices’ Views on Abortion in Their Own Words and Votes*, ASSOCIATED PRESS (Nov. 28, 2021, 9:08 PM), <https://apnews.com/article/abortion-us-supreme-court-health-voting-rights-john-roberts-32d2ff1e016c8f72012c49a4ed2bf2e1> [perma.cc/7V9P-TGFH].

87. 550 U.S. 124 (2007).

88. *Id.* at 167–68.

89. 140 S. Ct. 2103, 2133 (2020).

90. 136 S. Ct. 2292 (2016) (finding that requiring abortion providers to have hospital admitting privileges and provide care only in ambulatory surgery centers poses an undue burden on women in violation of *Casey*).

91. *June Med. Servs.*, 140 S. Ct. at 2133–34.

92. Fox News, *Donald Trump Talks Iowa, Boycotting Fox News Debate*, YOUTUBE, at 8:28 (Feb. 1, 2016), <https://www.youtube.com/watch?v=7q9NlqFwwiI&t=464s> [perma.cc/Z3ZX-YKJ4].

93. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

94. Wadhwa, *supra* note 46 (discussing the potential nomination and appointment of Amy Coney Barrett to the Court); *id.* (“The institutional underpinnings of a 6-3 conservative majority Supreme Court would be markedly different from 5-4 conservative majority. Most prominently, the median Justice—the individual who would cast the deciding vote in a 5-4 decision—would be Justice Brett Kavanaugh.”).

95. Justice Kavanaugh’s most recent Martin-Quinn score following the 2019–2020 Term was 0.548. *Martin-Quinn Scores: Measures*, *supra* note 45. Compare this with Justice Kennedy’s Martin-Quinn score of –0.270 following the 2014–2015 Term (the Term in which *Obergefell* was decided). *Id.*

Indeed, during his time on the bench for the D.C. Circuit, Justice Kavanaugh never ruled on or wrote about legal issues related to LGBTQ+ people.<sup>96</sup> Since his appointment to the Supreme Court, however, he has heard two cases involving LGBTQ+ rights. The first, *Fulton v. City of Philadelphia*,<sup>97</sup> involved a Catholic foster care agency that refused to certify same-sex couples as foster parents. While Justice Kavanaugh voted to allow this practice by the foster care agency to continue, the decision was unanimous—based on a procedural quirk in the city’s contract with the foster care agency.<sup>98</sup> Thus, *Fulton*’s use as a litmus test for attitudes towards LGBTQ+ issues is limited. The second case, *Bostock v. Clayton County*,<sup>99</sup> is more informative. In that case, the Court held that an employer who fires an individual based on their sexual orientation or gender identity violates Title VII of the Civil Rights Act of 1964.<sup>100</sup> Justice Kavanaugh dissented, arguing that Title VII’s prohibition on discrimination “because of . . . sex” does not prohibit discrimination on the basis of sexual orientation, or by extension, transgender status.<sup>101</sup>

Justice Gorsuch, another former Kennedy clerk, also departs from his mentor’s judicial philosophy and constitutional jurisprudence. A staunch originalist,<sup>102</sup> it is somewhat perplexing that Justice Gorsuch wrote the majority opinion in *Bostock*<sup>103</sup>—there is no reference to sexual orientation or gender identity in the text of the statute itself.<sup>104</sup> However, in extending workplace protections to LGBTQ+ persons, “the Court was performing an act of statutory interpretation, a very different issue than interpreting the Constitution to find a constitutional right to marriage equality”<sup>105</sup> or other LGBTQ+ rights. Indeed, just three years earlier, Justice Gorsuch, joined by Justices Thomas and Alito, dissented in *Pavan v. Smith*,<sup>106</sup> which found that a state law that precludes same-sex couples from having both spouses’ names on a birth certificate violates the Due Process Clause and Equal Protection Clause under *Obergefell*.<sup>107</sup> Justice Gorsuch has written in the past that

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96. *Stop Brett Kavanaugh Fact Sheet: LGBTQ Community*, PEOPLE FOR AM. WAY, <https://www.pfaw.org/campaign/protecting-the-supreme-court/tool-kit-for-activists-stop-brett-kavanaugh/stop-brett-kavanaugh-fact-sheet-lgbtq-community> [perma.cc/ML5Y-NMKN] (last visited Mar. 2, 2023).

97. 141 S. Ct. 1868 (2021).

98. The city’s contract with the foster care agency, while containing a nondiscrimination provision, allowed for discretionary exemptions to the nondiscrimination requirement. The city failed to grant the foster care agency an exemption. The Court ruled that non-discrimination laws apply to taxpayer-funded child services so long as they are enforced neutrally but determined that the city’s law was not neutral. In framing the ruling this way, the Court was able to avoid discussion of sexual orientation specifically, focusing instead on procedure. *See id.* at 1877–81.

99. 140 S. Ct. 1731 (2020).

100. *Id.* at 1754 (“In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.”).

101. *Id.* at 1823, 1823 n.1 (Kavanaugh, J., dissenting).

102. *See* GORSUCH, A REPUBLIC, *supra* note 70; Gorsuch Address, *supra* note 70.

103. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

104. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2 (2012).

105. Tim Holbrook, Opinion, *Same-Sex Marriage at Risk as Supreme Court Gets More Conservative*, CNN (Oct. 6, 2020, 6:15 AM), <https://www.cnn.com/2020/10/06/opinions/thomas-alito-obergefell-marriage-equality-at-risk-holbrook/index.html> [perma.cc/9WVWQ-NH2U].

106. *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

107. *Id.* at 2078–79.

the Constitution does not protect same-sex marriage at all<sup>108</sup> and, in 2015, joined an opinion for the Tenth Circuit stating that transgender individuals are not members of a protected suspect class.<sup>109</sup>

Justice Barrett presents an even more concerning attitude towards LGBTQ+ rights. In 2015, Justice Barrett signed on to a letter defining marriage as the “indissoluble commitment of a man and a woman,”<sup>110</sup> and during a 2016 talk at Jacksonville University Public Policy Institute, Justice Barrett questioned whether the Supreme Court should have taken up *Obergefell* at all.<sup>111</sup> These sentiments, made within just a year and a half of the *Obergefell* decision, “can only be understood as a rejection of the equal legal status of LGBTQ couples, and a warning shot with respect to the legitimacy that [Justice Barrett] would afford that decision.”<sup>112</sup> Apparently foreshadowing the lack of precedential value Justice Barrett would assign to *Obergefell* and its progeny, Justice Barrett, when confronted with *Obergefell*'s exclusion from the list of so-called “superprecedents” during her confirmation to the United States Court of Appeals for the Seventh Circuit, again declined to characterize any of the landmark LGBTQ+ rights decisions as such.<sup>113</sup> Justice Barrett’s attitude towards LGBTQ+ issues in the Court is not limited to gay marriage and matters of constitutional interpretation. Speaking on the Court’s decision to take up the case of *Gloucester County School Board v. G.G.*,<sup>114</sup> involving a New Jersey school board’s transgender bathroom ban, Justice Barrett called the interpretation of Title IX’s prohibition on discrimination based on sex as including gender identity a “strain [on] the text of the statute.”<sup>115</sup>

While falling somewhere near the ideological middle of the current Court,<sup>116</sup> “[Chief Justice] Roberts is no centrist conservative with a record of joining the left

108. See Corey Brettschneider, *Neil Gorsuch’s Dissertation Opposes Same-Sex Marriage*, TIME (Mar. 18, 2017, 5:09 PM), <https://time.com/4705941/neil-gorsuch-gay-rights-same-sex-marriage/> [<https://perma.cc/NAN6-KG6F>]; Neil Gorsuch, *Liberals N’ Lawsuits*, NAT’L REV. (Feb. 7, 2005, 12:42 PM), <https://www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6/> [[perma.cc/P7FG-BPZW](https://perma.cc/P7FG-BPZW)] (“American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to [other issues].”).

109. *Druley v. Patton*, 601 F. App’x 632, 635 (10th Cir. 2015) (“To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims.”).

110. *Letter to Synod Fathers from Catholic Women*, ETHICS & PUB. POL’Y CTR. (Oct. 1, 2015), <https://eppc.org/synodletter/> [[perma.cc/MXQ3-7FCP](https://perma.cc/MXQ3-7FCP)].

111. See Jacksonville University, *Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute*, YOUTUBE, at 31:51 (Dec. 5, 2016), <https://www.youtube.com/watch?v=7yjTEdZ81II> [[perma.cc/KX9M-FFRN](https://perma.cc/KX9M-FFRN)] (“Chief Justice Roberts, [in his] dissent . . . said those who want same-sex marriage . . . 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. . . . So, I think *Obergefell*, and what we’re talking about for the future of the Court, it’s really a who decides question.”).

112. Sasha Buchert, *These are Trump’s 3 Most Likely Supreme Court Picks. They’re Not Good.*, LAMBDA LEGAL (July 6, 2018), [https://www.lambdalegal.org/blog/20180706\\_trump-3-most-likely-scotus-picks](https://www.lambdalegal.org/blog/20180706_trump-3-most-likely-scotus-picks) [[perma.cc/92G2-G7B2](https://perma.cc/92G2-G7B2)].

113. SENATE COMM. ON THE JUDICIARY, *supra* note 60, at 2.

114. 137 S. Ct. 1239 (2017).

115. Jacksonville University, *supra* note 111, at 41:35.

116. Chief Justice Roberts’s most recent Martin-Quinn score following the 2019–2020 Term was 0.506. *Martin-Quinn Scores: Measures*, *supra* note 45.



on closely watched social policy disputes.”<sup>117</sup> This is particularly apparent with regard to the Chief Justice’s record on LGBTQ+ rights. In 2013, Chief Justice Roberts dissented in *United States v. Windsor*.<sup>118</sup> There, the Court struck down a key provision in the 1996 Defense of Marriage Act, which federally defined marriage as a union between one man and one woman and, in so doing, formally recognized same-sex marriages at the federal level.<sup>119</sup> Two years later, when the Court was once again asked to confront the issue of marriage equality—this time with regards to whether individual states must recognize and license same-sex marriages—Chief Justice Roberts again dissented, calling the *Obergefell* decision “deeply disheartening”<sup>120</sup> and stating that the Constitution “had nothing to do with it.”<sup>121</sup> Especially revealing, the Chief Justice read a summary of his twenty-nine page dissent out loud from the bench—the first and only time he has taken such a step in his nearly two decades on the Court.<sup>122</sup>

In perhaps the most brazen demonstration of anti-LGBTQ+ sentiment on the Court today, Justices Thomas and Alito, both of whom dissented in the *Obergefell* decision, issued a statement renewing their criticism of the landmark opinion and calling for its reversal following the Court’s denial of certiorari in a case brought by Kim Davis, the former Kentucky county clerk who refused to issue a marriage license for same-sex couples.<sup>123</sup> In the statement, Justice Thomas, writing for himself and Justice Alito, lambasted the Court for “undemocratically”<sup>124</sup> reading a “novel constitutional right”<sup>125</sup> into the Fourteenth Amendment, “even though that right is found nowhere in the text.”<sup>126</sup> Justice Thomas stated that “*Obergefell* enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots”<sup>127</sup> and characterized the Kim Davis case as a “stark reminder”<sup>128</sup> of the “ruinous consequences”<sup>129</sup> of *Obergefell*. While ultimately agreeing with the Court’s decision not to take up the case, Justice Thomas urged that “the Court has created a problem that only it can fix”<sup>130</sup> and appeared to call on anti-LGBTQ+ rights groups to bring a case to the

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117. Joan Biskupic, *How John Roberts Will Manage the Supreme Court’s Conservative Majority*, CNN (Oct. 9, 2018, 11:43 AM), <https://www.cnn.com/2018/10/08/politics/supreme-court-conservative-majority-john-roberts-brett-kavanaugh/index.html> [perma.cc/88UU-LCDT].

118. 570 U.S. 744 (2013).

119. *Id.* at 775.

120. *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

121. *Id.* at 713.

122. A Justice’s decision to issue an oral dissent from the bench is a dramatic measure, meant to place “much extra emphasis” on the dissent and “suggests a strong and deeply felt level of disagreement with the Court’s majority.” Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Dissenting from the Bench*, SCOTUSBLOG (July 2, 2013, 10:34 AM), <https://www.scotusblog.com/2013/07/scotus-for-law-students-sponsored-by-bloomberg-law-dissenting-from-the-bench/> [perma.cc/S8T7-9E95].

123. *Davis v. Ermold*, 141 S. Ct. 3 (2020) (statement of Thomas, J., and Alito, J., regarding the denial of certiorari).

124. *Id.* at 4.

125. *Id.*

126. *Id.* at 3.

127. *Id.* at 4.

128. *Id.*

129. *Id.* (quoting *Obergefell v. Hodges*, 576 U.S. 644, 734 (2015)).

130. *Id.*

Court that more “clearly present[ed]”<sup>131</sup> the issues in *Obergefell*. Justice Alito echoed this sentiment in a talk given to conservative group The Federalist Society.<sup>132</sup> Both Justices have been stalwart opponents of the Court’s LGBTQ+ jurisprudence, dissenting in every major LGBTQ+ case to go before the Court during their respective times on the bench, with Justice Thomas even dissenting in *Lawrence v. Texas*,<sup>133</sup> the 2003 decision guaranteeing same-sex couples a right so basic and fundamental as the right to physical intimacy.<sup>134</sup>

### III. LEGAL SIMILARITIES BETWEEN ABORTION AND LGBTQ+ RIGHTS

The Court’s LGBTQ+ rights jurisprudence is “built on the foundation of *Roe* and *Casey* and the [C]ourt’s other reproductive rights cases.”<sup>135</sup> This is because both lines of cases derive their authority from the doctrine of substantive due process. Substantive due process asks the question of whether the government’s deprivation of a person’s life, liberty, or property is justified by a sufficient purpose.<sup>136</sup> If a right is deemed fundamental under the Due Process Clauses of the Fifth or Fourteenth Amendment, the government must meet strict scrutiny in order to show a substantive justification that is adequate.<sup>137</sup> Courts are thus able to “use substantive due process to safeguard rights that are not otherwise enumerated in the [C]onstitution.”<sup>138</sup> Falling within this category of rights not explicitly safeguarded in the Constitution are those involving abortion and LGBTQ+ issues.

In *Roe v. Wade*,<sup>139</sup> the Court expressly declared that the right to privacy is guaranteed under the liberty of the Due Process Clause of the Fourteenth Amendment<sup>140</sup> and that this right “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>141</sup> As such, a statute “that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to her pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.”<sup>142</sup> The Court reaffirmed the central holding of *Roe* in *Planned Parenthood of Southeastern*

131. *Id.*

132. The Federalist Society, *Address by Justice Samuel Alito [2020 National Lawyers Convention]*, YOUTUBE, at 25:47 (Nov. 25, 2020), <https://www.youtube.com/watch?v=VMnukCVIZWQ> [perma.cc/9F6U-SZRG] (referencing the statement published by Justice Thomas following the Court’s denial of certiorari in *Davis v. Ermold* and complaining); *id.* (“You can’t say that marriage is a union between one man and one woman. Until very recently, that’s what the vast majority of Americans thought. Now it’s considered bigotry. That this would happen after our decision in *Obergefell* should not have come as a surprise.”).

133. 539 U.S. 558, 605 (2003) (Thomas, J., dissenting).

134. *Id.* at 578–79.

135. Robinson, *supra* note 8 (quoting Sharon McGowen, Lambda Legal).

136. Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

137. *See id.* at 1510.

138. *Id.*

139. 410 U.S. 113 (1973).

140. *Id.* at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is . . .”).

141. *Id.*

142. *Id.* at 164 (emphasis omitted).

*Pennsylvania v. Casey*,<sup>143</sup> reiterating that “[c]onstitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment”<sup>144</sup> and that “[i]f the right of privacy means anything, it is the right of an individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>145</sup> More generally, the Court held that “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>146</sup> Citing this passage from *Casey* in *Lawrence v. Texas*,<sup>147</sup> the Court went on to find that the right of privacy also protects an individual’s choice to engage in same-sex sex, declaring that “individual decisions by [two adults], concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”<sup>148</sup> And while *Lawrence* “[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,”<sup>149</sup> the Court eventually took that step in *Obergefell v. Hodges*,<sup>150</sup> holding that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty.”<sup>151</sup>

What is particularly noteworthy about the connection between the Court’s abortion and LGBTQ+ jurisprudence is that it is the very thing that links the two lines of cases that makes them so vulnerable to attack by the Court’s current majority. The idea that the Due Process Clause has more than a procedural component has been the source of much controversy,<sup>152</sup> facing historic opposition from originalist Justices “who believe there is no such thing as substantive due process”<sup>153</sup> and “take the position that fundamental rights are limited to those liberties explicitly stated in the text or clearly intended by the framers.”<sup>154</sup> Perhaps the most fervent opponent of substantive due process, Justice Scalia, during his time

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143. 505 U.S. 833, 845–46 (1992) (“After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

144. *Id.* at 846.

145. *Id.* at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

146. *Id.* at 851.

147. 539 U.S. 558 (2003).

148. *Id.* at 578 (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

149. *Id.*

150. 576 U.S. 644 (2015).

151. *Id.* at 647.

152. Chemerinsky, *supra* note 136, at 1501 (“There is no concept in American law that is more elusive or more controversial than substantive due process.”).

153. *Id.*

154. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 907 (6th ed. 2020).

on the bench, called the doctrine an “atrocious,”<sup>155</sup> an “oxymoron,”<sup>156</sup> “babble,”<sup>157</sup> and “judicial usurpation.”<sup>158</sup> Justice Scalia believed that, to interpret the Fourteenth Amendment, a judge should look at how the amendment was understood at the time of its ratification in 1868.<sup>159</sup> To the extent that rights not explicitly enumerated in the Constitution may be found under substantive due process at all, “such rights should be established only if there is a tradition of protecting them, with the tradition stated at the most specific level of abstraction.”<sup>160</sup>

Justice Scalia’s articulation of substantive due process, however, effectively cripples the doctrine by imposing upon it conditions for its use that, by design, are impossible to achieve. One of the country’s preeminent scholars on constitutional law, Erwin Chemerinsky explains:

This way of defining liberty interests shows that virtually no rights [are] protected under substantive due process, because if a right was already protected, there would be no reason to have the Court do it. The fact that the right is not protected shows there is no tradition of protecting the right stated at the most specific level of abstraction.<sup>161</sup>

Justice Scalia’s approach to substantive due process, then, can more accurately be viewed as akin to judicial sabotage—attempting to leave the doctrine wholly intact, but dead in the water. And given President Trump’s promise to nominate Justices to the Court who are “in the mold of Justice Scalia,”<sup>162</sup> it is hard to imagine that the Court’s three newest members do not share the late Justice’s sentiment.

Indeed, in her acceptance speech following her nomination to the Supreme Court, Justice Barrett stated that the judicial philosophy of Justice Scalia is her

155. *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

156. *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring).

157. Vivek Krishnamurthy, *Live-Blogging: Nino Scalia*, REACTION (Nov. 10, 2006, 9:24 AM), <http://the-reaction.blogspot.com/2006/11/live-blogging-nino-scalia.html> [perma.cc/N56N-D5K4] (live-blogging an address given by Justice Scalia to students at Yale Law School on November 10, 2006).

158. *City of Chicago*, 527 U.S. at 85; *see also* *Obergefell v. Hodges*, 576 U.S. 644, 720 (2015) (Scalia, J., dissenting) (stating that substantive due process “stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes”).

159. *See Obergefell*, 576 U.S. at 715–16 (Scalia, J., dissenting) (“When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as “due process of law” or “equal protection of the laws”—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification.”).

160. Chemerinsky, *supra* note 136, at 1513 (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989)).

161. *Id.* at 1514.

162. Donald Trump, Presidential Debate at Washington University in St. Louis, Missouri (Oct. 9, 2016), <https://debates.org/voter-education/debate-transcripts/october-9-2016-debate-transcript/> [perma.cc/CWN9-5KLD] (“I am looking to appoint judges very much in the mold of Justice Scalia.”).

own.<sup>163</sup> She has written that “more vigorous enforcement of the Due Process . . . Clause[] may increase the risk of over-nationalizing policy preferences at the hands of the Supreme Court”<sup>164</sup> and has stressed the “harm the Court can do”<sup>165</sup> when, in reliance on rights established through substantive due process, “it invalidates legislation that it should let stand.”<sup>166</sup> Justice Gorsuch has stated that the idea that the Due Process Clause protects substantive rights, and thus has more than a procedural dimension, “stretch[es] the clause beyond recognition.”<sup>167</sup> Justice Kavanaugh has praised the dissent in *Roe* for its refusal to “recognize unenumerated rights”<sup>168</sup> and the majority opinion in *Washington v. Glucksberg*,<sup>169</sup> a case declining to recognize a fundamental right to assisted suicide,<sup>170</sup> for “stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.”<sup>171</sup> These beliefs of the newest Justices toward substantive due process match those of their more established counterparts on the majority.<sup>172</sup>

Originalist Justices who reject substantive due process believe that the decision to recognize rights not explicitly enumerated in the Constitution rests solely with the legislature.<sup>173</sup> This has led to virtually identical rhetoric in the dissenting opinions of both abortion and LGBTQ+ rights cases, arguing that each respective issue is inherently political—rather than judicial—in nature and should thus be left to the states to decide.<sup>174</sup> In apparent agreement with these dissents, each of the Justices

163. Amy Coney Barrett, USSC Nomination Acceptance Address, at 2:50 (Sept. 26, 2020), <https://www.americanrhetoric.com/speeches/amyconeybarrettusscnominationacceptance.htm> [<https://perma.cc/XNL6-GFSK>] (discussing Justice Scalia and noting, “His judicial philosophy is mine too.”).

164. Barrett, *supra* note 12, at 78.

165. *Id.* at 76.

166. *Id.* Justice Barrett’s use of the language “that it should let stand” when referring to legislation struck down for violating substantive due process rights indicates her belief that these rights are not constitutionally protected in the first place.

167. NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 77 (2006) (“One might even ask whether it is bold enough to hold that the procedurally oriented language of the due process guarantee contains the enumerated substantive rights of the Bill of Rights; does going any further—holding that the clause is also the repository of other substantive rights not expressly enumerated in the text of the Constitution or its amendments, and thus entirely dependent on their legitimacy solely on the ‘reasoned judgment’ of five judges—stretch the clause beyond recognition?”).

168. See Kavanaugh, *supra* note 70, at 15.

169. 521 U.S. 702 (1997).

170. *Id.* at 735.

171. See Kavanaugh, *supra* note 70, at 16.

172. *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2150 (2020) (Thomas, J., dissenting) (“[W]hatever the precise requirements of the Due Process Clause, the notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.”).

173. See CHEMERINSKY, *supra* note 154 (“An originalist would say that the Court acts impermissibly and usurps the democratic process if it finds [unenumerated] rights to be fundamental.”).

174. See, e.g., *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (arguing that the finding of a fundamental right to an abortion “is far more appropriate to a legislative judgment than to a judicial one”); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting) (“The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”); *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting) (“I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. . . . But

in the Court's current conservative majority has expressed a belief that judicial rulings on abortion and LGBTQ+ issues are improper.<sup>175</sup>

#### IV. EFFECT OF OVERRULING ROE ON LGBTQ+ PRECEDENT

Given the current Court's attitude toward abortion, its demonstrated hostility towards substantive due process, and each Justice in the majority's expressed willingness to break from established precedent, it is not particularly surprising that an overruling decision occurred.<sup>176</sup> That the decision took the form of a single, wholesale reversal of *Roe*, however—as opposed to a slow, incremental dismantling of the Court's abortion jurisprudence—does suggest cause for heightened concern. Prior to the Court's publishing of its final decision, legal commentators had warned that “[e]ven if a Supreme Court decision overruling *Roe* were initially written in the most modest possible terms . . . it would still be hasty and misleading to conclude that the decision would have no effect on constitutional jurisprudence protecting fundamental rights outside the sphere of abortion rights.”<sup>177</sup> The Court's outright reversal of *Roe* seems to signal a brazen majority, unaverse to brash decisions and the acceleration of the ultraconservative brand of Republicanism advocated by Trump and his constituents. And while the majority in *Dobbs* purports to make clear that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion,”<sup>178</sup> Justice Thomas's concurrence explicitly calls for the use of *Dobbs* as a foundation to “reconsider all of this Court's substantive due process precedents, including . . . *Lawrence* and *Obergefell*.”<sup>179</sup>

The decision to overturn *Roe*—and by extension, *Casey*—implicates existing LGBTQ+ caselaw both directly and indirectly. In *Lawrence*, the Court cited extensively to *Casey* in finding a right to same-sex sex under the liberty of the Due Process Clause.<sup>180</sup> The majority's reliance on the Court's abortion jurisprudence to

persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. . . . What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change.”); *Obergefell v. Hodges*, 576 U.S. 644, 686–710 (2015) (Roberts, C.J., dissenting) (“[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. . . . By [finding a right to same-sex marriage] under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance.”).

175. Jacksonville University, *supra* note 111 (“I think *Obergefell*, and what we're talking about for the future of the Court, it's really a who decides question.”); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1822 (2020) (Kavanaugh, J., dissenting) (“Like many cases in this Court, this case boils down to one fundamental question: Who decides?”); Gorsuch, *supra* note 108 (“American liberals have become addicted to the courtroom, relying on judges and lawyers rather than elected leaders and the ballot box, as the primary means of effecting their social agenda on everything from gay marriage to [other issues].”).

176. Indeed, by Justice Barrett's own admission, “Constitutional cases are the easiest to overrule.” Barrett, *supra* note 52 at 1713 (citing Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 321, 321 nn.20–22 (2005)).

177. Fallon, *supra* note 1, at 649.

178. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_, 66 (2022)

179. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. \_\_\_\_, 3 (2022) (Thomas, J., concurring).

180. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

define this right thus renders *Lawrence* “especially vulnerable.”<sup>181</sup> And while the majority in *Obergefell* makes no explicit mention of *Roe* or *Casey* in its opinion (perhaps in an attempt to avoid the very risk created by the Court in *Lawrence*), the dissenting Justices make sure to point out that it is upon this foundation that the ruling is based.<sup>182</sup> Indeed, in his dissent, Chief Justice Roberts recounts how “by intervening in the debate over abortion . . . the Court got out ahead of the American people and short-circuited the democratic process”<sup>183</sup> and criticizes the majority in *Obergefell* for doing the same with same-sex marriage.<sup>184</sup> Thus, while a renunciation of *Roe* does not invalidate *Obergefell* on its face, the inclusion of *Roe* in the dissent creates a back door through which the current majority could push the same type of federalism argument.

One response, at least with regard to *Obergefell*, is that Justice Kennedy’s fusing of substantive due process and equal protection immunizes the case from overruling, even in the face of the Court’s decision to overturn *Roe*.<sup>185</sup> The novelty of this combination, however, and its effectiveness in sufficiently distinguishing *Obergefell*, appear to be overstated. While ultimately grounding its decision in substantive due process, “the *Casey* decision has strong notes of equal protection throughout its discussion.”<sup>186</sup> Indeed, Erwin Chemerinsky has written that “the Court, for the first time [in *Casey*], found abortion rights under equal protection.”<sup>187</sup> Thus, while *Obergefell* certainly makes explicit what the Court’s abortion jurisprudence had, up until that point, “merely hinted at,”<sup>188</sup> the equality element is still present. It seems reasonable to posit, then, that—given the ease with which the Court overturned *Roe* and *Casey*—it would have no problem ignoring Justice Kennedy’s equal protection argument in *Obergefell*. Indeed, Chief Justice Roberts says as much in his dissent, claiming that Justice Kennedy’s finding of a synergy between the Equal Protection Clause and Due Process Clause based on the fact that “some precedents relying on one Clause have also relied on the other” does not “seriously engage with [the equal protection] claim.”<sup>189</sup>

More broadly, the decision to overrule *Roe* and *Casey* represents a departure by the Court from its approach to *stare decisis* generally—what at least one legal commentator has dubbed the “liberty thesis.”<sup>190</sup> Under this approach, a prior decision that takes an expansive view of constitutionally based liberty rights is much

181. Fallon, *supra* note 1.

182. See *Obergefell v. Hodges*, 576 U.S. at 710–11 (Roberts, C.J., dissenting) (invoking *Roe*); *id.* at 713–20 (Scalia, J., dissenting) (alluding to *Roe*).

183. Cary Franklin, *Roe as We Know It*, 114 MICH. L. REV. 867 (2016) (reviewing MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015)).

184. See *Obergefell*, 576 U.S. at 710–11 (Roberts, C.J., dissenting). Chief Justice Roberts refers to abortion here as the “[j]other issue.” *Id.*

185. The rationale is that of a double-hulled ship—if the substantive due process argument fails, the decision can still hold water on the equal protection argument.

186. Melanie Kalmanson & Riley Erin Fredrick, *The Viability of Change: Finding Abortion in Equality After Obergefell*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 647, 659 (2020).

187. Chemerinsky, *supra* note 136, at 1516 (citing *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 849–52 (1992)).

188. Kalmanson & Fredrick, *supra* note 186, at 678.

189. *Obergefell v. Hodges*, 576 U.S. 644, 706–07 (2015) (Roberts, C.J., dissenting).

190. Drew C. Ensign, Note, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence*, 81 N.Y.U. L. REV. 1137, 1140 (2006).

more likely to be respected as binding than one that takes a restrictive view.<sup>191</sup> This is because “the Court [has] suggested, explicitly and implicitly, that liberty is an additional and compelling factor in evaluating the force of *stare decisis*.”<sup>192</sup> Indeed, *Casey* itself tends to suggest the validity of this approach. In *Casey*, the Court laid out four criteria that the Court should consider when deciding whether to overturn established precedent: (1) whether the prior decision has proven unworkable; (2) whether the rule has engendered a “kind of reliance that would lend a special hardship to the consequences of overruling”; (3) whether later cases have undermined the doctrinal basis so that it remains “no more than a remnant of abandoned doctrine”; and (4) “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”<sup>193</sup> And, while the *stare decisis* analysis of *Roe* in *Casey* is plausible, it is “not overwhelmingly convincing.”<sup>194</sup> That the *Casey* Court ruled to uphold *Roe*, then, in spite of this weak *stare decisis* argument, provides a “direct suggestion[] that liberty was used as a component of its *stare decisis* analysis.”<sup>195</sup> The decision to overturn *Roe* suggests that the Court has removed liberty from its *stare decisis* analysis. With the proposed contraction of a recognized liberty interest no longer effectively triggering a presumption against overruling—and with Justices like Amy Coney Barrett already advocating for a form of *stare decisis* more relaxed than the test set out in *Casey*<sup>196</sup>—it would seem that the Court’s current conservative supermajority would have no problem paring back existing LGBTQ+ rights, even in the face of conflicting precedent.

Counteracting the effects that the overruling decision of *Roe* could have on LGBTQ+ precedent will require practitioners going before the Court to shift from a legal strategy that has, for years, focused on drawing out the similarities between abortion and LGBTQ+ rights, to one that places nearly exclusive emphasis on their differences. What form that emphasis must take was largely dependent on how the Court chose to pare back *Roe* and its progeny. Had the Court opted to keep *Roe* and *Casey* intact and instead lower the cut-off for viability—as Chief Justice Roberts seemed to insinuate during oral argument in *Dobbs*<sup>197</sup>—LGBTQ+ practitioners would have wanted to appeal directly to the purported distinction, discussed in Part I of this Note, that abortion implicates the sanctity of life in a way that LGBTQ+

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191. *Id.* at 1138. This approach was alluded to in *Dobbs*, both during oral argument as well as in amicus briefs filed with the Court. See Transcript of Oral Argument, *supra* note 9, at 85 (U.S. Solicitor General Elizabeth B. Prelogar) (“If this court renounces the liberty interest recognized in *Roe* and reaffirmed in *Casey*, it would be an unprecedented contraction of individual rights and a stark departure from the principles of *stare decisis*.”); Brief for LGBT Organizations and Advocates as Amici Curiae in Support of Respondents at 28, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392 (U.S. argued Dec. 1, 2021) (“Even when the Court has reconsidered its constitutional rulings, it rarely—if ever—overrules precedent to take away previously recognized individual rights . . . [overruling] *Roe* and *Casey* would represent a stark departure.”).

192. *Id.* at 1138.

193. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 854–55 (1992).

194. Ensign, *supra* note 190, at 1148. For a detailed discussion of the relative weakness of each *stare decisis* factor in *Casey*, see *id.* at 1146–48.

195. *Id.* at 1145.

196. See Barrett *supra* note 52, at 1715.

197. Totenberg, *supra* note 7 (“Chief Justice John Roberts, a fellow conservative, focused on on [sic] abortion only, and on the viability line, not reversal.”).



rights never have. Ultimately, however, given the Justices' decision to reverse *Roe* and *Casey* outright, practitioners will want to emphasize differences that distinguish the substantive due process analysis between the two—for example, by pointing to what many opponents of abortion consider to be *Roe* and *Casey*'s relatively weak reliance argument<sup>198</sup> compared with that created by LGBTQ+ rights cases.<sup>199</sup>

On its face, the disentanglement of abortion and LGBTQ+ issues provides LGBTQ+ rights practitioners with a viable litigation strategy following *Roe*'s reversal. But even more than that, distinguishing LGBTQ+ rights from abortion serves to remove LGBTQ+ rights from today's conceptualization of the culture wars. By viewing LGBTQ+ rights in isolation from abortion, the purported "morality" that placed LGBTQ+ issues within the purview of the culture wars to begin with can be seen for what it truly is: nothing more than recoded normative religiosity.<sup>200</sup> And while this means of framing morality, based in religion, may be permissible for individual citizens, it is unacceptable in a body bound by the Constitution to be a neutral arbiter of the law and prohibited from running afoul of the Establishment Clause.

#### CONCLUSION

The case of *Dobbs v. Jackson Women's Health Organization*<sup>201</sup> reverses nearly fifty years of precedent and represents one of the only times in American history that the Supreme Court has taken away a fundamental right.<sup>202</sup> While *Dobbs*

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198. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. at 956–57 (1992) (Rehnquist, C.J., with whom White, J., Scalia, J., and Thomas, J., join, concurring in part and dissenting in part) ("The joint opinion thus turns to what can only be described as an unconventional—and unconvincing—notation of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to 'two decades of economic and social developments' that would be undercut if the error of *Roe* were recognized. The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their 'places in society' in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.") (internal citations omitted).

199. The majority implies as much in the *Dobbs* opinion itself. See *Dobbs v. Jackson Women's Health Organization*, 597 U. S. \_\_\_\_, 71–72 (2022) ("Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence."). A more convincing argument can be made, for example, regarding the interests conferred upon same-sex couples who are already married in reliance on *Obergefell*. These include rights of inheritance, custody, pensions, tax status, and much more.

200. Indeed, while there are many who believe that the legality of gay marriage should be left to the states, few would say the same of interracial marriage. The only thing reconciling this seemingly contradictory view, is the religious edict that marriage be between "a man and a woman."

201. No. 19-1392 (U.S. argued Dec. 1, 2021).

202. As Christopher M. Richardson pointed out in an op-ed published in the Los Angeles Times, after the *Dobbs* decision ended federal protections for abortion, some high-profile responses suggested the ruling marked the "first time" the Supreme Court rescinded an established fundamental right. However, this is not accurate. During Reconstruction and the end of the Nineteenth Century, Black Americans gained, then lost, basic rights at the hands of the Supreme Court by way of the Civil Rights Cases. Christopher M. Richardson, *OpEd: Dobbs Isn't the First Time the Supreme Court Took Away Key Rights*, L.A. TIMES (July 15, 2022, 3:00 AM), <https://www.latimes.com/opinion/story/2022-07-15/supreme-court-abortion-civil-rights> [perma.cc/H7RE-DN27].

represents a direct affront to the Court's longstanding abortion jurisprudence, the potential effects of the ruling are not limited to reproductive rights. The decision in the case signals a willingness by the Court's new conservative supermajority, emboldened by the recent appointments of three Trump-nominees, to challenge precedent previously considered to be largely out of reach. Especially vulnerable, given the cultural and legal similarities to abortion, is the Court's LGBTQ+ rights jurisprudence.<sup>203</sup> *Dobbs* thus threatens to be the proverbial thread the Court has been waiting to pull in order to unravel protections established in landmark cases like *Lawrence v. Texas*<sup>204</sup> and *Obergefell v. Hodges*.<sup>205</sup> To stop this from happening, practitioners going before the Court must change course, making a concerted effort to distinguish LGBTQ+ issues from those involving abortion and ultimately ensure that any Justice hoping to wind back the clock on LGBTQ+ rights has a tough row to hoe.

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203. Given Congress's passage of the Respect for Marriage Act, Pub. L. No. 117-228 (2022), in response to the Court's ruling in *Dobbs*, there will be those tempted to dismiss this argument as moot. And while statutory protections for gay marriage are certainly a significant step in the right direction, they are by no means as robust a protection as a constitutionally enshrined right to the same. Indeed, one need only look to the fate of the antithetical Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) to see this play out.

204. 539 U.S. 558 (2003).

205. 576 U.S. 644 (2015).

