QUEER BLACK TRANS POLITICS AND CONSTITUTIONAL ORIGINALISM

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Oh
friends, my friends—
bloom how you must, wild
until we are free.

—Cameron Awkward-Rich,
Cento Between the Ending and the End

LGBTQIA+ communities are still learning how and why to center Black trans lives in their individual and collective politics. These communities are coming to understand the power of saying—as the Black Queer & Intersectional Collective of Columbus, Ohio has explained—"that the liberation of Black LGBTQIA+ people will lead to liberation for all people," including all LGBTQIA+ people, and that "the freedom of Black queer and trans people cannot exist if another group is oppressed; our liberations are intertwined."[1] As these understandings take root outside the collectives and collective practices that help produce them, they are yielding cascading transformations in political consciousness that are reshaping what LGBTQ life is and what LGBTQ politics are about.

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1. *Mission and Principles*, BLACK QUEER & INTERSECTIONAL COLLECTIVE, https://bqic.net/mission-principles/. *Cf. also, e.g.*, Fannie Lou Hamer, *"Nobody's Free Until Everybody's Free," Speech Delivered at the Founding of the National Women's Political Caucus, Washington, D.C., July 10, 1971*, *in* THE SPEECHES OF FANNIE LOU HAMER: TO TELL IT LIKE IT IS 134 (Maegan Parker Brooks & David W. Houck eds., 2011); Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), *in* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 77, 79 (1963). For some classic, critical thinking on identity, politics, and community, see Steven Seidman, *Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 105 (Michael Warner ed., 1993). After the initial use of "LGBTQIA+" to track the language used by Black Queer & Intersectional Collective, I use the shorter "LGBTQ" in the remainder of the work. I don't intend to be making any big theory point with these or other identity terms. A new intervention on this front is in T. Anansi Wilson, *Sexual Profiling & BlaQueer Furtivity: BlaQueers on the Run*, (June 1, 2021) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3858005.

Here, I seek to think with queer Black trans politics—and in particular, from among their far-ranging commitments, their intersectional understandings and demands to center Black trans lives—about a set of questions nested in federal constitutional law. Nominally, the aim is to reflect on a real-time constitutional situation—driven by the Supreme Court's newly enthroned constitutional originalist project—that has placed the constitutional abortion right first announced in *Roe v. Wade* and reaffirmed by *Planned Parenthood v. Casey* on the brink of extinction.[2] Vitally important in its own terms, this extinction is one that many fear (even as some others hope) will lead to LGBTQ constitutional rights and protections likewise being eliminated. The conceptual configuration around this potential one-two punch—played out around what the Court's ruling in *Dobbs v. Jackson Women's Health Organization* will do to the abortion right and to LGBTQ constitutional rights by implication—expresses conventional forms of legal consciousness and the politics that they have helped inspire.[3] Produced by and within legal outlooks that have traditionally operated in single-axis identity terms, these ways of understanding constitutional developments around *Dobbs* miss what queer Black trans politics can readily see: The conventional constitutional fields of abortion rights and LGBTQ rights are not wholly distinct, related only in a legal series, but rather are aspects of a larger constitutional law that intersect and cross-inflect one another, and that likewise intersect and cross-inflect the Court's constitutional race equality jurisprudence, itself a jurisprudence of colorblind constitutionalism increasingly organized under the sign of constitutional originalism, that has been turning against pro-Black, including pro-Black trans, and hence LGBTQ, positions for some time.

On one level, these understandings make the work of thinking with queer Black trans politics look like a familiar intersectional intervention. In important ways, it is. The present effort broadly joins calls for moving from traditional forms of legal and political consciousness defined by single-axis identity thinking about race, sex, and LGBTQ identity and rights toward newer and more complex—not to forget, more socially accurate—forms of intersectional thinking about them and how they work. This undertaking is thus aligned with longstanding intersectional

2. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

3. Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021). For relevant reflections on constitutional law as a source of legal and lived consciousness, see Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1573–74 (1984).

praxis pushing to reconceptualize basic outlooks on U.S. constitutional civil rights.[4] Beyond demonstrating some of the transformative possibilities of thinking with queer Black trans politics, however, the argument in these pages also shows that intersectional praxis is making its way into civil rights litigation while also giving shape to conservative resistance to it. On this level, thinking with queer Black trans politics offers opportunities to glimpse how intersectional thinking is functioning, if not by name, as a tool not only supporting, but also opposing, pro-Black intersectional praxis.[5] This opposition has formally begun at times to re-cast progressive civil rights like abortion and LGBTQ rights in anti-Black terms as means of restricting or clawing them back. Venturing forth from queer Black trans politics' intersectional and centering demands thus draws this creeping anti-Black intersectional practice into focus. It also helps to explain it by exposing moments when queer Black trans people personify the threats to existing race-sex-sexuality-gender-identity orders that so many people, prominently including many social conservatives, fear and oppose.

Building on understandings that emerge from queer Black trans politics, the present work is structured as follows. Part I begins with a pro-Black, queer, and trans-aligned perspective on the Court's race equality jurisprudence—a perspective that opens onto a critical topography of LGBTQ constitutional rights. From there, discussion shifts in Part II to how queer Black trans politics inform analysis in the abortion right setting, focusing on important dimensions of the *Dobbs* litigation, including how different legal actors imagine *Dobbs* mapping onto—and thus implicating—LGBTQ constitutional rights. Building on this engagement, Part III then takes up what constitutional originalism looks like from a perspective informed by queer Black trans politics. Here, constitutional originalism appears to be more than a force that has constrained pro-Black politics, and more than a force poised to decimate the constitutional abortion right in *Dobbs*. Originalism, on this understanding, is also a project that implicates LGBTQ constitutional positions—positions that have been in its sights all along as expressions of constitutional race equality and constitutional abortion rights guarantees. The Conclusion, Part IV, summarizes how a queer Black trans

4. One effort in the constitutional civil rights setting that should not be missed is in Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection*, 129 YALE L.J. F. 108 (2019). Inflecting LGBTQ rights, see also, for example, Kaiya Arroyo, *Burden of Proof: How Intersectionality Can Inform Our View of the Equal Protection Intent Requirement*, 19 U. PA. J. CONST. L. 1015 (2017).

5. For some important theoretical and historical context, see *infra* note 12.

politics-inspired perspective refracts constitutional politics in distinctive ways that reveal some of the powers of insight and foresight that queer Black trans politics possess. Among the many other things they do, queer Black trans politics offer perspectives on, and positions within, LGBTQ politics that LGBTQ communities should seriously engage in the days ahead, as—in the aftermath of *Dobbs* and anticipating other constitutional originalist transformations—political and constitutional challenges to LGBTQ rights continue to mount. Queer Black trans politics teach that the security of LGBTQ rights remains largely in LGBTQ people's hands.

I. COLORBLIND CONSTITUTIONAL ORIGINALISM AND LGBTQ RIGHTS IN THE CONSTITUTIONAL RACE EQUALITY SETTING

Tracking queer Black trans politics' intersectional commitments and their calls to center Black trans people, it is apparent that Black trans people's constitutional rights, along with the rights of other Black LGBTQ people, have for some time now been subject to the force and weight of the Supreme Court's commitments to a colorblind constitutionalism—a jurisprudence that, as it has been evolving, is increasingly being reorganized under the sign of, and as an expression of, constitutional originalism, a trend that the Supreme Court's present composition seems likely to bring to doctrinal completion.[6] Familiar as the background constellation of points may be, they are regularly lost in conversations about LGBTQ rights as points implicating them.

Broadly speaking, and formulated in these newer and somewhat anticipatory terms, the Court's colorblind originalist jurisprudence can be figured as having generated a range of legal doctrines and rules indicating the Court's retreat from earlier constitutional race equality decisions that, in different ways, marked out—and delivered on—a transformative, anti-subordinationist vision of constitutionally-based racial justice, itself articulated with an historically informed contemporary eye to what the Civil War Amendments demand.[7]

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6. Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013), offers an important conceptual pivot. Works that illuminate different dimensions of the evolutionary shift, while noting the challenges for colorblindness expressed as an originalist project include *id.*, as well as Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 768 (1996), and Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823 (2008). For some additional reflections on the themes, see Mary Ziegler, *What is Race?: The New Constitutional Politics of Affirmative Action*, 50 CONN. L. REV. 279 (2018).

7. *See, e.g.*, Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147–77 (1976); *see also, e.g.*, Brandon Hasbrouck, *The Antiracist Constitution*, 102 BOSTON U. L. REV.

In lieu of that project, the Court's constitutional colorblindness decisions have aligned the Court's racial justice docket with formal equality principles that have been sharply critiqued for tracking race-hierarchical and ideologically white supremacist positions.[8] Consistent with what those positions recommend, the Court, years back, abandoned playing a meaningful role in constitutionally developing, then managing, far-reaching institutional transformations of the ideological and material conditions of racial injustice in the United States in pro-Black directions.[9] Instead, the Court has for some time now regularly announced colorblindness-centered or colorblindness-corresponding legal rules that, in different ways, constrict governmental powers at the national, state, and local levels, increasingly circumscribing the space for purposefully pro-Black political outcomes to be realized in law in race-conscious ways.[10]

87, 127–41 (2022); *see also generally, e.g.*, Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 BOSTON U. L. REV. 255 (2010). For exposition built in part in relation to the insight that "[h]istory shows that antisubordination values live at the root of the anticlassification principle—endlessly contested, sometimes bounded, often muzzled," see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1477 (2004). For important legal historical work that spotlights the Black Convention Movement and powerfully widens and reshapes the legal historical archive, see James W. Fox Jr., *The Constitution of Black Abolitionism: Reframing the Second Founding*, 23 J. CON. L. 267 (2021).

8. For one penetrating engagement in a wider context, see *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995). Another forceful critique of colorblind constitutionalism as it operates across a range of doctrinal domains is in Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 77–85 (2018).

9. *Compare* Brown v. Board of Education (*Brown I*), 347 U.S. 483 (1954), *and* Brown v. Board of Education (*Brown II*), 349 U.S. 294 (1955), *with* Milliken v. Bradley, 418 U.S. 717 (1974), *and* Gary B. v. Whitmer, 376 F.3d 616 (6th Cir. 2020), *vacated*, 958 F.3d 1216 (6th Cir. 2020) (en banc); *see also, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987). For a certain counterpoint, see Brown v. Plata, 563 U.S. 493 (2011), part of a wider history of federal courts' constitutional governance of prisons, with racial, including desegregative, inflections, on which see, Margo Schlanger, *Book Review*, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATES: HOW THE COURTS REFORMED AMERICA'S PRISONS (1997)), which, as part of offering a challenge to judge-centered modes of understanding prison litigation developments, captures how aspects of prison litigation at times contributed to the burgeoning of the prison industrial complex. *Id.* at 2012 & n.68. On how some constitutional colorblindness moves inflect and so "produce and entrench normative gender identities," see Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS 811, 817 (2013), and for one account of "how constitutional doctrine facilitates the incapacitation of motherhood," see Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2229–37 (2018).

10. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Shelby County. v. Holder, 570 U.S. 529 (2013); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Merrill v. Milligan, 595 U.S.___, 142 S. Ct. 879 (Feb. 7, 2022); Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). Also note that if a necessary constitutional touchstone for these measures is found their

Within the same body of law, the Court has also been approving a widening set of restrictions on political participation that enable overlapping political playing fields in the U.S. to be tilted against African Americans and pro-Black political outcomes by extension.[11]

If, in these ways, the Supreme Court's colorblind originalist project implies broken promises and significant institutional retractions and retrenchments involving the constitutional rights of Black people generally, it also affects Black trans and other Black LGBTQ-identified people in ways that indicate the Court's race equality doctrines—not themselves intersectional in official terms—nevertheless are intersectional as governance practices that shape lived experiences.[12] The Court's race equality jurisprudence and constitutional race equality rights always, at least in some sense, inscribe Black trans and/or Black LGBTQ people's rights. The Court's colorblind originalism thus rules LGBTQ peoples' lived experiences of race-based constitutional rights.

Recognizing this, there has long been something comprehensible, if also highly problematic and misguided, about pro-LGBTQ constitutional rights arguments premised on racial analogies designed to get LGBTQ people access to constitutional race equality protections' safe harbors. The move is comprehensible, since the Court formally sees its constitutional race jurisprudence as being about race—not sexual orientation, or LGBTQ identities or rights more generally. The "like-race" analogy remains highly problematic, however, in erroneously suggesting that there is a fully rationalizable—and sustainable—parallel to be offered as a bridge between LGBTQ-inflected constitutional arguments, on the one

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purposes or intentions, on which, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 768–78 (6th ed. 2019), whether they are facially race-based is not the sole consideration for assessing their constitutionality.

11. Relevant reflections on this front are in Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018), Daniel P. Tokaji, *Representation and Race Blindness: The Story of* Shaw v. Reno, *in* RACE LAW STORIES (Rachel F. Moran & Devon W. Carbado eds., 2008), and Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211 (2018). Fannie Lou Hamer's instruction on race and democracy in the United States are still indispensable. *See generally, e.g.*, HAMER, *supra* note 1.

12. For thoughts on trans*-ness and Blackness as "differently inflected names for an anoriginal [sic] lawlessness that marks an escape from confinement and a besidedness to ontology," see Marquis Bey, *The Trans*-ness of Blackness, the Blackness of Trans*-ness*, 4 TRANSGENDER STUD. Q. 275, 275 (2017). Additional relevant perspective, including perspective on how ostensibly non-intersectional forms of jurisprudence nevertheless are capable of validating claims of white men, is in Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 142–43 n.12 (1989). *See also* Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151, 167–69 (2013).

hand, and constitutional arguments about race, on the other.[13] Over and above historical differences that are not readily transcended, the constitutional "like-race" analogy still regularly misses its own fraught double play: de-centering and thus "marginal[izing]," when not simply ignoring, people with Black *and* LGBTQ identities inside both Black and LGBTQ communities in order to generate and preserve its conceptual coherence.[14]

"Like-race" thinking in the LGBTQ constitutional arena thus moves in practical denial of the ways constitutional race equality decisions inscribe LGBTQ rights and how constitutional LGBTQ rights rulings, in turn, inscribe race equality rights.[15] Part of what makes this analogical effort misguided in the constitutional setting is how it regularly papers over the hard realities of what the Court's colorblindness jurisprudence has done to constitutional race equality protections. Its deployment within constitutional efforts to gain—or preserve—LGBTQ constitutional rights regularly breezes past how the Court's colorblindness rules have fostered inequality in Black people's, including Black LGBTQ people's, lives. In these ways, "like-race" thinking in constitutional argument involving LGBTQ rights regularly syncs with, and furthers, post-racial

13. Not that the Court's race equality jurisprudence does not implicate sexual orientation or sexuality, as perhaps most notably, though hardly exclusively, in McLaughlin v. Florida, 379 U.S. 184 (1964), and Loving v. Virginia, 388 U.S. 1 (1967).

14. Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1365, 1368 & n.54 (2000). For another treatment of the "like-race" analogy launched from within a very different kind of project, see Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW 115 (David Kairys ed., 3d ed. 1998). Other counterpoints against the tendencies described in the text are in Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 624–34 (1997); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 40–58 (1999); Margaret M. Russell, *Lesbian, Gay, and Bisexual Rights and the "Civil Rights Agenda,"* 1 AFR-AM. L. & POL'Y REP. 33, 37–40 (1994); Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 382–83 (2007); Jane S. Schacter, *The Gay Civil Rights Debate in the United States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 314 (1994). This is not to say like-race arguments have been—or in any event, will be—abandoned. *See, e.g.*, Craig J. Konnoth, Note, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Identity Litigation in the 1950s–1970s*, 119 YALE L.J. 316, 371 (2009); Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases* 42 CARDOZO L. REV. 67, 71–74, 85–103 (2020).

15. Important dimensions of the history of legal thinking and practice at the intersections of race and sex inequality are tracked in Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187 (2006), and Serena Mayeri, *Pauli Murray and the Twentieth-Century Quest for Legal and Social Equality*, 2 IND. J.L. & SOC. EQUAL. 80 (2014). For more sustained treatment, see generally SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2014), and DAVID A.J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES (1999).

constitutional mythologies holding that the arc of justice runs from canonical high-points like *Brown v. Board of Education* and *Loving v. Virginia* to the present day, an era said to be defined by post-racial racial equity, as the future will be—but without fully reckoning with the race-unequal social conditions that the Court's colorblind originalist project, for its part, has wrought.[16]

Turning toward the Supreme Court's foundational pro-LGBTQ constitutional rights rulings, the Court's single-axis identity thinking about race has helped underwrite its pro-LGBTQ constitutional rights project, but in ways that subtly mark it in intersectional terms—contingently, not only about LGBTQ identity (chiefly lesbian and gay identity), but also whiteness, along with cisness and middle-classness, all elements in the homonormative "white club" that, as far back as the early 1970's, Sylvia Rivera publicly condemned.[17] Alignments with these forms of social privilege—and others—have paved the way for LGBTQ constitutional rights, including the right to marry that *Obergefell v. Hodges* announced, to harmonize with, and, at times, to pinkwash, different kinds of pro-white political efforts—from racial capitalism to settler colonialism to imperialism to white nationalism—by making it seem impossible to believe the same Court that would vindicate LGBTQ rights could likewise vindicate white privilege and white racialized hierarchies, much less at the same time.[18]

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16. Brown v. Board of Education, 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967). On the marriage project's rhetoric and its legitimation of post-racial ideology, see generally Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010 (2014).

17. On homonormativity, see generally Lisa Dugan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, *in* MATERIALIZING DEMOCRACY: TOWARD A REVITALIZED CULTURAL POLITICS 175 (Russ Castronovo & Dana D. Nelson eds., 2002), and on Sylvia Rivera's idea of the "white club," see Sylvia Rivera, *"Y'all Better Quiet Down" Original Authorized Video, 1973 Gay Pride Rally NYC*, YOUTUBE at 04:30 (May 23, 2019), https://www.youtube.com/watch?v=Jb-JIOWUw1o/. For more recent expressions of the general point in the legal academic literature, see, for example, Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 U.C. DAVIS L. REV. 1027, 1050–51 (2019), and Russell K. Robinson, *Mayor Pete,* Obergefell *Gays, and White Male Privilege*, 69 BUFF. L. REV. 296, 317–24 (2021). Related theorizing on homonationalism is found in JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES (2007), and Jasbir Puar, *Rethinking Homonationalism*, 45 INT. J. MIDDLE EAST STUD. 336 (2013). For some additional background on Sylvia Rivera, see Benjamin Shepard, *From Community Organization to Direct Services: The Street Trans Action Revolutionaries to Sylvia Rivera Law Project*, 39 J. SOC. SERV. RES. 95, 98–101 (2013)

18. 576 U.S. 644 (2015). For germane and illuminating thoughts on the pinkwashing problem, see, among other sources, Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006); Che Gossett, *Žižek's Trans/gender Trouble*, L.A. REV. BOOKS (Sept. 13, 2016), https://lareviewofbooks.org/article/zizeks-transgender-trouble/; Robinson, *White Male Privilege, supra* note 17. Another way to register the pinkwashing concern is to note how cases like *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v.*

From the perspective of the lived experiences of LGBTQ people, however, the Supreme Court's race and LGBTQ rights doctrines practically carve up the terrain of LGBTQ people's constitutional rights in a fashion that has yielded a distinctive topography.[19] Up on a hill, the tale is the largely cheery story of pro-LGBTQ constitutional rights protections and sensibilities whose march has, so far, escaped originalism's grip. By contrast, in the valley below, LGBTQ people's rights, powerfully shaped by the Court's anti-pro-Black colorblind originalism, entail a harder truth of constitutional rollbacks and constitutionally approved closures of the political space for fomenting robust and forthrightly pro-Black anti-subordinationist positions—positions that, in a wide sense, would also vindicate the rights of Black trans and other Black LGBTQ people.

The constitutional rights that the Court and others still regularly consider to be "LGBTQ rights" are the constitutional rights up on the hill. Access to them formally remains open to Black trans and other Black LGBTQ people—if and when they are like their white, cis, and socioeconomically at least middle-classed lesbian, gay, bisexual, and queer sisters and brothers. Notice how this configuration inverts traditional "like-race" arguments.[20] Whiteness, along with cisness and class privilege, serve here as the model for LGBTQ constitutional rights protections, a fact that might be surprising were whiteness not already the touchstone for the racialized originalist rules that govern in the valley below, as they govern the remainder of the Court's race equality jurisprudence.[21]

Nor should it be surprising to anyone that efforts to oppose LGBTQ constitutional rights and other LGBTQ rights up on the hill have, at times,

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Hodges, effectively bracket the history of racialized definitions of marriage, both in the antebellum South and the Jim Crow era, along with marriage's and family law's wider racial inflections, on which, see, for example, Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575 (2011).

19. Venturing no simplistic causation claims, certain rough correspondences to this constitutional topography are found, in different ways, in and as normative structures of sexuality and sexual desire operative "inside" LGBTQ communities, on which consider Russell K. Robinson & David M. Frost, *LGBTQ Equality and Sexual Racism*, 86 FORDHAM L. REV. 2739 (2018). For a classic variation of the hill/valley imagery in other terms and in another context, see Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1 (1965).

20. Along these lines, consider the argument detailed in Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008).

21. This is not derived from Darren Hutchinson's "inversion thesis," but that thesis nevertheless provides a helpful framework for understanding the constitutional topography being described here. Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 3 U. ILL. L. REV. 615 (2003).

been driven by attempts, sometimes subtle, sometimes not, to pull those rights toward, or to hold them in, the valley below by racializing them, as though they could properly be marred into legal non-recognition by imputations of certain kinds of Blackness.

One such effort that constructs LGBTQ rights in racialized terms, thus marking them as intersectional rights, but in ways that cast doubt upon them, appeared in *Bostock v. Clayton County*, the case announcing that anti-gay and anti-trans discrimination are forms of sex discrimination prohibited by Title VII of the 1964 Civil Rights Act.[22] While *Bostock* is, by its own terms, a statutory interpretation decision, the majority opinion in the case, in a deep sense, conforms to, and draws supports from, the Court's pro-LGBTQ constitutional rights jurisprudence.[23]

A series of notable anti-gay and anti-trans arguments in *Bostock*—of keen interest to those concerned with queer Black trans politics—focused on the pro-trans Title VII anti-discrimination claim in one of the cases *Bostock* collects, Aimee Stephens's sex discrimination case against her former employer, R.G. & G.R. Harris Funeral Homes, Inc., which discriminated against her because she was trans.[24] Pro-defense arguments in this case traded in ideologically saturated stereotypes about trans people as part of positions urging the Court to deny trans people statutory sex discrimination rights, suggesting that trans people—and specifically trans women—posed imminent sexual threats to cisheterosexual women (described simply as "women" in these accounts). Pro-defense briefing and oral arguments in Stephens's case repeatedly involved trans women being misgendered and maligned by positions that depressingly reproduced familiar anti-trans cultural scripts that figure trans people, and trans women more particularly, fantastically and wholly unsupported by any facts, as sexual monsters who do and would do terrible and sexually injurious things to women in showers and locker rooms if only given the chance. The idea here was that a pro-trans ruling in Stephens's case would

22. Bostock v. Clayton Cnty., 590 U.S. ___, 140 S. Ct. 1731 (2020).

23. Marc Spindelman, Bostock*'s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553 (2021).

24. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018); *aff'd sub nom.* Bostock v. Clayton Cnty, 590 U.S. ___, 140 S. Ct. 1731 (2020). The anti-trans arguments in Stephens's case are traced in detail in Marc Spindelman, *The Shower's Return: An Essay on the Supreme Court's LGBT Title VII Sex Discrimination Cases*, 82 OHIO ST. L.J. ONLINE 128 (2021). For linkages to bathroom debates that have arisen within "anti trans lawfare," see Gossett, *supra* note 18.

do just that by providing the occasion for these abuses as a matter of legally protected civil rights.[25]

These anti-trans positions did not expressly center race. What was evident, however, to anyone broadly familiar with the U.S. cultural archive, including its genealogies of sexual violence, was that the anti-trans fantasies circulating in *Bostock* drew their rhetorical form and power from fantastical and malignant slaver misrepresentations of African-American men, noxiously figured, consistent with "colonial racialization . . . [and] mythologization," as sexually irrepressible beasts who pose an ever-present threat to white women in ways that warrant—even demand—vigilant and subordinating collective responses.[26]

The anti-trans fantasies at work in *Bostock*—themselves unhinged and group-based projections, which, on one understanding, tacitly figured Black trans women as intersectionally personifying their anti-trans concerns—were, as in historical white supremacist anti-Black discourses, the conjurings of white and, apparently, cisheterosexual men. Sourcing aside, the cultural imperatives of these fantasies of sexual violence exceeded the seemingly measured calls for the Court to deny that anti-trans discrimination was prohibited sex discrimination under federal law.[27] Beyond that, these imaginary spectacles of violence stretched toward enjoining the state to respond to the looming, racialized trans menace through its monopoly on legitimate violence, deploying criminalization, policing, and punishment, to stop it. Curiously, it was not those responses so much as another that pro-defense arguments focused on. Here, one notable thought was that the looming trans menace should be handled by handing trans people back over to the psychiatric professions, the asylum being more apt as social management response than affording trans people sex discrimination protections under law.[28]

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25. Trans monstrosity is discussed and reclaimed, transvalued, in Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, *in* THE TRANSGENDER STUDIES READER 244, 245–47, 254 (Susan Stryker & Stephen Whittle eds., 2006).

26. Che Gossett, *Blackness and the Trouble of Trans Visibility*, *in* TRAP DOOR: TRANS CULTURAL PRODUCTION AND THE POLITICS OF VISIBILITY 183, 187 (Reina Gossett, Eric A. Stanley, & Johanna Burton eds., 2017). *See also, e.g.*, Crenshaw, *Close Encounters*, *supra* note 12, at 184–88; Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 19, 22 (1991). On the relation of some of these ideas to slaver outlooks, see James Baldwin, *A Talk to Teachers*, *in* COLLECTED ESSAYS 678, 681–82 (1998). This is not to make any general point here, though it does raise questions about some conservative approaches that seek to protect white ciswomanhood and their racial inflections.

27. For discussion, see Spindelman, *The Shower's Return*, *supra* note 24, at 160–73.

28. *Id.* The racial resonances and underpinnings of the anti-trans fantasies that surfaced in *Bostock* suggested not only why statutory sex discrimination protections were appropriate, and needed, but also why, in theory, statutory race discrimination protections might have been argued for

Happily, the anti-trans efforts in *Bostock* did not succeed. This is not exactly to say that they failed—or were defeated outright. *Bostock* nowhere openly engaged these arguments to discredit them. Instead, *Bostock* set the arguments focused on trans women in showers and locker rooms to one side as matters for another day.[29] Leaving the possibilities for their return open this way, if and when they do come back, as seems likely, what the Court will make of them may, like *Bostock*, turn on the status at that point of the Court's LGBTQ constitutional rights decisions—the cases up on the hill—and whether, by then, the Court's originalist project will have driven all LGBTQ people's constitutional rights into the valley below through a new constitutional originalist jurisprudence that broadly flattens out the wider topography of LGBTQ rights.[30]

II. QUEER BLACK TRANS POLITICS IN THE ABORTION RIGHTS SETTING

Thinking with queer Black trans politics also reconfigures widespread legal and popular understandings of the stakes of the originalist challenges that have dominated the *Dobbs* litigation, now focused less on its constitutional challenge to Mississippi's fifteen-week abortion ban than on Mississippi's pro-life originalist defense of that law, grounded in an originalist take-down of *Roe*, *Casey*, and the abortion right

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as an alternative statutory ground of support for the trans rights claims involved in the case, and perhaps the lesbian and gay rights claims argued for in it, as well. To the extent that historical forms of white supremacy and anti-Blackness determine trans people's rights—or lesbian women's or gay men's or other people's rights—they might be understood to be part of the protean ways that racial hierarchy reproduces itself, including how it intersects with other supremacist ideologies, including cisheterosexism. Race equality tools like Title VII's ban on sex discrimination could thus be marshalled against them.

29. *Bostock*, 140 S. Ct. at 1753.

30. Part of what makes this seem likely is the ongoing anti-trans lawfare unfolding in real-time, including measures focused on trans women in sport, see ACLU, *Legislation Affecting LGBTQ Rights Across the Country*, Sec.(c), https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country/ (Feb. 25, 2022), and other anti-trans political efforts, including Texas's showing involving child abuse claims, on which, see, for example, J. David Goodman & Amanda Morris, *Texas Investigates Parents Over Care for Transgender Youth, Suit Says*, N.Y. TIMES (Mar. 1, 2022), https://www.nytimes.com/2022/03/01/us/texas-child-abuse-trans-youth.html/, and J. David Goodman, *Texas Court Halts Abuse Inquiries into Parents of Transgender Children*, N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-transgender-child-abuse.html/, not to overlook sometimes related anti-gay political efforts, like Florida's so-called "Don't Say Gay" measure, Ana Ceballos & Kirby Wilson, *Student Voices are Loud, But Florida Republicans are Clear. "Don't Say Gay" Bill Passes,* MIAMI HERALD (Mar. 8, 2022), *available at* https://www.arcamax.com/currentnews/newsheadlines/s-2644732, presently being copied in other jurisdictions. *See, e.g.*, Peter Greene, *Not Just Florida. How "Don't Say Gay" Legislation Compares in Other States*, FORBES.COM (Apr. 14, 2022), https://www.forbes.com/sites/petergreene/2022/04/14/not-just-florida-how-dont-say-gay-legislation-compares-in-other-states/.

they protect. In this setting, originalism has practical repercussions for legal protections covering sex equality, as well.

Conventionally, the constitutional abortion right encodes liberty figured as belonging to cisgender, and, more exactly, cisheterosexual, women, largely on the supposition that the pregnancies that abortions end result from sex these women had with cisheterosexual men. Within this sex-binaristic and cisheterosexualized matrix, the constitutional abortion right implicates cisheterosexual women's equality with cisheterosexual men, and hence sex equality in a wider sense, at least as a function of abortion's social and political meanings, if not how it has been consecrated in constitutional doctrine, chiefly on privacy or liberty rationales.[31]

If not self-evident, the whiteness of the cisheterosexualized constitutional abortion right, along with its relative class locations come into focus by attending to *Roe*'s simultaneous rhetorical foregrounding and legal backgrounding of cisheterosexual women in the course of announcing the constitutional abortion right.[32] The abortion right that *Roe*

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31. Reflections on sex equality under law, including treatment of sex, pregnancy, and abortion, are in Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991). The *Casey* joint opinion set down tracks connecting the abortion right, as an expression of Fourteenth Amendment liberty, to the prospects of affirming it as a matter of Fourteenth Amendment sex equality guarantees in *Casey*, 505 U.S. at 852, 856, 860–69, 887–98 (majority opinion), further observations on which are in Gonzalez v. Carhart, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting). Speaking intersectionally, there are other legal prospects for giving abortion and other forms of reproductive rights a home in the Constitution's text, including one possibility breaking in Brief for Constitutional Law Scholars, Catharine A. MacKinnon et al. as Amici Curiae Supporting Appellants, Virginia v. Ferriero, No. 21-5096 (D.C. Cir. Jan. 10, 2022). Also worth noting here is how faithful pro-life work against constitutional abortion protections is itself deeply invested in cisheterosexualized understandings of womanhood and "motherhood." Conservative religious pro-choice positions have, at times, been reactive and responsive to those kinds of claims, though, candidly, pro-choice commitments do also at times have their own independent commitments to thinking in traditional heterosexualized and gender binaristic terms.

32. Reflections on some dimensions of the journey reproductive justice movements have been on toward full inclusion are in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE (2007), https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051/. *See also generally* Loretta Ross, *What Is Reproductive Justice?*, *in id.* at 4. On LGBTQ inclusion see, for example, Alisa Wellek & Miriam Yeung, *Reproductive Justice and Lesbian, Gay, Bisexual and Transgender Liberation*, *in id.*, at 18; NATIONAL LGBTQ TASK FORCE, QUEERING REPRODUCTIVE JUSTICE: A TOOLKIT (Zsea Beaumonis, Candace Bond-Theriault, Stacey Long Simons, & Sabrina Rewald eds., 2017), https://www.thetaskforce.org/wp-content/uploads/2017/03/Queering-Reproductive-Justice-A-Toolkit-FINAL.pdf. On trans inclusivity more particularly, see also *id.* at 35–37, and Naomhán O'Connor, *Framing Reproductive Justice in the Context of Institutionalized Transphobia Globally*, SEXUAL AND REPRODUCTIVE HEALTH MATTERS, http://www.srhm.org/news/framing-reproductive-justice-in-the-context-of-institutionalized-transphobia-globally/. Thanks to Angela Harris for engagement on this point.

announced, specifying the generalized constitutional right to privacy earlier cases recognized, placed the abortion decision first, foremost, and directly not in pregnant cisheterosexual women's hands, but in the hands of their physicians, said to have the right to end unwanted pregnancies in consultation with their patients, free from undue state interference.[33] At the time of *Roe*'s announcement, those physicians were overwhelmingly white, cisheterosexual men with professional prestige and socio-economic power.[34] Later abortion cases, including the public funding cases and *Casey*, differently crystallized *Roe*'s and the abortion right's class dimensions, making it clear the right was for those who had the means to access it, even as the Court clarified that the right belonged to pregnant women, for whom it was more robust the more they conformed to heteronormative ideals, like marriage, themselves deeply, though obviously not categorically, racially marked as white.[35]

Understanding the racialized, cisheterosexualized, and classed dimensions of the constitutional abortion right, and having a sense of how those features have persisted across time, illuminate a significant dimension of the pro-choice litigation strategy in *Dobbs*. A collection of pro-choice arguments in the case—by lawyers representing Jackson Women's Health Organization and amici supporting its position—urged

33. *See, e.g.*, *Roe*, 410 U.S. at 163–66. *But see id.* at 113. The earlier cases are Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972). *See also* Susan Frelich Appleton, *Doctors, Patients, and the Constitution: A Theoretical Analysis of the Physician's Role in "Private" Reproductive Decisions*, 63 WASH. U. L.Q. 183 (1985).

34. For the notation that "[i]n the first generation after Roe, abortion providers were mostly men because doctors were mostly men," something that has since changed, so that women "are now the main force behind providing abortion," see Emily Bazelon, *The New Abortion Providers*, N.Y. TIMES (July 14, 2010), https://www.nytimes.com/2010/07/18/magazine/18abortion-t.html?referringSource=articleShare/. *See also* C.E. Joffe, T.A. Weitz, & C.L. Stacey, *Uneasy Allies: Pro-Choice Physicians, Feminist Health Activists and the Struggle for Abortion Rights*, 26 SOCIO. HEALTH & WELLNESS 775, 788 (2004).

35. On abortion funding, see Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). On the *Casey* point, compare Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–87 (1992) (plurality opinion), with *id.* at 887–98 (majority opinion). For an important overview of how family law privileges whiteness, see generally King, *supra* note 18, and for an engagement with how "marriage as an institution" has "worked in ways that primarily served to marry African Americans—those who are married, as well as those who are not—to second class citizenship," see R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 58 (2015). These features of marriage are both in contrast to, and, differently, continuous with, "[a]ntebellum social rules and laws [that] considered enslaved people morally and legally unfit to marry," and "incapacitated [them] from entering into civil contracts of which marriage was one." Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMANITIES 251, 252 (1999). It is additionally worth recognizing how the racial markings of the abortion right work through silence about who has exercised the right—and who, given the demographics of exercising the abortion right, is disproportionately affected by abortion restrictions.

the Court to reaffirm *Roe* and *Casey* by showing how bad a contrary result would be for cis women from all walks of life.[36] These arguments variously presented the abortion right as a lived intersectional right through socio-legal accounts of what the right means for cis women from different socially disadvantaged groups, prominently including groups defined by race, ethnicity, national origin, immigration status, age, disability, class, and "sexual minority" status.[37] A number of these arguments surfaced in amicus briefs that further inflected intersectionally, cross-indexing the social identities they spotlighted with other forms of social inequality pregnant people live, including in relation to abortion.[38]

As to "sexual minority" cisgender women, the most important amicus brief was filed by a number of LGBTQ organizations and prominent LGBTQ advocates.[39] This LGBTQ organizations and advocates brief resurfaces older LGBTQ traditions understanding reproductive justice as an LGBTQ issue while productively indicating

36. *See, e.g.*, Brief for Respondents at 37, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 422 (2021) (No. 19-1392); Brief of 547 Deans, Chairs, Scholars and Public Health Professionals, as Amici Curiae in Support of Respondents at 15–16, 142 S. Ct. 422 (No. 19-1392); Brief of National Women's Law Center as Amici Curiae in Support of Respondents at 7, 142 S. Ct. 422 (No. 19-1392); Brief of Legal Voice as Amici Curiae in Support of Respondents at 4, 11–16, 142 S. Ct. 422 (No. 19-1392); Brief of YWCA USA as Amici Curiae in Support of Respondents at 7–13, 142 S. Ct. 422 (No. 19-1392); Brief for Organizations Dedicated to the Fight for Reproductive Justice—Mississippi in Action as Amici Curiae in Support of Respondents at 9–39, 142 S. Ct. 422 (No. 19-1392). The intersectional arguments for abortion rights harken to older feminist traditions, not followed in *Roe*, as described in Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2048–49 (2021) (discussing Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972)).

37. In addition to the briefs cited *supra* note 36, see also generally, for example, Brief of Campaña Nacional Por el Aborto Libre, Seguro, y Accesible as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 422 (2021) (No. 19-1392); Brief for LGBTQ Organizations and Advocates as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 422 (2021) (No. 19-1392); Brief of National Asian Pacific American Women's Forum as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 422 (No. 19-1392); Brief of Advocates for Youth, Inc. as Amicus Curiae in Support of the Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 422 (No. 19-1392); Brief of the Autistic Self Advocacy Network as Amicus Curiae in Support of the Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 422 (No. 19-1392). There can be little doubt that larger strategic thoughts were in play in these framings.

38. *See, e.g.*, Brief of Legal Voice, *supra* note 36, at 4–5; Brief of YWCA USA, *supra* note 36, at 11–13, 16–19, 23–24, 29–30, 32–35; Brief for Organizations Dedicated to the Fight for Reproductive Justice, *supra* note 36, at 1–2, 3–5. Beyond these *Dobbs* briefs, see also generally Murray, *supra* note 36; Michele Goodwin, *Banning Abortion Doesn't Protect Women's Health*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/opinion/roe-abortion-supreme-court.html/.

39. Brief for LGBTQ Organizations and Advocates, *supra* note 37.

abortion does not involve only cisheterosexual women's rights.[40] Thus, the brief notes that sexual minority women, too, can and do become pregnant via intercourse with cisgender men, though neither the intercourse nor the pregnancies that result are always consensual or wanted.[41] Focusing on sexual minority women's experiences with sexual violence and injury, the brief explains abortion is sometimes necessary to limit the consequences of sexual abuse, giving sexual minority victims and survivors back some control over their bodies and futures, instead of compounding harms they suffer by forcing them to carry pregnancies to term against their will.[42] Along other lines, the brief shows abortion rights are important to sexual minority women who face economic and other social barriers to good contraceptive care, which put them at risk of unwanted pregnancies.[43] As to both these points, the brief thickens its arguments by talking about "sexual minority" cis women who experience other forms of social inequality in their lives, showing how diverse LGBTQ communities are, even just among those who could become pregnant. Among other facets of LGBTQ life, the brief distinctively engages the reproductive realities faced by Black, poor, young, trans, as well as non-binary "sexual minority" people who might need—and should have—the constitutional abortion right.[44]

Without singularly centering Black trans people and their experiences with sex, contraception, healthcare, pregnancy, and the reproductive freedoms that they do and do not enjoy, the LGBTQ organizations and advocates brief holds important space for them and thus affirms what queer Black trans politics also understand: The depiction of abortion rights as about white, cisheterosexual, and socioeconomically privileged people registers only a part of a larger social picture. Though the abortion right was forged around cisheterosexual women and other kinds of social privilege, LGBTQ people do rely on it, hardly without challenge, as with other forms of healthcare LGBTQ people need. As such, it has become a right that LGBTQ people need and use—and in that sense at least, abortion is an LGBTQ right.

Thus, *Dobbs*—a case about the right of pregnant people to end unwanted pregnancies—is also an LGBTQ rights case. If and when *Dobbs*

40. Reminders of this tradition are in URVASHI VAID, IRRESISTIBLE REVOLUTION: CONFRONTING RACE, CLASS, AND THE ASSUMPTIONS OF LGBT POLITICS 4, 41, 63, 122, 136, 139, 142, 172 (2012).

41. Brief for LGBTQ Organizations and Advocates, *supra* note 37, at 19–23.

42. *Id.* at 21–23.

43. *Id.* at 23–25.

44. *See id.* at 16 n.2, 20–27.

overturns or shrinks *Roe* and *Casey*, it will, in and of itself, diminish the rights of pregnant people outside, but also inside, LGBTQ communities. As Kierra Johnson, Executive Director of the National LGBTQ Task Force, put it in a public statement addressed to LGBTQ communities the day that *Dobbs* was argued:

> If you think this decision will not affect you, think again: a wrong decision by the Supreme Court means you, too, will lose your bodily autonomy, your ability to own your own personal and community power. This is not just about abortion; it is about controlling bodies based on someone else determining your worthiness. This is a racial justice issue. This is a women's issue. It is an LGBTQ issue. It is a civil rights issue. These are our fundamental rights that are at stake.[45]

Johnson's statement understandably frames *Dobbs*' immediate danger to LGBTQ people in broad terms—terms that emphasize "bodily autonomy" and self-control, in order to make its case to LGBTQ publics who need to hear its message. But what it says is more narrowly true just as to the abortion right itself. That right—hence *Dobbs*—involves racial justice, women's equality, and LGBTQ rights, and it does so all at once. The statement's stance bespeaks intersectionality this way, though it is articulated so that even non-intersectionality-savvy LGBTQ audiences can hear it. If the Court's originalist project comes for *Roe* and *Casey* and the constitutional abortion right in *Dobbs*, it will come for the lived rights, freedom, and equality of people in all these groups—groups that are themselves interconnected partly by virtue of the people who make them up, including Black trans people and Black cis lesbian, bisexual, and other sexually identified queer women.

What all this means is that *Dobbs*' impact on LGBTQ people's constitutional rights is not only off at a distance, as many still think—about, say, what *Dobbs* will or will not do to undermine the foundations of LGBTQ constitutional rights up on that hill, or what *Dobbs* will or will not mean, down the road, for continued recognition of that same group of rights. *Dobbs* does raise those questions, to be sure, but its impact on

45. *SCOTUS Reaction Statement from Task Force Executive Director, Kierra Johnson*, NATIONAL LGBTQ TASK FORCE (Dec. 1, 2021), https://www.thetaskforce.org/scotus-reaction-statement-from-task-force-executive-director-kierra-johnson/. For discussion elsewhere cross-illuminating the intersectional commitments of Johnson's "reaction statement," see Kierra Johnson, *Queer Rights Are Reproductive Rights & Repro Rights Are Queer Rights*, LGBTQ NATION (Sept. 30, 2021), https://www.lgbtqnation.com/2021/09/queer-rights-reproductive-rights-repro-rights-queer-rights/. For context detailing Johnson's role as "[a] longtime leader" in the reproductive justice movement, see Becca Damante, *Kierra Johnson Redefines the Movement for the National LGBTQ Task Force*, TAGG MAG. (Mar. 15, 2021), https://taggmagazine.com/kierra-johnson-national-lgbtq-task-force/.

LGBTQ rights, however it is decided, will be more direct and immediate than that—along just the lines Johnson's statement describes. To fail to recognize this is to fail to recognize what liberty and equality mean for LGBTQ people who are or who may become pregnant. It misunderstands who LGBTQ people are—and what LGBTQ people need to be free.

Viewed critically and aligned with queer Black trans politics-inspired realism, if one begins with an appreciation for the racial logics of the Court's colorblind originalism, the pro-choice litigation strategy in *Dobbs*—highlighting abortion's meaning to different kinds of pregnant people—involved a long-term strategic play. It might not move a single conservative Supreme Court justice committed to a pro-life originalism in *Dobbs* into the pro-*Roe* or pro-*Casey* column (though who knows?), but the strategy could easily inform dissents in *Dobbs* that will sow the seeds of future doctrinal innovations re-establishing abortion protections in their lived intersectional realities, a new *Roe* for a new day. In other directions, the pro-choice intersectionality strategy in *Dobbs* speaks the lived truths of the abortion right in a way that advertises the practices of, and the ongoing need for, a broad political vision of reproductive justice that, going forward, is ready to underwrite intersectional reproductive rights protections, and in ways that may reshape local, state, and even national U.S. politics.[46]

Doctrinally, the pro-choice intersectionality strategy in *Dobbs* may already have helped draw out its own form of unintended dialectical resistance—one that syncs the Court's treatment of the abortion right with the broad, rights-denying impulses of the Court's ostensibly colorblind originalism. During oral arguments in *Dobbs*, Justice Clarence Thomas repeatedly invoked—seemingly approvingly—"a case out of South Carolina . . . [that] involved a woman who had been convicted of criminal child neglect because she ingested cocaine during pregnancy."[47]

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46. *See, e.g.*, *Abortion Is a Reproductive Issue for Black Families and Communities*, NATIONAL BIRTH EQUITY COLLABORATIVE, https://birthequity.org/wp-content/uploads/2022/01/NBEC_RJ2.0_FINAL-NYT-ad_REVISED.pdf. For another prophetic account of reproductive justice that offers reflections on different ways to meet the present moment, see Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009). Of course, there are alienating risks in this setting as well.

47. Transcript of Oral Argument, at 49, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 422 (2021) (No. 19-1392). For additional engagement, see *id.* at 49–50, 103–04. *Cf.* Whitner v. State, 492 S.E.2d 777 (S.C. 1997). *But cf. also* Ferguson v. City of Charleston, 532 U.S. 67 (2001). Important context for Justice Thomas' views on abortion and race, sometimes inflected in dialectic terms, is offered by Murray, *supra* note 36. *See* especially *id.* at 2029–30, 2052, 2057–59, 2071, 2083–2101. *See also* Corey Robin, *Clarence Thomas's Radical Vision of Race*, NEW YORKER (Sept. 10, 2019), https://www.newyorker.com/culture/essay/clarence-thomass-radical-vision-of-race/. For

Read in terms of political geography that meets both pro-life politics and the racialized war on drugs head-on, Justice Thomas's questions raised the prospect that pro-life originalist approval of abortion bans may soon start blessing other forms of criminal-law-based state management of pregnant people generally, but with a distinctive "colorblind" eye on Black women's mind-bodies and lives.[48] Consistent with pro-life logics that, in racial terms, trace racial capitalist histories to human reproduction during the long era of U.S. slavery, both as an effect and a cause of racialized wealth, it is possible that *Dobbs* will practically open the door for treating Black cis women's and Black trans people's and other women's bodies as forms of public commons that are to be managed and overseen by the state, backed by the imprimatur of the Constitution as defined by the Supreme Court.[49] So much for the Civil War Amendments and their original, grand promises of freedom and self-possession—and originalism's own claims to historical objectivity and political neutrality.[50] It is no comfort that all pregnant women—and other pregnant people—may be treated the same way, consistent with constitutional equality demands.

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more from Justice Thomas himself on race and abortion, see *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 587 U.S. ___, 139 S. Ct. 1780, 1782 (2019) (Thomas, J., concurring).

48. On race and the war on drugs, see, for example, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 1–7, 47–53, 59–62 (2010). On racialized state control of reproduction, see generally, for example, MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 114–48 (2020), and DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 150–245 (1997). *See also* Aziza Ahmed & Michele Goodwin, *Coercing Rape Survivors to Be Pregnant for the State—The Texas Way*, MS. MAGAZINE (Oct. 1, 2021), https://msmagazine.com/2021/10/01/texas-abortion-ban-rape-exception-greg-abbott-crime-control/; Michele Goodwin & Mary Ziegler, *Whatever Happened to the Exceptions for Rape and Incest*, THE ATLANTIC (Dec. 29, 2021), https://www.theatlantic.com/ideas/archive/2021/11/abortion-law-exceptions-rape-and-incest/620812/.

49. *See, e.g.*, Murray, *supra* note 36, at 2033–34; *see also, e.g.*, ROBERTS, *supra* note 48, at 24–31. For related treatment spotlighting incarcerated women from within "a robust legal framework, informed by the principles of reproductive justice," see Priscilla Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191 (2018).

50. Then again, anti-Black readings of "constitutional guarantees of Black citizenship" entailed in the Civil War Amendments have their own history. One recent notation is in Joseph Fishkin & William E. Forbath, *How Progressives Can Take Back the Constitution*, THE ATLANTIC (Feb. 8, 2022), https://www.theatlantic.com/ideas/archive/2022/02/progressives-constitution-oligarchy-fishkin-forbath/621614/. As Fishkin and Forbath observe: "By the turn of the 20th century, the U.S. Supreme Court refused to intervene to enforce constitutional guarantees of Black citizenship, even in the face of openly illegal mass disenfranchisement and white political violence. All three branches of the federal government had abandoned the promises of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Id.*

III. WHEN CONSTITUTIONAL ORIGINALISM MEETS THE COURT'S PRO-LGBTQ CONSTITUTIONAL RIGHTS DECISIONS ON THE HILL

As important as everything to this point has been—and is—on its own terms, it is all also useful in producing a new set of critical understandings of what a pro-life constitutional originalist decision in *Dobbs* might mean for and do to those constitutional LGBTQ rights decisions on the hill that have been in the same Fourteenth Amendment liberty family as *Roe* and *Casey*. These new understandings are not only fostered by, but they also have implications for, queer Black trans politics and how they circulate in LGBTQ communities in the shorter and longer term.

While there are different ways to thread the originalist needle, from the point of view that I have been developing—recognizing what the Court's constitutional originalism has meant for race equality and what it may soon mean for sex equality—it looks like the Court's originalist project already has LGBTQ people's constitutional rights in its sights. The wonder here is not what *Dobbs* may soon mean for LGBTQ rights generally, but what it may mean for those other LGBTQ rights up on that hill, and how, in principle, they could be treated any differently.

At this juncture, it is worth returning to *Bostock* and glimpsing its presumably unintended underbelly. Maligned by a number of conservatives as an act of textualist interpretive infidelity and sometimes also as an act of pro-gay and pro-trans political treason, Justice Neil Gorsuch's *Bostock* opinion has been welcomed in many pro-LGBTQ and feminist circles as a case that, at long last, without saying so in so many words, has recognized the tight, unbreakable social link forged inside male supremacist ideologies between and among sexism, anti-gay, and anti-trans discrimination.[51] Whether seen in terms of progressive

51. For criticisms of *Bostock*'s textualist method from other pro-textualist positions, see, for example, *Bostock*, 140 S. Ct. at 1755–75 (Alito, J., dissenting), and Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158 (2020). Reporting on the political critique includes Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html/; Jane Coaston, *Social Conservatives Feel Betrayed by the Supreme Court—and the GOP That Appointed It*, VOX.COM (Jul 1, 2020), https://www.vox.com/2020/7/1/21293370/supreme-court-conservatism-bostock-lgbtq-republicans/. *See also* 166 CONG. REC. S2998–3000 (daily ed. June 16, 2020) (statement of Sen. Josh Hawley). For some analysis of whether *Bostock* can properly be counted as feminist, see Ann C. McGinley et al., *Feminist Perspectives on* Bostock v. Clayton County, 53 CONN. L. REV. ONLINE 1 (2020). On male supremacy's treatment of anti-gay discrimination, see ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 60–61 (1989), ANDREA DWORKIN, INTERCOURSE 191–98 (1987); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex*

understandings of the case or in its own formalist terms, however, *Bostock* may prove to have boomerang-like tendencies. Without any significant conceptual effort, *Bostock* can readily be redeployed as a legal device for translating an originalist set-back to the abortion right in *Dobbs*, itself, practically, a set-back to sex equality rights, into other sex-based originalist losses—losses that may limit or likewise unwind LGBTQ victories in cases like *Lawrence v. Texas* and *Obergefell v. Hodges*.[52]

This prospect presents a new way to apprehend *Bostock*'s curious, if careful, avoidance of any express mention, much less engaged discussion, of the Supreme Court's pro-LGBTQ constitutional decisions up on the hill—no matter how those decisions underwrite and structure its sense of what legal justice required in the case.[53] It is, frankly, hard to conceive of *Bostock* as a legal long-con by a mustachios-twisting textualist/originalist justice who secretly and strategically cast homophobia and transphobia as sexism in *Bostock* in order to prefigure an alley-oop after a case like *Dobbs* that would turn this pro-LGBTQ textualist victory into authority for subsequent anti-LGBTQ constitutional originalist defeats. Intentions aside, *Bostock*'s capacity for redeployment as authority for overturning the Court's pro-LGBTQ constitutional rights decisions after *Dobbs* is now impossible to miss. If and when the moves are formally placed upon the table, even Justice Gorsuch could conceivably join. The explanation might be that nothing in *Bostock* anyway committed him to upholding the Court's pro-LGBTQ constitutional rights decisions.[54] ("See? I didn't even cite them!")

While such a ruling would be at odds with more straightforward understandings of *Bostock*'s letter and spirit, it is the kind of turn-about that a long view of the Court's so-called colorblind originalism—like the kind of critical perspective that queer Black trans politics helps to tee up—

Discrimination, 69 N.Y.U. L. REV. 197 (1994). On how anti-trans discrimination fits in, see, for example, John Stoltenberg, *Andrea Dworkin Was a Trans Ally*, BOSTON REV. (Apr. 7, 2020), https://bostonreview.net/articles/john-stoltenberg-andrew-dworkin-was-trans-ally/. Additional sources in the context of a larger argument about sex equality and gay men are in Marc Spindelman, *Gay Men and Sex Equality*, 46 TULSA L. REV. 123, 131 n.27 (2013).

52. Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

53. The argument of how the Court's pro-LGBTQ constitutional decisions underwrite and structure *Bostock* is detailed in Spindelman, Bostock*'s Paradox*, *supra* note 23. *Bostock* also broadly avoids any deep, express engagement with ideas about sex stereotyping beyond its textualist sex formalism. For a critical account of *Bostock*'s on these grounds, see Anthony Michael Kreis, *Unlawful Genders*, 85 LAW & CONTEMP. PROBS. 103 (2022).

54. An explanation for why, in principle, *Bostock* drives toward reaffirming, not rolling back, much less erasing, *Roe* and *Casey* in *Dobbs* is found in Marc Spindelman, *Justice Gorsuch's Choice: From* Bostock v. Clayton County *to* Dobbs v. Jackson Women's Health Organization, 13 CONLAWNOW 11 (2021).

might anticipate. Settled judgments about constitutional and legal protections, after all, rise and fall, and when they fall, they not uncommonly do so through sometimes clever, if also highly dubious means. Across the sweep of U.S. history, pro-white and anti-Black racialized forms of individual and institutional power have demonstrated stunning talents for scanning a political/legal situation and sensing how anti-racist and pro-Black power formations are in play and at work—in order to move to thwart them.

Note in this light the possible stakes of LGBTQ communities getting sharper and more aggressive in their anti-racist and anti-white-supremacist alignments and commitments.[55] The more that LGBTQ communities proudly stand to be counted as part of what has, at times, disparagingly been termed the "Great Awokening," a term that itself calls out to be queered, the greater the chances that LGBTQ rights will come under fire from that colorblind originalist project that has done so much to constrict race equality rights, elements of the lived, intersectional rights of Black trans and non-trans LGBTQ people.[56] If this process holds to pattern, including as expected on the abortion right front, even those LGBTQ rights on the hill could be sent down to the valley of rights. From there, they would presumably be returned to the arena of ordinary politics, subject, once again, to surveillance and management by new iterations of old forms of religious and moral anti-LGBTQ opposition that, in the past, sought to order and control them by placing them under the overlapping strictures of religious, moral, legal, medical, and socio-cultural domination. What other futures might life in the valley of LGBTQ rights hold in store? What additional, constitutionally approved constraints might limit chances of getting free of them?

For now, anyway, the Supreme Court's pro-LGBTQ constitutional rights jurisprudence, comprised of those cases up on the hill, does seem basically secure enough. Notwithstanding how a pro-life originalist decision in *Dobbs* will weaken its foundations, the Court's pro-LGBTQ rights jurisprudence may hold, escaping a wholesale reversal by the

55. Public indications of this movement and these commitments are set forth in *LGBTQ Organizations Unite to Combat Racial Violence*, HUMAN RIGHTS CAMPAIGN, https://assets2.hrc.org/files/assets/resources/LGBTQ_Organizations_Unite_to_Combat_Racial_Violence.pdf. *See also* Elizabeth Bibi, *The Human Rights Campaign and 100+ LGBTQ Organizations Release Letter Condemning Racial Violence*, HRC.ORG (May 29, 2020), https://www.hrc.org/news/hrc-and-75-lgbtq-organizations-release-letter-condemning-racist-violence/.

56. On the "Great Awokening," see, for example, Matthew Yglesias, *The Great Awokening*, VOX.COM (Apr. 1, 2019), https://www.vox.com/2019/3/22/18259865/great-awokening-white-liberals-race-polling-trump-2020/.

Court's aggressive, activist originalism. Mississippi's pro-life originalist positions in *Dobbs* indicated that that is where Mississippi's lawyers thought the Supreme Court stood on the question. Bare-knuckled as Mississippi's pro-life originalist politics were—whaling on *Roe* and *Casey* for their non-originalism, said to be sufficient to overturn them—the state pulled its punches where non-originalist pro-LGBTQ constitutional rights decisions like *Lawrence* and *Obergefell* were concerned.[57]

On one view, this was not merely Mississippi ably counting to five. In a deeper sense, it was about how vote counting on the ongoing constitutional status of LGBTQ rights up on the hill involves the status of a constitutional compromise realignment and re-grounding of LGBTQ constitutional rights first announced by the Supreme Court *Masterpiece Cakeshop v. Colorado Civil Rights Commission* ruling, Justice Anthony Kennedy's swansong opinion on his signature jurisprudential issue of LGBTQ constitutional rights.[58] Needless to say, this focus on these LGBTQ constitutional rights and how their preservation will shape Justice Kennedy's historical legacy stands at a striking distance from a decision in *Masterpiece Cakeshop* centered on or around Black trans lives—or rights.

Many have treated *Masterpiece Cakeshop* as a narrow, shallow, and modest ruling of no great constitutional moment. Subsequent developments have helped clarify this reading is wish fulfillment—not what the opinion is or does, but what some of its pro-LGBTQ readers might like it to mean.[59] *Masterpiece Cakeshop* instead quietly produced a highly significant shift in the Court's basic conceptualization of, and approach to, LGBTQ constitutional rights up on the hill. It lifted them up in order to set them back down on different constitutional foundations.

The Court's early pro-LGBTQ constitutional rights decisions evolved through rulings in which the Court generally treated lesbian and gay rights as emerging within a politically liberal, or perhaps more precisely, a politically libertarian, constitutional tradition and order. In it, religious and moral views on homosexuality and same-sex relationships, including marriage, had—and were declared to have—no legitimate role to play in setting state policy on the prospects of, and for, LGBTQ life. Religious and moral views opposing LGBTQ people and their rights were

57. *Compare* Brief for Petitioners at 18, Dobbs v. Jackson Women's Health Org., No. 19-1392 (July 22, 2021), *with id.* at 17, for the pulled punches.

58. 584 U.S. ___, 138 S. Ct. 1719 (2018).

59. An assessment of these possibilities and citations to some relevant sources are in Marc Spindelman, Masterpiece Cakeshop*'s Homiletics*, 68 CLEV. ST. L. REV. 347, 349 n.2 (2020).

thus openly dismissed in the Court's pre-*Masterpiece Cakeshop*, pro-LGBTQ constitutional rights decisions as so much unconstitutional discrimination. Religious and moral positions against lesbian and gay rights were variously held to be—in constitutional terms—forms of illicit animus (read: hate) or irrationality (read: madness).[60]

If these decisions thus struck many faithful conservatives and traditional moralists as a constitutionally based affront—an affront that many liberals and progressive secretly or not so secretly cheered—they also, beyond insult, involved what many perceived to be forms of constitutional emasculation. They stripped faithful conservatives and traditional moralists of the political authority they had long enjoyed as, if not a set of proper constitutional rights, then anyway, constitutionally affirmed prerogatives, by which they could enforce their normative visions of what homosexuality's status under law should look like.[61]

Right at the cusp of his retirement from the Court, then poised to lurch rightward, Justice Kennedy's *Masterpiece Cakeshop* opinion set out to shore up, and thus to preserve, the basics of then-existing LGBTQ constitutional rights up on that hill, but in a way that resituated them atop a differently inflected vision of the constitutionally governed political order. Moving from a politically liberal, or libertarian, constitutional vision that kept religion and morality at the margins and so basically out of public life, certainly where LGBTQ rights were concerned, *Masterpiece Cakeshop* announced that, going forward, LGBTQ constitutional rights would be protected within a secular and religious pluralistic constitutional order in which religious conservatism and traditional moralism, like LGBTQ forms of life, were entitled to full and equal respect, as constitutionally protected ways to live a good life.[62]

In these terms, far from the kinds of social margins marked by queer Black trans politics, *Masterpiece Cakeshop* is a precedent in the manner of an LGBTQ rights version of the joint opinion Justice Kennedy co-authored in *Planned Parenthood v. Casey*, with its famous "*Pax Roeana*":

60. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996); Lawrence v. Texas, 539 U.S. 558, 574, 577–78 (2003); Obergefell v. Hodges, 576 U.S. 644, 672–76 (2015).

61. This is context for the claim that "the justices have never reversed Supreme Court precedent to take away a freedom long enjoyed by Americans, with the possible exception of one time, in 1937," and that doing so in *Dobbs* "would violate one of the fundamental-yet-unwritten rules of Supreme Court jurisprudence that liberal and conservative majorities alike have respected for many years." Noah Feldman, *Reversing Roe Would Risk Supreme Court Legitimacy*, BLOOMBERG LAW (Oct. 24, 2021), https://news.bloomberglaw.com/us-law-week/reversing-roe-would-risk-supreme-court-legitimacy-noah-feldman/.

62. Capturing what are, no doubt, more widely shared sentiments is the critique offered by Kyle Velte, *Postponement as Precedent*, 29 S. CAL. REV. L & SOC. JUST. 1 (2019), on the level of social meaning.

a kind of brokered constitutional compromise that, it was hoped, would preserve "everyone's" constitutional rights while securing an enduring constitutional and political peace by giving "all" the parties to these culture wars investments in the Supreme Court's authority as a neutral but fair and trustworthy arbiter.[63] (The truth is: not really "everyone" and not really "all.")

In *Masterpiece Cakeshop*, the Court reaffirmed the basics of pro-LGBTQ constitutional rights protections while declaring different First Amendment rights that faithful conservatives and traditional moralists enjoyed.[64] The Court even recognized that some would-be extensions of the liberty and equality promises of the Court's earlier pro-LGBTQ constitutional rights decisions might have to be sacrificed, snipped at least at their ostensible margins, so that clashing constitutional values could be accommodated under the peace sign of strict, strict state neutrality as between these warring ways of life.[65] Neither side would get everything they wanted, but then neither side would have reason to fear their basic ways of living would be subject to their enemies gaining the political, then legal, upper hand to try to squash them. Hence *Masterpiece Cakeshop*'s rule that the state and its agents must not, in service of pro-LGBTQ liberty and equality promises, be casual in their respect for a neutral stance between the parties to the case, much as the Court itself had been in its earlier pro-LGBTQ rights rulings.[66] *Masterpiece Cakeshop*'s various opinions made it appear this was a consensus position on the Court. Though not without some contraindications since, the leading decisions in *Masterpiece Cakeshop*'s wake involving LGBTQ rights and the rights of faithful conservatives and traditional moralists—prominently, *Bostock* and, just last year, *Fulton v. City of Philadelphia*—have broadly reaffirmed *Masterpiece Cakeshop*'s delicate *Pax Obergefell*-ana.[67] Not even Mississippi's bull-in-a-china-shop originalism dared disturb it.[68]

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63. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

64. For discussion that clocks the Court's offerings, see Spindelman, *supra* note 59, at 383–90.

65. *Id.* at 389.

66. *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24, 1731. *See also* Spindelman, *supra* note 59, at 357–58.

67. For one of those contraindications, see Nina Totenberg, *Justices Thomas, Alito Blast Supreme Court Decision on Same-Sex Marriage Rights*, NPR.ORG (Oct. 5, 2020), https://www.npr.org/2020/10/05/920416357/justices-thomas-alito-blast-supreme-court-decision-on-gay-marriage-rights/. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020); Fulton v. City of Philadelphia, 593 U.S. __, 141 S. Ct. 1868 (2021).

68. Nor, exactly, need the Court's next major case involving LGBTQ rights squaring off against religious liberties, advanced as First Amendment free speech claims. 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S.Ct. 1106 (Feb. 22, 2022). It is possible the

How long this peace *Masterpiece Cakeshop* worked out will hold in the aftermath of a pro-life originalist decision in *Dobbs*, particularly as the Court's originalist project continues to crest, is anyone's guess. From a principled originalist point of view, the distinction that Mississippi offered the Court in *Dobbs*, by which it could overturn *Roe* and *Casey* while leaving established pro-LGBTQ constitutional rights rulings like *Lawrence* and *Obergefell* in place, sounded much more in pro-life views and values proper than anything corresponding to originalist theory as such. Mississippi's lawyers told the *Dobbs* Court that none of its originalist arguments against *Roe* and *Casey*, including its originalist attack on the general privacy right out of which *Roe* grew, need be extended to apply to *Lawrence* or *Obergefell* in *Dobbs*.[69] Those cases, unlike *Roe* and *Casey*, Mississippi explained, did not involve "a right to destroy human life."[70]

In closer step with Scalian originalist positions on abortion and LGBTQ rights, opposed to one and all, and more forthcoming about the likely actual intentions of many faithful, pro-life originalists, is the position taken up by the *Dobbs* amicus brief filed by Texas Right to Life, listing as counsel of record Jonathan Mitchell, the so-called mastermind behind Texas' S.B. 8, which has rehearsed the on-the-ground elimination of abortion rights while *Roe* and *Casey* formally remain good law, meantime sending word out their time is nigh.[71] The brief's closing passage speaks with (depending on your views) rousing and spine-chilling confidence, evidently convinced it is already safe to look beyond a pro-life originalist victory in *Dobbs* to the next-line originalist battles ahead. Thus, the brief offers an originalist take on *Lawrence* and *Obergefell*, along with some practical advice for the Court.

The Texas Right to Life brief's originalist line succinctly characterizes *Lawrence* and *Obergefell* as being "as lawless as *Roe*."[72]

Court's eventual decision in this case will "simply" rebalance the *Masterpiece Cakeshop* compromise without displacing it by overturning the underlying pro-LGBTQ constitutional precedents whose scope it is widely understood to implicate.

69. For distinctions between *Roe* and *Casey*, on the one hand, and *Lawrence* and *Obergefell*, on the other, see Brief for Petitioners at 13, 17, Dobbs v. Jackson Women's Health Org., No. 19-1392 (July 22, 2021). For an argument about the general right to privacy, see *id*. at 2, 14–18.

70. *Id*. at 17. For other articulations of the point, see *id.* at 2, 28. Pro-life locutions, like "unborn life," "unborn child," "unborn human being[]," "unborn girls and boys," and "the unborn," are found elsewhere in the brief. *See, e.g.*, *id.* at 1; *id.* at 4; *id.* at 7; *id.* at 18; *id.* at 30.

71. Brief of Texas Right to Life as Amicus Curiae in Support of the Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 422 (2021) (No. 19-1392); Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html/.

72. Brief of Texas Right to Life, *supra* note 71, at 25.

Like *Roe*, neither homosexual sodomy nor same-sex marriage is expressly protected by the Constitution, and no history or tradition under law, relevant in a conservative originalist sense, supports them.[73] While that presumably means they should meet the same fate the brief contemplates for *Roe*, the brief tells the Court that it is not necessary to make the announcement in *Dobbs*. But, the brief hastens to add, "neither should the Court hesitate to write an opinion that leaves those decisions [*Lawrence* and *Obergefell*] hanging by a thread."[74]

The brief's justification for this treatment of *Lawrence* and *Obergefell*—leaving them dangling by a thread without formally overruling them—is more or less the reason Mississippi offered to the Court, but with a sly twist. Despite being "as lawless as *Roe*," the Texas Right to Life brief explains, *Lawrence* and *Obergefell* do not have to be treated the same as *Roe* in *Dobbs*, because they do not involve the same degree of threat to life *Roe* does. Consider the brief's exact words: "*Lawrence* and *Obergefell*, while far less hazardous to human life, are as lawless as *Roe*."[75]

The curious precision of the brief's negative comparison of *Roe* with *Lawrence* and *Obergefell*—the latter two cases being "far less hazardous to human life" than *Roe,* not simply non-hazardous to them—resurfaces old school associations by which cisheterosexuality and homosexuality and gender non-binarism have been seen as different and properly hierarchized. Whereas cisheterosexuality has traditionally been associated through ideas about procreation and childbirth with health, vitality, life, and regeneration, by negative implication and in contrast, homosexuality and gender non-conformity have traditionally run through ideas about their non-procreativity to a sense that they involve degeneration, barrenness, waste, disease, decay, weakness, and death, life's very end.[76] Seen in these terms, and reminiscent of how some of these associations carried the day in the mid-1980s when *Bowers v. Hardwick* declared homosexual sodomy not to be encompassed by constitutional privacy guarantees during an important moment in the HIV/AIDS pandemic, *Lawrence* and *Obergefell*, on the Texas Right to Life brief's view, look to partake of what has sometimes been characterized as a "culture of

73. *Id.* at 24–25.

74. *Id.* at 25.

75. *Id.* at 25.

76. *See, e.g.*, Marc Spindelman, *Sexuality's Law*, 24 COLUM. J. GENDER & L. 87, 100 (2013). For a different phantasmatic escalation in the context of trans identity, see Spindelman, *The Shower's Return*, *supra* note 24, at 160–73.

death."[77] The brief was urging the Court not to miss this, and to acknowledge these dimensions of *Lawrence* and *Obergefell* even as it preserved them through a ruling that prefigured their eventual demise on originalist grounds.

Re-upping queer Black trans politics and their angles of vision onto social life, there is a question about what it means for the Texas Right to Life's brief to line up *Lawrence* and *Obergefell* as lawless rulings associated with a culture of death as conditions for how the Supreme Court should respond to them. Without overlooking how these lawless threats to "ordinary" life may sound in racial registers, the Texas Right to Life brief's suggestion that the Court string *Lawrence* and *Obergefell* up and leave them publicly hanging by a thread figures them as both alive, and, immanently dead—a death that will, like *Dobbs*, vindicate a conservative, traditionalist culture of life.

This is yet another, potent reminder, were any needed, of the deep, intense, and both racialized and gendered passions that pro-life constitutional originalism unleashes and channels in the setting of abortion rights that already involves—and anticipates—carry-overs into other LGBTQ constitutional rights. If Mississippi's lawyers spoke to the Court about reasonable public debate and political compromise around abortion, the Texas Right to Life brief shows how hard that is going to be in *Dobbs*' wake when, even before it comes down, both gloves—and bets—are off.[78] Given how the Court's originalist decisions have already allowed Black trans and other Black LGBTQ people's constitutional rights to be rolled back, and given what the Court in *Dobbs* seems likely to do to devastate the abortion right, a right that Black trans and other LGBTQ people have relied on, the momentum continues to build toward an originalist *coup de grace* for those LGBTQ constitutional rights that, up on the hill, seem in their basics, anyway, safe—for now.

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77. 478 U.S. 186 (1986). On the *Hardwick* point, see, for example, Brief of Amicus Curiae David Robinson, Jr., Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140). For counterpoints on the "end" of the HIV/AIDS epidemic and its racial, gender, and class constructions, *compare* Andrew Sullivan, *When Plagues End*, N.Y. TIMES (Nov. 10, 1996), https://www.nytimes.com/1996/11/10/magazine/when-plagues-end.html, *with* generally, TRANS IN A TIME OF HIV/AIDS (Che Gossett & Eva S. Hayward eds., 2021), *and* Linda Villarosa, *America's Hidden H.I.V. Epidemic*, N.Y. TIMES MAG. (June 6, 2017), https://www.nytimes.com/2017/06/06/magazine/americas-hidden-hiv-epidemic.html/. On the "culture of death," see Pope John Paul II, *Evangelium Vitae* [*The Gospel of Life*], VATICAN (Mar. 25, 1995, https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html .

78. Transcript of Oral Argument, *supra* note 47, at 5–6.

IV. CONCLUSION

As everyone awaits the Court's decision in *Dobbs*, this much is certain: Queer Black trans politics—significantly themselves politics of precarity built at the de-centered margins of social, including political and legal, life—entail ample resources for generating new angles of vision on how power is organized and deployed, including by the Supreme Court through its originalist project, now plainly on the march.[79] Thinking with queer Black trans politics helps to illuminate some of the ways that pro-Black intersectional thinking is now being met—and reworked—by different legal actors in politically regressive directions through practices of intersectional thinking that, without necessarily using those terms, racially recast progressive rights claims, like claims about abortion and LGBTQ rights, in order to stop or defeat them. Even more, thinking with queer Black trans politics broadly indicates the ongoing need to rethink how constitutional civil rights are conceived. Challenging dominant forms of legal and political consciousness, that work—if not in precisely the same ways as more well-known forms of intersectional praxis that engage constitutional civil rights—may seem to some to be utopian, perhaps pointless, even downright dangerous, given how it may imperil established constitutional civil rights guarantees. Still, the high stepping of the Supreme Court's now-majoritarian originalist project, precisely by circumscribing and eliminating existing civil rights protections, may paradoxically help clear space for the intellectual and legal work of building a constitutional future out of intersectional ideals—including the prospect that intersectionality writ large might hold room center stage for queer Black trans lives.[80]

It is presently difficult to imagine a pro-queer-Black-trans constitutionalism that, as a national consensus position, delivers queer Black trans people the constitutional promises of liberty and equality that they deserve. This is especially true now that so many progressives are expressing a principled skepticism about the Supreme Court's central place within U.S. legal and political life.[81] That the prospects of a

79. On the "politics of location," see Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1831 (1993) (quoting Adrienne Rich, *Notes Toward a Politics of Location* (1984), *in* BLOOD, BREAD AND POETRY: SELECTED PROSE 1979–1985, at 210 (1986)).

80. These efforts might build on the kind of abolitionist constitutionalism described in Roberts, *supra* note 8.

81. For one recent statement that circulated widely, see Written Statement of Nikolas Bowie, *The Contemporary Debate Over Supreme Court Reform: Origins and Perspectives,* Presidential Comm'n on the Sup. Ct. of the U.S. (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf.

Supreme Court-centered constitutionalism will secure the future of queer Black trans liberation are so dim may, in different terms, actually be just fine to some who embrace queer Black trans politics. Queer Black trans collectives, as well as queer Black trans activists and organizers, have variously suggested they are broadly uninterested in entrusting queer Black trans people's welfare and futures to institutional and political governors or other social managers who have, sometimes with the cooperation of "white club" LGBTQ politics, left queer Black trans communities largely to fend for themselves, their security, their lives, and their worlds.

Recognizing queer Black trans politics' illuminating powers—powers that can help to demystify what conventions of legal and political consciousness represent as happening in the current constitutional and political moment—it seems practically wise for LGBTQ communities to give these politics a broad-based and active witness. If, realistically, the time for that witness may not have quite arrived, it soon may—in that moment of urgency and even crisis, if and when *Dobbs* comes down as expected, threatening the doctrinal foundations of LGBTQ constitutional rights up on the hill, which seem so likely to foment new, on-the-ground political challenges to established LGBTQ rights. Who has missed some of the more prominent anti-trans and anti-gay ways these challenges have already started heating up?[82] As the fire that has been burning in the valley of LGBTQ rights moves up the hill, it may, at last, become clear that queer Black trans politics are in a genealogical line that traces back to the forbearers of today's LGBTQ communities and the forbearers of race and sex equality rights. At the margins and outsides of normative social life, queer Black trans politics have been being forged in distinctively intense fires of oppression that exist in those social locations. These politics can thus withstand that heat as they chart political pathways forward.

Looking ahead to political conflicts within LGBTQ communities whose contours are already possible to discern: As older "white club" LGBTQ politics increasingly experience the temptation to reassert and re-center themselves at the expense of queer Black trans political "freedom-dreaming and visionary world-making," it will be important to remember that queer Black trans politics require a major flex and deep self-transformation for those inclined to the old LGBTQ political ways.[83] As even some LGBTQ allies who claim solid queer Black trans political

82. *See supra* note 30.

83. JENNIFER C. NASH, BLACK FEMINISM REIMAGINED: AFTER INTERSECTIONALITY 130 (2019).

credentials have been learning and teaching, these self-transformations are, for many, much easier to think or speak about than to practice and live. The depth of queer Black trans challenges to established "white club" ways of living and doing politics, including identity politics, will, therefore, require repeated reassurances and reminders about what has lately been being gained by efforts that many LGBTQ people and institutions have engaged in, as they have re-centered themselves, their politics, and their identities around pro-trans, and, often separately, around pro-Black LGBTQ politics. The question is whether the comfort and the past successes of the old political ways will again win out over the politics and identities of precarity and location. These politics are hard, but they have queer Black trans liberation—and the liberation of all people—directly in their sights, not as practices of "trickle down" so much as "trickle up" politics.[84]

A palpable sense is afoot within the spaces that queer Black trans politics are building. It suggests that LGBTQ communities—like so many others—are facing critical inflection points that will define the futures and freedoms that people in these communities have or lack. Here is Raquel Willis during the 2020 Brooklyn Liberation March, thinking aloud about Black trans lives that have been needlessly and tragically lost before their time, and about all the Black trans spirits that have passed over, prophesying while declaring the realities and dreams of queer Black trans power: "And the reckoning is here. The reckoning is here, y'all."[85] The reckoning is here. Then, looking to the future—the future we all now inhabit and the future that has also yet to arrive—Willis asked a question that must now, in some way, be asked again and again: "So when you leave here today, we might be silent today, but tomorrow we're not gonna be silent, right?"[86]

The kind of political reckoning, speech, and action that Willis spoke toward—the inward-looking and outward-facing reckoning that LGBTQ communities now confront—involves both individual and collective

84. On "trickle down" and "trickle up" politics, see, for instance, Duggan, *supra* note 17, at 182–83, and Rob Nichols, *An Interview with Dean Spade, Toward a Critical Trans Politics*, 14 UPPING THE ANTI: A J. OF THEORY AND ACTION 37, 47–49 (2013). For important related discussion suggesting that queer Black politics may challenge the scope and configurations of the political itself, see Zane McNeill & Kyra Smith, *Whose Pride Is This Anyway? The Quare Performance of the #Black Pride 4*, *in* PALGRAVE HANDBOOK OF QUEER AND TRANS FEMINISMS IN CONTEMPORARY PERFORMANCE (T. Rosenberg et al., eds., 2021), and Zoie (Zane) McNeill & Blu Buchannan, *Tracing the Color of Queer Choreopolitics* (Jan. 13, 2020), ACTIVIST HIST. REV., https://activisthistory.com/2020/01/13/tracing-the-color-of-queer-choreopolitics/.

85. Raquel Willis, *I Believe in Black Trans Power*, YOUTUBE, at 09:11 (June 17, 2020), https://www.youtube.com/watch?v=Bq1w7glqwkU/.

86. *Id.*

political struggle that must be seen, understood, and acted upon as such. If it is to succeed, gaining all LGBTQ people the kind of liberation that many have yearned for as the animating, multigenerational spirit of hope for LGBTQ communities' transformative politics, this struggle must be undertaken as Chase Strangio said in a loving remembrance honoring Lorena Borjas, "the mother, guardian, hero and healer of the transgender community in Jackson Heights, Queens": "Every single day, relentlessly."[87]

87. Chase Strangio, *Lorena Borjas*, WASH. POST: OPINIONS (Apr. 1, 2020), https://www.washingtonpost.com/opinions/2020/04/01/lorena-borjas-guardian-healer-trans-community-new-york/.