

**JUSTICE GORSUCH’S CHOICE:  
FROM *BOSTOCK V. CLAYTON COUNTY* TO  
*DOBBS V. JACKSON WOMEN’S HEALTH ORGANIZATION***

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The Supreme Court’s decision to take up *Dobbs v. Jackson Women’s Health Organization*—the Mississippi case involving a law banning abortions after 15 weeks—likely foreshadows ominous news for reproductive rights.<sup>1</sup> The most probable reason for the Court to consider the constitutionality of this measure is to approve it and, in doing so, to cut back on or overturn *Planned Parenthood v. Casey*, and what it preserved of *Roe v. Wade*.<sup>2</sup> Supporters of reproductive rights are thus as

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1. 2021 WL 1951792 (May 17, 2021); *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 268–69 (5th Cir. 2019) (discussing the Mississippi law being challenged in the case).

2. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). For thoughtful commentary in these general directions, see Linda Greenhouse, *The Free Ride May Soon Be Over for Anti-Abortion Politicians*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/20/opinion/Supreme-Court-abortion.html> (“Do I think the court will use this case to permit states to ban abortion entirely? No, not directly and not this soon; there’s no need for the new majority, handpicked for that very purpose, to go that far this fast.”); Leah Litman & Melissa Murray, *The Supreme Court’s Conservative Supermajority Is About to Show Us its True Colors*, WASH. POST (May 17, 2021), <https://www.washingtonpost.com/opinions/2021/05/17/supreme-court-mississippi-abortion-restrictions-roe-v-wade/> (“[I]t would not be unthinkable for this Supreme Court to use the Mississippi case to jettison *Roe* and *Casey*. . . . Even in cases where the court has not overruled past decisions, it has gone to herculean lengths to limit prior cases, broadly refashioning entire areas of law without explicitly overruling the decisions undergirding those doctrines.”); Mary Ziegler, *Abortion Is Legal Until a Fetus Is Viable. Will the Supreme Court Change That Standard?*, WASH. POST (May 18, 2021), <https://www.washingtonpost.com/outlook/2021/05/18/scotus-abortion-rights/> (“The Supreme

right to worry about *Dobbs* as supporters of the right to life are to feel hopeful about it. As everyone awaits developments in the case, a possibility—capable of reconfiguring the entire landscape—dwells in an unlikely place: last year’s blockbuster LGBT Title VII sex discrimination ruling in *Bostock v. Clayton County*.<sup>3</sup>

Preserving *Casey* and *Roe* in *Dobbs* will require at least two of the Court’s conservative justices to join the Court’s three remaining liberals. Chief Justice John Roberts did that last year in *June Medical Services, L.L.C. v. Russo*, the Court’s last major abortion rights case.<sup>4</sup> The Chief Justice’s swing-vote concurrence in *June Medical* embraced the Court’s *Casey* ruling, with its reaffirmation of *Roe*’s “essential holding,” including the rule that the abortion decision is finally the pregnant woman’s to make prior to fetal viability, around 24 weeks.<sup>5</sup> Everyone on the level agrees Mississippi’s 15-week abortion ban flouts *Casey* and its understanding of *Roe*’s rules.<sup>6</sup>

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Court’s decision to take what is unquestionably the biggest abortion case in decades is being greeted as an existential threat to *Roe v. Wade*[.] . . . But even if *Roe* isn’t entirely overturned, the justices could still hand a huge victory to the antiabortion movement by targeting the linchpin of abortion rights jurisprudence: the viability standard.”). For additional commentary astutely engaging the larger, current moment for abortion rights, see David J. Garrow, *The Right to Abortion and the Bush-Trump Federal Courts*, BALKINIZATION (Feb. 1, 2021), <https://balkin.blogspot.com/2021/02/the-right-to-abortion-and-bush-trump.html>. For some historical perspective on the current situation, offered with *Dobbs* in view, see generally Earl M. Maltz, *We Have Been Here Before: Planned Parenthood of Southeastern Pennsylvania v. Casey and the Survival of Abortion Rights*, SSRN.COM, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3850724](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850724).

3. 140 S. Ct. 1731 (2020).

4. 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring).

5. *Casey*, 505 U.S. at 846 (discussing *Roe*’s “essential holding”). An account of Chief Justice John Roberts’ *June Medical* concurrence as embracing *Casey* is in Marc Spindelman, *Embracing Casey: June Medical Services L.L.C. v. Russo and the Constitutionality of Reason-Based Abortion Bans*, 109 GEO. L. J. ONLINE 115 (2020). For views along similar lines, see Garrow, *supra* note 2 (describing Chief Justice Roberts’ concurrence in *June Medical* as being “of potentially momentous importance,” and listing first among the reasons why that “he explicitly declares that ‘under principles of stare decisis’ . . . I would adhere to the holding of *Casey*”), and Laurence H. Tribe, *Roberts’s Approach Could End Up Being More Protective of Abortion Rights—Not Less*, WASH. POST (July 1, 2020), <https://www.washingtonpost.com/opinions/2020/07/01/robertss-approach-could-end-up-being-more-protective-abortion-rights-not-less/> (“Although some advocates of abortion rights fear that the chief justice’s approach will open the door to other restrictions on abortion, I believe that Roberts’s analysis, correctly applied, could end of being more protective of abortion rights, not less.”). For the viability line being around 24 weeks, see *Casey*, 505 U.S. at 860 (“The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at . . . 23 to 24 weeks, as it sometimes does today[.]”), and see also *Obstetric Care Consensus*, 130 OBSTETRICS & GYNECOLOGY e187, e188–89, e192 (2017) (24 weeks).

6. Mississippi is quite clear on this in the merit brief it has filed in *Dobbs*, arguing first and foremost that *Roe* should be overturned. Brief for Petitioners at 12–38, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392 (July 22, 2021) [hereinafter *Dobbs* Petitioners’ Brief].

Informed speculation indicates that even if Chief Justice Roberts joins the Court's remaining liberals in *Dobbs*, no other justice will. As prediction, this may well prove right. While *Casey* and *Roe*'s shared fate may thus already be sealed, *Bostock* indicates it should not be. The Court's decision in the case provides reasons sounding in women's equal citizenship and rule of law values for thinking that its author—Justice Neil Gorsuch—might, as a matter of principle, supply the additional vote needed to recommit the Court to *Casey* and *Roe*.<sup>7</sup>

### I. *BOSTOCK*'S VINDICATION OF WOMEN'S RIGHTS

Justice Gorsuch's opinion for the *Bostock* Court confidently announces that its holding—that anti-gay and anti-trans discrimination are sex discrimination outlawed by Title VII of the 1964 Civil Rights Act—follows from a “straightforward application of legal terms with plain and settled meanings.”<sup>8</sup> On its surface, this textualist opinion does not address constitutional abortion protections, nor, indeed, constitutional rights of any sort.<sup>9</sup> Yet even as it explains that the “plain” terms of Title VII's sex discrimination ban “necessarily” entail a bar against anti-gay and anti-trans discrimination, the new reality that *Bostock* delivers to LGBT workers is built atop a powerful foundation of women's workplace equality under law.<sup>10</sup>

Amidst and beyond its textualist positions, *Bostock* repeatedly confirms its interpretive work against Title VII sex discrimination rulings that ground women's workplace rights and structure Title VII's sex

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7. Some believe that Justice Brett Kavanaugh is as—or more—likely than Justice Gorsuch to provide this fifth vote to affirm *Casey* and *Roe*, particularly given his dissent in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), the most moderate of the conservative justices' dissents delivered in the case. Thinking along these lines is in keeping with the idea that Justice Kavanaugh has “replaced Roberts as the ideological midpoint of the court.” Nina Totenberg & Eric Singerman, *The Supreme Court's Term Appeared to Be Cautious. The Numbers Tell a Different Story*, NPR.ORG (July 9, 2021), <https://www.npr.org/2021/07/09/1013951873/the-supreme-courts-term-appeared-to-be-cautious-the-numbers-tell-a-different-sto?s=03>. Where Justice Amy Coney Barrett is expected to come out in *Dobbs* is not based on any position she has expressed in a high profile abortion rights case at the Supreme Court.

8. 42 U.S.C. § 2000e; *Bostock*, 140 S. Ct. at 1743.

9. For a close scrub of *Bostock* that traces its underlying constitutional energies and its rule of law extensions, and that deals with its broad, but not categorical, elision of the Supreme Court's pro-LGBT constitutional rights decisions, see generally Marc Spindelman, *Bostock's Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553 (2021).

10. *Bostock*, 140 S. Ct. at 1743 (“plain”), *id.* at 1742 (“necessarily”), *id.* at 1744 (same), *id.* at 1745 (same), *id.* at 1747 (same). For *Bostock*'s main textualist account of itself, see *id.* at 1738–43. For some of the Court's discussion of aspects of the foundations of women's workplace equality under the statute, see *id.* at 1743–44. Other passages are noted *infra* note 11.

discrimination guarantees.<sup>11</sup> In reaching its pro-LGBT conclusions, *Bostock* decisively rejects defense arguments that, in theory, were inconsistent with, and thus threatened, established sex discrimination protections, notably rules against sexual harassment and motherhood discrimination.<sup>12</sup> Reaffirming these anti-discrimination protections, *Bostock* continues Title VII's tradition of safeguarding cisheterosexual women's opportunities to work and earn a living on terms cisheterosexual men have long enjoyed. In the process, all of these individuals are made more nearly equal at work—and in the remainder of social life.<sup>13</sup> These sex equality positions point the way from *Bostock* to a pro-choice ruling in *Dobbs*.

## II. *BOSTOCK*'S ALIGNMENT WITH ABORTION RIGHTS

Without discussing abortion rights, *Bostock* aligns with important ideas about them offered by the controlling opinion in *Casey*. Coauthored

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11. See, e.g., *id.* at 1738–39 (“[W]e orient ourselves to the time of the statute’s adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court’s precedents.”); *id.* at 1743 (“If more support . . . were required, there’s no need to look far. All that the statute’s plain terms suggest, this Court’s cases have already confirmed.”). Even within *Bostock*’s assessment of the statute’s “plain” meaning, precedent is part of the Court’s analysis. See *id.* at 1739–41. Passages in which *Bostock* looks to the Court’s established sex discrimination rules include *id.* at 1741 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion)); *id.* at 1743–48 (discussing case law including *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)); *id.* at 1746 (discussing *Phillips*); *id.* at 1746–47 (discussing sexual harassment and motherhood discrimination); *id.* at 1748 (discussing legality of “gender role[.]” stereotyping); *id.* at 1749 (citing *Oncale*); *id.* at 1751–52 (same); *id.* at 1752 (discussing *Phillips* and sexual harassment law developments “by the late 1970s”).

12. See, e.g., *id.* at 1746–47 (discussing the implications of anti-LGBT arguments mounted in the case for the Supreme Court’s sexual harassment and motherhood discrimination precedents and rhetorically asking, then answering: “Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not.”). See also *supra* note 11 for other textual passages discussing sexual harassment and motherhood discrimination.

13. For some important reflections on the dynamic relationship between the Court’s Title VII sex discrimination rules and its constitutional sex discrimination jurisprudence, see, for example, Mary Anne Case, *Reflections on Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 765, 766 (2002) (“[T]he development of the constitutional law of sex discrimination was path dependent, but not, as I see it, principally on constitutional race-discrimination law, [but] instead on the statutory law of sex discrimination arising out of Title VII of the 1964 Civil Rights Act. It is thus path dependent on exactly what . . . American law traditionally holds back from, to wit governmental intervention into private discrimination[.]”), and Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 36–37 (1995) (characterizing the Supreme Court’s approach in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as coordinated to the Court’s sex stereotyping doctrine found “throughout its modern constitutional and statutory sex discrimination jurisprudence”).

by Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter, the *Casey* joint opinion rededicated the Court to *Roe*'s "essential holding" in meaningful respects because the abortion right that it recognized helped to ensure women's control over their bodies and their destinies.<sup>14</sup> *Casey*'s formal ruling on constitutional liberty highlighted liberty's equality dimensions, vindicating what Justice Ruth Bader Ginsburg called women's "equal citizenship stature," and what the *Casey* joint opinion described as "[t]he ability of women to participate equally in the economic and social life of the Nation."<sup>15</sup> Both *Bostock* and *Casey* already rest within this larger legal framework.

If Justice Gorsuch's opinion in *Bostock* meshes with *Casey* in these ways, suggesting a potential shared future in *Dobbs*, a counter-indication to that prospect surfaced last year in *June Medical*. Dissenting there and voting to uphold the Louisiana anti-abortion law that the Court's majority held inconsistent with *Casey* and *Roe*, Justice Gorsuch's *June Medical* opinion said some ominous things about constitutional abortion rights—arguably pointing toward their elimination.<sup>16</sup>

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14. *Casey*, 505 U.S. at 846 (discussing *Roe*'s "essential holding"); *id.* at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); *id.* at 852 (characterizing "the abortion decision" as "originat[ing] within the zone of conscience and belief"); *id.* ("Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."). Incisive engagement with *Casey*'s sex equality analytics in the context of lesbian and gay rights as elaborated in *Lawrence v. Texas*, 539 U.S. 558 (2003), is in Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L. J. 1081, 1088 (2004).

15. For Justice Ginsburg's expression, see *Gonzalez v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). See also Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1287–88 (2003) (discussing "equal citizenship stature for men and women" and tracing the idea, in part, to Justice Byron White's dissent in *Kahn v. Shevin*, 416 U.S. 351, 361 (1974) (White, J., dissenting)). For the relevant language from *Casey*, see *Casey*, 505 U.S. at 856. *Accord id.* at 912 (Stevens, J., concurring in part and dissenting in part) ("*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."). For more on Justice Ginsburg's thinking about equal citizenship stature, see, for example, Neil S. Siegel, "*Equal Citizenship Stature*": *Justice Ginsburg's Constitutional Vision*, 43 NEW ENG. L. REV. 799 (2009). For other points in *Casey* shoring up its sense of "what *Roe* has meant for the ability of women to live according to their own goals and values," Christina B. Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1984 (2002), see *Casey*, 505 U.S. at 852, 855–56, 860–68, 887–98.

16. *June Medical*, 140 S. Ct. at 2171, 2181–82 (Gorsuch, J., dissenting) (offering an aerial vision and snapshot of the trajectory of the opinion's argument against the results reached by the Court in the case). For passages in the opinion that arguably run against the grain of existing constitutional protections for the abortion right, see *id.* at 2171–79.

Still, the dissent did not slam the door shut on abortion rights. It might easily have done so, either in its own terms or by indicating its agreement with the calls in Justice Clarence Thomas’s *June Medical* dissent for *Roe* to be overturned.<sup>17</sup> By contrast, Justice Gorsuch’s opinion stressed early on that *Roe* was “not even at issue here,” and later critiqued the Chief Justice’s *June Medical* concurrence for its “discontinuity with *Casey*,” digging into rules from *Casey* that Justice Gorsuch believed should have been followed but were not.<sup>18</sup>

Justice Gorsuch’s *June Medical* dissent ended with a lament that the Court had “lost [its] way.”<sup>19</sup> Not strictly a comment on *Casey* and *Roe*, the opinion intimated that the Court could—and should—rediscover its path by a ruling in a future case reestablishing faith with “the neutral principles that normally govern the judicial process,” presumably including strict adherence to *Casey*’s longstanding rules and what they kept of *Roe*.<sup>20</sup> In these ways at least, the dissent held space for a more thoroughgoing embrace of *Casey* and *Roe* in a case like *Dobbs*.

To occupy this space may be thought to require Justice Gorsuch to soften, if not modify, his position on constitutional abortion rights.<sup>21</sup> *Bostock* shows the openness of his judicial process, but in ways that *Dobbs* may test.

During oral arguments in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, one of the cases that *Bostock* collects and that centered on whether anti-trans discrimination is sex discrimination under Title VII, Justice Gorsuch voiced concerns about whether interpreting Title VII in pro-trans ways would yield a “drastic . . . change” or a “massive social upheaval.”<sup>22</sup> Justice Gorsuch’s expression of these concerns seemed to

17. *Id.* at 2142 (Thomas, J., dissenting) (“Our abortion precedents are grievously wrong and should be overruled.”); *see also id.* at 2149–53 (elaborating the argument for the conclusion that “[t]he Constitution does not constrain the State’s ability to regulate or even prohibit abortion. . . . [T]he putative right to abortion is a creation that should be undone”). Thanks to Mary Ziegler for conversation on this aspect of *June Medical* and on the larger point.

18. *June Medical*, 140 S. Ct. at 2171, 2181 (Gorsuch, J., dissenting).

19. *Id.* at 2182 (“lost our way”). The larger discussion is in *id.* at 2181–82.

20. *Id.* at 2182. Of course, if “the neutral principles that normally govern the judicial process” are the touchstone for judgment in *Dobbs*, it is difficult to see how they would be furthered, much less honored, by a decision attacking the viability standard that has been in place since *Roe* governing the Supreme Court’s constitutional review of abortion regulations. *Roe v. Wade*, 410 U.S. 113, 163–65 (explaining the significance of the viability line).

21. *Cf.* Tribe, *supra* note 5 (noting that *June Medical* was the Chief Justice’s “first vote against an abortion restriction,” and discussing the significance of the opinion and its prospects).

22. Transcript of Oral Argument at 24, 26, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (No. 18-107), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_4gcj.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_4gcj.pdf) (statements of Justice Gorsuch). For the larger exchange, see *id.* at 23–28.

confirm already-circulating assumptions about his opposition to LGBT rights. On hearing them, many felt even more confident that he would reject the pro-trans position in the case, and maybe the pro-gay positions in the other cases argued the same day.<sup>23</sup>

When David Cole, the American Civil Liberties Union attorney representing Aimee Stephens, the trans plaintiff in *Harris Funeral Homes*, met Justice Gorsuch's concerns head-on, he reminded him that, although lower courts had recognized trans sex discrimination rights for decades, those decisions had precipitated no drastic change or massive social upheaval.<sup>24</sup> The lack of any such response suggested that judicial and social experiences with trans sex equality under Title VII law posed no obstacle to what was otherwise a principled, pro-trans outcome in the case, based on the standard textualist interpretive protocols that were the main focus of Cole's advocacy on Stephens's behalf.<sup>25</sup>

Judging from the *Bostock* opinion, Cole's reassurances worked. Without dwelling in thoughts of social disruption, *Bostock* proudly presents itself as a "simple and momentous" ruling for LGBT workers and their rights.<sup>26</sup> Happily, too, as Cole predicted, *Bostock* has caused no social uproar. The flurry of anti-trans legislative activity in its wake is depressing, but a wholly predictable effort in retrenchment seeking to circumscribe *Bostock*'s ripple effects.<sup>27</sup> Like other post-*Bostock* LGBT rights developments, these measures have already started being processed by a judiciary that has heard—and is generally following—*Bostock*'s trumpet for LGBT equality under law.<sup>28</sup>

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23. See *Bostock*, 140 S. Ct. at 1737–38 (discussing the cases involving Gerald Bostock and Donald Zarda).

24. Harris Funeral Homes Transcript, *supra* note 22, at 27 (statement of David D. Cole) (“[F]ederal courts of appeals have been recognizing that discrimination against transgender people is sex discrimination for 20 years. There’s been no upheaval.”).

25. Brief for Respondent Aimee Stephens at 3–4, 15–16, 20–27, 36–40, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC 139 S. Ct. 1599 (2019) (No. 18-107) (noting the arguments from statutory text favoring Stephens's position).

26. *Bostock*, 140 S. Ct. at 1741 (“The statute’s message for our cases is . . . simple and momentous.”). What thoughts of disruption there are in *Bostock*, particularly legal disruption, cut against defense positions in the case. For some examples, see *id.* at 1747 (discussing implications of defense arguments for sexual harassment and motherhood discrimination rules), *id.* at 1751 (describing defense arguments as “pro[ving] too much,” because, if accepted, “we’d have more than a little law to overturn”); *id.* at 1753 (discussing defense concerns about the “sweep” of the majority opinion).

27. For one report on the recent flurry of anti-trans legislative activity, see David Crary, *No Big Backlash for States Passing Anti-Transgender Laws*, APNEWS.COM (Apr. 27, 2021), <https://apnews.com/article/us-news-health-laws-legislature-bills-5726fdeb8a5e7cf2c89a4a2d176e8a7f>

28. For some of the pro-LGBT legal actions and decisions in *Bostock*'s wake, see Spindelman, *supra* note 9, at 609 n.180, 610–11 n.182, and Robert Barnes & Hannah Natanson,

While Justice Gorsuch’s concerns about the social impacts of a pro-trans ruling in *Harris Funeral Homes* were resolved by the time *Bostock* came out, his decision to express them as part of his deliberative process was important and telling. The remarks show Justice Gorsuch’s judicial mindset in action, and how salient to it rule of law ideas about social stability are—ideas that are among the rule of law values avowed textualists like Justice Gorsuch have relied on to justify their interpretive methodology and its results.<sup>29</sup> Overshadowed by *Bostock*’s textualist formalism, Justice Gorsuch’s questions in *Harris Funeral Homes* indicated a recognition, itself grounded in the rule of law, that judging and the judicial process, particularly in momentous cases that may operate in unpredictable and socially disruptive ways, are complex and dynamic, not mechanical, affairs.<sup>30</sup> Nowhere may artfulness in judicial decision-making be more necessary than in cases involving the already superheated waters of culture war politics that have so long and forcefully swirled around women’s and LGBT rights.<sup>31</sup>

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*Supreme Court Will Not Hear Transgender Bathroom Rights Dispute, a Win for Va. Student Who Sued His School for Discrimination*, WASH. POST (June 28, 2021),

[https://www.washingtonpost.com/politics/courts\\_law/supreme-court-transgender-bathroom-gavin-grimm/2021/06/28/e51b47e6-d815-11eb-bb9e-70fda8c37057\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-transgender-bathroom-gavin-grimm/2021/06/28/e51b47e6-d815-11eb-bb9e-70fda8c37057_story.html). For a recent decision on new anti-trans legislation that builds on *Bostock*, see, for example *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883, at \*7 (S.D.W. Va. July 21, 2021) (citing *Bostock* and *Grimm v. Gloucester Cnty. School Bd.*, 972 F.3d 586 (4th Cir. 2020), in granting a preliminary injunction to a transgender athlete against the state’s “Save Women’s Sports Bill”). See also *Brandt v. Rutledge*, No. 4:21-CV-00450, 2021 WL 3292057 (E.D. Ark. Aug. 2, 2021) (granting preliminary injunction against a law banning gender-affirming treatment for transgender minors).

29. See, e.g., NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 47, 55–56 (2019) (“[W]hen judges pull from the same toolbox and look to the same materials to answer the same narrow question—What might a reasonable person have thought the law was at the time?—we confine the range of possible outcomes and provide a remarkably stable and predictable set of rules people are able to follow. And even when a hard case does arise, once it’s decided it takes on the force of precedent, becomes an easy case in the future, and contributes further to the determinacy of our law.”); *id.* at 57 (“Lawyers seek to make judgments about the future based on a set of reasonably stable existing rules; they do so with a respect for and in light of the law as it is. This is not politics; that is the ancient and honorable practice of law.”). For more on *Bostock* as a rule of law decision grounded in principles of legal equality or legal justice, see generally Spindelman, *supra* note 9.

30. GORSUCH, *supra* note 29, at 189, 195 (“Of course, there are some truly hard cases, plenty of them. And judging is more of an art than some mechanical science always yielding a single obviously right answer.”).

31. Commentary from across the viewpoint spectrum debunks the impulse to think that *Roe v. Wade* precipitated the “culture wars” around abortion rights, and that, consequently, a decision overturning *Casey* and *Roe* would settle them back down. Sources in this vein include GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISMS IN THE UNITED STATES 150–206 (2005); BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING ix–x, 1–116, 253, 256–59 (Linda Greenhouse & Reva Siegel eds., 2010); DAN WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 1–197 (2015); MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE

Rule of law ideas and ideals about social stability may not figure prominently and in so many words in *Bostock*'s official rationale, but their place in the record forges its own link to *Casey* and its conviction that rule of law stability fears were urgent enough in the abortion setting to help drive it to reconfirm *Roe*'s basics.<sup>32</sup> *Casey* honored the foundation of constitutional abortion rights not only because of the meaning of equality-inflected liberty under the Constitution, but also because of the far-reaching social upheaval it understood overturning *Roe* would produce across multiple axes of law and social life.<sup>33</sup> When stability returns as a decisional yardstick in *Dobbs*, *Bostock* suggests that Justice Gorsuch will seriously consider it. It is among the reasons *Bostock* tees up for him to claim the space that his *June Medical* opinion left open for a decision reaffirming *Casey* and *Roe*.

### III. CASEY'S TEACHINGS: CONSTITUTIONAL DOCTRINE AND JUDICIAL MODERATION

Whether these prospects will actually materialize in *Dobbs* depends partly on whether Justice Gorsuch follows *Bostock*'s pro-women's-equal-citizenship and rule of law thinking in the new case. No less significantly, their materialization will depend on whether the various resonances between *Bostock* and *Casey* impel Justice Gorsuch to engage in a more searching reflection on the *Casey* joint opinion's teachings—teachings he

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ABORTION DEBATE 186–218 (2015); MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT 6, 13–20, 208–10 (2020). I thank Mary Ziegler for introducing me to some of these materials. On the deeper connections between cis women's rights as women's rights and LGBT rights, they can be lined up doctrinally, as through the right to privacy or constitutional liberty guarantees, or along the lines suggested by *Bostock* as dimensions of larger sex equality concerns. Perspective on one recent major development, described in Dave Montgomery & Edgar Sandoval, *Near-Complete Ban on Abortion Is Signed Into Law in Texas*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/19/us/texas-abortion-law.html>, is found in Laurence H. Tribe & Stephen I. Vladeck, *Texas Tries to Upend the Legal System With Its Abortion Law*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html>.

32. See, e.g., *Casey*, 505 U.S. at 855 (raising the prospect that overturning *Roe* would produce “serious inequity to those who have relied upon it or significant damage to the society governed by it”); *id.* at 869 (“A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.”).

33. Discussion of various examples is found in *Casey*, *id.* at 846–69, *id.* at 869–78 (opinion of O'Connor, Kennedy, and Souter, JJ.), and *id.* at 901 (opinion of the Court).

already knows, but that may reveal new facets as the pressures in *Dobbs* put its survival both on the line and in his hands.<sup>34</sup>

*Casey*'s instructions have significant doctrinal dimensions. *Casey* acknowledged that, in the years since *Roe*, it had become an integral part of the Court's understanding of constitutional liberty, one that should persist.<sup>35</sup> Eliminating *Roe*—as now with *Casey* itself—was understood as needlessly and problematically destabilizing to the Court's larger line of liberty cases.<sup>36</sup> This series now includes the Court's pro-LGBT constitutional rights decisions, which *Bostock*, without herald, indeed, without expressly citing them, elevates to new heights.<sup>37</sup> Notably for Justice Gorsuch's developing jurisprudence, striking at abortion rights in *Dobbs* would diminish the wider constitutional context of women's and LGBT constitutional liberties, which together reinforce *Bostock*'s textualist handiwork.

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34. Aside from his opinion in *June Medical*, 140 S. Ct. at 2181 (Gorsuch, J., dissenting), which discusses *Casey*, see NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 8–11, 14–15, 18, 39, 77–82, 84, 216, 255 n.10 (2017), which also does.

35. See, e.g., *Casey*, 505 U.S. at 844 (“Liberty finds no refuge in a jurisprudence of doubt.”); *id.* at 847–48 (discussing the Court’s privacy cases and noting that they have “vindicated” “a realm of personal liberty which the government may not enter”); *id.* at 849 (discussing the Court’s privacy cases); *id.* at 851 (discussing the Court’s privacy cases and quoting the promise from *Eisenstadt v. Baird*, 405 U.S. 438, (1972), that the Constitution protects “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”); *id.* at 852–53 (noting the relationship of *Roe* to “the decision to use contraception” protected by decisions whose “correctness” *Casey* indicates it does not “doubt”); *id.* at 869 (opinion of O’Connor, Kennedy, and Souter, JJ.) (“We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate.”); *id.* at 898 (opinion of the Court) (“If a husband’s interest in the potential life of the child outweighs a wife’s liberty, the State could require a married woman to notify her husband before she uses a postfertilization contraceptive.”).

36. For different expressions, see, for example, *Casey*, 505 U.S. at 852–53 (discussing *Roe*’s relationship to the Court’s earlier right to privacy cases); 855–57 (discussing various reliance interests and indicating different doctrinal lines that *Roe* intersects with). For some additional historical context, see Transcript of Oral Argument at 19, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (“[W]e are not asking the Court to unravel the fabric of unenumerated and privacy rights which this Court has woven in cases like *Meyer* and *Pierce* and *Moore* and *Griswold*. Rather, we are asking the Court to pull this one thread.”) (remarks by Charles Fried, Special Assistant to the Attorney General), *but see id.* at 26-27 (“It has always been my personal experience that when I pull a thread, my sleeve falls off. There is no stopping. . . . It is the full range of procreational rights and choices. . . .”) (remarks by Frank Susman, for the Appellees). The challenges of selectively pulling the abortion rights thread from the Court’s constitutional privacy, or liberty, decisions is all the more challenging in the present tense, as noted in the text, because of the Court’s expansion of those decisions to encompass LGBT rights in the Court’s pro-LGBT constitutional rights jurisprudence.

37. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015). The relationship of these cases to *Bostock*, including their formal elision in the Court’s opinion, which is not so perfect as at first glance it might appear, is explored in Spindelman, *supra* note 9.

What is more, if *Dobbs* ends up clawing back abortion rights—no matter how many times they have been reaffirmed and served as building blocks for other decisions—it would not only be cases decided in the Constitution's open textures of liberty that would be punctuated by a new question mark. Counterintuitively, an anti-abortion ruling in *Dobbs*—establishing the legal conditions for stripping Americans of individual rights that have persisted for generations—could become the very precedent that another Court might someday use to stop or roll back conservative constitutional rights that are now being recognized by the Court.<sup>38</sup> Such is the double-edged nature of constitutional principle.

Doctrine aside, *Casey*'s approach to judicial decision-making is an example of the once-esteemed art and practice of judicial moderation. The *Casey* joint opinion presented itself as an attempt to respect the balance of opposing interests in the case in a way that reflected the hope that, if done well, the balance might hold going forward, because it would foster and reinforce a wider spirit of practical accommodation and compromise in abortion politics.<sup>39</sup> By recalibrating the abortion right through not-insignificant enhancements of its limits—limits that afforded right-to-life views and values greater room to hold sway over the abortion decision within the constitutional framework that it announced—the *Casey* joint

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38. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). For other rights that might be at stake, see also, for example, *New York State Rifle & Pistol Ass'n Inc. v. Corlett*, 2021 WL 1602643 (Apr. 26, 2021). See also Brendan Pierson, *How COVID and Shadow Docket Exploded SCOTUS's Scope of Religious Freedom*, REUTERS.COM (June 17, 2021), <https://www.reuters.com/legal/government/how-covid-shadow-docket-exploded-scotus-scope-religious-freedom-2021-06-16/>.

39. *Casey*, 505 U.S. at 866–67 (“Where . . . the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . . , its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”). See also Yale Kamisar, *Against Assisted Suicide – Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 768 (1995) (explaining, in the context of an argument rejecting a broad constitutional right to assisted suicide, that “[a]ll things considered, I believe the Court that reaffirmed *Roe* in 1992 was bent on bringing an old constitutional war to an end—not preparing to fight a new one,” and thereby distinguishing *Casey* from pro-assisted suicide claims). Cf. also GORSUCH, ASSISTED SUICIDE, *supra* note 34, at 80–81 (2006) (“Similarly, it may well be the case that, in time, *Casey* may come to be dominantly read as a *stare decisis* decision—a ruling, in essence, that we must respect the abortion right out of traditional deference to settled law—rather than creating any new, open-ended right to ‘define one’s concept of existence.’ . . . How far *Casey*'s ‘reasoned judgment’ analysis might be extended thus very much remains to be seen.”). Sharp and still timely analysis of Justice Gorsuch's views on assisted suicide and euthanasia and how they might play out in the abortion setting is in Amy Howe, *Gorsuch on Euthanasia and Assisted Suicide—And Abortion?*, SCOTUSBLOG.COM (Mar. 16, 2017), <https://www.scotusblog.com/2017/03/gorsuch-euthanasia-assisted-suicide-abortion/>.

opinion figured a constitutional consensus position that it believed people of good faith, with very different abortion commitments, might accept.<sup>40</sup>

Now regarded as a failed attempt in turning political enemies into friends, *Casey* chose its path while understanding that the alternative—returning abortion to the political arena on ordinary terms—would almost certainly fan the flames of already-burning culture war politics.<sup>41</sup> *Casey*'s sightline included the prospects that the passionate commitments of anti-abortion positions could easily drag the Court back into the constitutional fray.<sup>42</sup> Among the reasons: abortion might be outlawed without adequate provision for women's life and health, in cases of rape or incest, through pro-life state constitutional amendments that choke off ordinary political channels for legal reform, or—scarcely unthinkably—because pro-life forces have long envisioned the Court announcing a pro-life interpretation of the Constitution that would outlaw efforts to make abortion legal.<sup>43</sup>

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40. For *Casey*'s enhancement of the limits of the abortion right, see *Casey*, 505 U.S. at 871–79 (opinion of O'Connor, Kennedy, and Souter, JJ.). For the bid to consensus, see, for example, *id.* at 867 (opinion of the Court) (noting constitutional interpretations designed to “call[] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution”).

41. For a contrary position, see *Dobbs* Petitioners' Brief, *supra* note 6, at 23 (suggesting that “any real compromise on the hard issue of abortion” will only arrive after *Roe* and *Casey* are overturned); *id.* at 24 (“The national fever on abortion can break only when this Court returns abortion policy to the States—where agreement is more common, compromise is often possible, and disagreement can be resolved at the ballot box.”). Some will undoubtedly find the idea of compromise being possible only after *Roe* and *Casey* are overturned difficult to track in the context of *Dobbs*, particularly given Mississippi's uncompromising position on abortion rights in its merits brief and as reflected in the state law at issue in the case.

42. For some perspective on some of the likely patterned effects of a decision overturning *Casey*, see, for example, Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 47–82 (2018) (discussing abortion and poverty); Clare Huntington, *Book Review, Abortion Talk*, 117 MICH. L. REV. 1043, 1052 (2019) (reviewing Carol Sanger, *About Abortion: Terminating Pregnancy in Twenty-First-Century America* (2017)) (same). See also generally Michele Goodwin & Erwin Chemerinsky, *Book Review, Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270 (2018) (reviewing Khiara M. Bridges, *The Poverty of Privacy Rights* (2017)). Related, intersecting effects are also powerfully described in 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> (“Black women bear the brunt of reproductive politicking in the United States.”).

43. For one report on an early-term, viability abortion ban that contains no exceptions for cases of rape or incest, see Jason Breslow & Sarah McCammon, *The Governor of Texas Has Signed a Law That Bans Abortion as Early as Six Weeks*, NPR.ORG (May 19, 2021), <https://www.npr.org/2021/05/19/998237349/the-governor-of-texas-has-signed-a-law-that-bans-abortion-as-early-as-6-weeks> (noting the law “make no exceptions for pregnancies that are the result of rape or incest”). The pro-life wish for a Supreme Court decision announcing a pro-life interpretation of the Constitution has recently been discussed in Mary Ziegler, *The Abortion Fight Has Never Been About Just Roe v. Wade*, THE ATLANTIC (May 20, 2021), at <https://www.theatlantic.com/ideas/archive/2021/05/abortion-fight-roe-v-wade/618930/>. For some relevant thoughts on state law patterning of abortion law should *Casey* and *Roe* be overturned, consider GORSUCH, *supra* note 29, at 286, 288 (“Justice [Byron] White . . . argued that the Court had

A sober judicial assessment of the political upheavals potentially associated with a decision overturning *Roe* might thus have suggested to the justices whose views carried the day in *Casey* that the Court's permanent exit from involvement in the constitutional management of abortion rights was a pipedream, and a pipedream with steep costs for liberty, equality, and the rule of law.<sup>44</sup> Accepting that reality, which does not at all overlook how pro-choice, reproductive justice forces would respond to such developments, perhaps in the direction of pursuing a new *Roe*, the steadiest and surest way forward may have seemed—and may remain—*Casey*'s path, trying, however imperfectly, to find an idealized consensus point for the Court to hold fast to when applying the rules *Casey* announced.

As between the stark alternatives of staying *Roe*'s course or retreating from it entirely, *Casey* broke toward the middle path of a "*Pax Roeana*."<sup>45</sup> It did so not because its own head was in the clouds, but because that path was illuminated by a perspective that was itself informed by conservative, rule of law preferences for legal and social stability, respect for settled decisions and principled decision-making, and a sense that *Roe*'s basics, even if *Roe* was initially wrongly decided, conduced to modern-day understandings of women's liberty and equality in society and under law, if with limits.<sup>46</sup> In *Casey*'s estimation, these all were values befitting the Supreme Court as a rule of law institution to respect while issuing its constitutional judgment in the case.<sup>47</sup>

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an obligation to take and resolve these disagreements so that people in one part of the country weren't treated differently from those elsewhere only because of the happenstance of geography."). This patterning might be reinforced through legal rules regulating interstate travel to procure an abortion.

44. See *supra* note 32.

45. *Casey*, 505 U.S. at 996 (Scalia, J., concurring in the judgment in part and dissenting in part).

46. *Id.* at 868 (opinion of the Court) ("The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete."); *id.* at 865 (framing an explanation for "why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would [also] seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law"); *id.* at 874 (opinion of O'Connor, Kennedy, and Souter, JJ.) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of liberty protected by the Due Process Clause.").

47. See, e.g., *Casey*, 505 U.S. at 869 (opinion of the Court) ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.").

#### IV. THE SPIRITUAL UNDERPINNINGS OF *CASEY*'S SPIRIT OF MODERATION

From one perspective, *Casey*'s middle path is a conventional liberty-based constitutional ruling that respects women's liberty and advances women's equal citizenship stature by broadly freeing abortion from religious and moral condemnations of it expressed through law. *Casey* fosters and reinforces this impression of itself when it comments that: "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."<sup>48</sup> In saying this, *Casey* indicates it is not issuing a morality-based, anti-abortion ruling in the case. This is true as far as it goes, but it does not tell the whole story. No sooner does *Casey* relinquish morality as a touchstone for an anti-abortion ruling than it embraces a spiritual outlook that animates the reasoning it offers and the conclusions it reaches, and could yet again in *Dobbs*.

*Casey*'s spiritual outlook is on display—hidden in plain sight—in one of the joint opinion's most memorable and infamous expressions. *Casey* locates the abortion decision within "the heart of [constitutional] liberty," which, it says, is "the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."<sup>49</sup> Involving these higher matters, abortion, on this view, is spiritually driven, expressed in liberal terms through decision and choice.

*Casey* elaborates this idea as it proceeds. Indeed, in its very next paragraph, *Casey* explains:

[T]hough the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because

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48. *Id.* at 850.

49. *Id.* at 851. For a thoughtful effort that traces the "underground establishment clause" in the Court's abortion cases, including *Casey*, see Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court's Abortion Cases*, 23 REGENT U. L. REV. 1 (2010). See also *id.* at 3–4 n.8 (collecting sources discussing abortion's relationship to religion and the First Amendment's religion clauses).

the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>50</sup>

The bookends here express the crucial features of *Casey*'s spiritual perspective on the case's stakes. "[T]he abortion decision[,] originat[ing] within the zone of conscience and belief" and impacting "the woman's [social] role," "must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society[.]"<sup>51</sup> The decision whether or not to carry a pregnancy to term and to become a mother emerges from, and so involves, spiritual grounds.

Understood in these terms, *Casey*'s middle way does not simply cut a path between women's autonomous decision-making, on the one hand, and conservative religious and traditional moral views and values, on the other. That is how *Casey* ultimately expresses the point as its constitutional conclusion, but before it does so, *Casey*'s spiritual framing indicates the abortion conflict implicates a clash of spiritual positions that, for purposes of this constitutional decision at least, are on the same plane.<sup>52</sup>

*Casey*'s exercise of judicial moderation is thus a stylized expression of a deeper spiritual perspective that refuses to hold any one spiritual

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50. *Id.* at 852. For more along these lines, see *id.* 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stages"); *id.* at 853 (discussing the "wonder of creation"). See also, e.g., *id.* at 916 (Stevens, J., concurring in part and dissenting in part) ("As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience."); *id.* at 919 ("A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.").

51. *Id.* at 852.

52. Attuned to this, *Casey*'s readers may appreciate subtleties of expression that could otherwise be easily missed, as when the opinion talks about "[m]en and women of good conscience" disagreeing with one another "about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stages." *Id.* at 850. Moral and spiritual perspectives in the locution exhaust the universe of values *Casey* implicates at its own heart.

stance on abortion—for or against it—above any other. *Casey*'s approach to the conflict in the case is, accordingly, spiritually moderate and modest, as well as spiritually pluralistic. Paying equal respects to the different spiritual expressions the case involves, both pro-choice and pro-life people of “good conscience” receive decisional jurisdiction over part of women’s pregnancies with fetal viability—inherited from *Roe* and preserved for the reasons *Casey* explains—serving as the crucial jurisdictional boundary line.<sup>53</sup> Not inviolable, this boundary is porous in rule-bound respects. Each spiritual perspective has some limited room to operate where the other generally reigns supreme.<sup>54</sup> Prior to viability, where the spiritually-based choice whether to have an abortion is paramount, pro-life views and values may operate by seeking to persuade—but not coerce or force—a particular abortion decision.<sup>55</sup> Likewise, after viability, where pro-life religious and moral views and values hold sway, they must still yield where a pregnant woman’s life or health is at stake.<sup>56</sup> In all of this there is a sense of a rule of law vision of equal justice that is in operation. According to it, women and men of good conscience are treated with the law’s equal respect and in roughly the same way.

Recognizing this, *Casey* does not rest content with ensuring that women’s bodies and minds are not wholly overtaken by the state prior to fetal viability consistent with pro-life views and values—as imperative as that is in constitutional liberty terms. More fundamentally, *Casey*'s promises minister and safeguard women’s spiritual integrity and welfare, including their consciences and beliefs. *Casey*'s instruction is that these dimensions of women’s spiritual being must likewise be preserved intact, neither shattered nor negated before viability by pro-life anti-abortion laws that force women to travel a spiritual road not of their own free will.<sup>57</sup>

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53. See, e.g., *id.* at 861 (“[N]o changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips.”). For relevant discussion of viability in *Casey*, see *id.* at 860–61 (opinion of the Court), *id.* at 869–79 (opinion of O’Connor, Kennedy, and Souter, JJ.).

54. See, e.g., *id.* at 878–79 (summarizing holding).

55. *Id.* at 877 (“What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”).

56. See, e.g., *id.* at 879 (opinion of the Court).

57. As the joint opinion puts it immediately after describing “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”: “Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” *Casey*, 505 U.S. at 851. For a different perspective on the relation of this freedom to the viability line, see *id.* at 870 (opinion of O’Connor, Kennedy, and Souter, JJ.) (“In some broad sense

Formally for women's benefit, this understanding reaches out to pro-life religious conservatives and traditional moralists. It is as if *Casey*, having already expressed fellowship, even identity, with them, says: We, of all people, must understand the importance of the state honoring the dignity and nobility of spiritual being and the sometimes mysterious movement of the spirit unto conscientious conviction and belief—even when the conclusions that another spirit reaches are profoundly at odds with our own.

Not incidentally, *Casey*'s spiritual pluralism and the constitutional rules that it produces supply the elements required for a full reply to the famous charge that the “dictum” of its sweet-mystery-of-life passage is “the passage that ate the rule of law.”<sup>58</sup> The accusation's rhetorical delights paper over its own substantive excesses. The drama of its expression distracts from how *Casey*'s spiritual pluralism actually manifests in law-bound ways via its cross-cutting jurisdictional carve-ups. By its own terms, *Casey* conserves—it does not eat—the rule of law.

In other terms, however, the charges against *Casey*'s mystery-of-life passage stick. The ridicule they heap on *Casey*'s spiritual outlook speaks to a recognizable outrage on the pro-life right about *Casey*'s equal legal treatment project and its ostensibly implied moral equivalence of abortion and religious and moral opposition to it. In this at least there is a certain convergence with the pro-choice left. For different reasons, progressive, pro-choice reactions to *Casey*'s spiritualizing are primed to see it as unwarranted statist evangelizing that figures women's autonomous reasons and choices as spiritually grounded, whether they are or not. To make matters worse, this apparent affront to women's capacities for rational, autonomous decision-making is not directed at—but rather past—them. Its overarching function is to offer a rationale that might persuade faithful conservatives and traditional moralists to accept the Court's outcome in the case.

*Bostock* resonates with some of these themes in its own way, especially when it trains its sights on existing sex discrimination protections against sexual harassment and motherhood discrimination. *Bostock*'s multiple invocations of these cases and their rules subtly give

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it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.”).

58. *Lawrence v. Texas*, 539 U.S. 558, 588 (Scalia, J., dissenting) (“[I]f the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage . . . : That ‘casts some doubt’ upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. . . . [I]f the passage calls into question the government's power to regulation *actions based on one's* self-defined ‘concept of existence, etc.,’ it is the passage that ate the rule of law.”).

off the impression that they are being conceived at least in part from within a traditionalist perspective that imagines sexuality, reproduction, parenting, and, distinctively, motherhood, as tied to higher moral purposes and ends. This understanding, broadly familiar within U.S. cultural traditions as *Casey* attests, corresponds with ideas that circulated in the cases *Bostock* collects, where the idea of “sex”—both as an attribute and an activity, sometimes with reproductive consequences—at times carried discernible religious undertones.<sup>59</sup>

Against this backdrop, *Bostock*’s emphasis on sexual harassment and motherhood discrimination rules reads as an element of a judicial strategy meant to appeal to culturally conservative audiences by indicating that values they hold dear—around sexuality and motherhood—are not imperiled but affirmed by the decision, which otherwise limits the scope of their religious and moral outlooks. A more prominent dimension of this strategy arrives in *Bostock*’s reassurances that its protections for LGBT workers will not in the future needlessly imperil religious rights.<sup>60</sup> Without exactly pursuing its own path of peace, *Bostock* seeks to calm the intensities of the opposing positions in the case in a way that loosely reflects *Casey*’s sensibility and that tracks its structure of recognizing conflicting rights and interests while reaching for modes of doctrinal accommodation.

*Bostock*’s express affirmation of its own concerns with First Amendment free exercise rights and statutory protections against religious discrimination keep the Court from having to contemplate the prospect of redefining its sexual harassment and motherhood discrimination protections in traditionalist terms. That undertaking, which would have involved re-imagining Title VII’s rules in relation to traditionalist

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59. On *Casey*’s attestation, see *supra* text accompanying note 50. For some discussion of the uses of the term “sex” in the cases that *Bostock* collects, see Marc Spindelman, *The Shower’s Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part II*, 81 OHIO ST. L.J. ONLINE 87, 91–92 n.14 (2020), and Marc Spindelman, *The Shower’s Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part III*, 81 OHIO ST. L.J. ONLINE 101, 105–06 & n.16 (2020). The sexual logics of aspects of the anti-trans position in *R.G. & G.R. Harris Funeral Homes, Inc., v. EEOC*, 139 S. Ct. 1599 (2019) (No. 18-107), are discussed generally in Spindelman, *Shower’s Return, Part II*, in Spindelman, *Shower’s Return, Part III*, and in Marc Spindelman, *The Shower’s Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part IV*, 81 OHIO ST. L.J. ONLINE 117 (2020).

60. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1733, 1753–54 (2020) (recognizing that, while “the employers fear that complying with Title VII’s requirements in cases like ours may require some employers to violate their religious convictions[.]” “[w]e are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society,” and then going on to flag statutory protections for religious liberties that future cases might implicate).

purposes, would anyway have conflicted with *Bostock*'s textualist commitments. Moreover, it would have contradicted *Bostock*'s broad understanding of sex discrimination rights for LGBT persons, newly afforded the right to be themselves at work.

Recalling that LGBT rights in *Bostock* emerge from a legal framework guaranteeing cisheterosexual women anti-discrimination protections, *Bostock*'s meaning for their rights to be themselves must not be overlooked. As *Bostock* intimates, these rights include women's individual control over sexuality, reproduction, and motherhood decisions. These decisions are only meaningful individual choices when liberated from the traditionalist ideas that, in "the course of our history and our culture," have dominated them.<sup>61</sup> If sexual harassment and motherhood discrimination rules now broadly carry equality-enhancing and liberty-affirming meanings, it is significantly because existing constitutional rules—including the abortion right—make women's sexual and reproductive destinies more truly their own. These rationalizing logics, which link Title VII's sex discrimination protections to constitutional sex discrimination rules, hold up across the expanse of Title VII sex discrimination law in ways *Bostock* does not spotlight. Title VII's sex discrimination rules also ban pregnancy discrimination—a prohibition that has authoritatively been held to afford women the right to make pregnancy-related decisions, including abortion, for themselves, without suffering adverse consequences at work.<sup>62</sup>

Much like *Bostock*, which voices its "deep[] concern[s] with" religious liberty only to stop short of manifesting their doctrinal implications in the case, *Casey* generates its spiritual outlook on the abortion right and then noticeably pumps the brakes on it.<sup>63</sup> *Casey* declines to convert its spiritual outlook on abortion into First Amendment protections for it, and likewise refuses to rule religious and moral opposition to abortion out of bounds as a religious establishment problem. Nor, along similar lines, does *Casey* require the exercise of the abortion right to hinge on any spiritual test.<sup>64</sup> Instead, abiding by established

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61. *Casey*, 505 U.S. at 852.

62. See generally 42 U.S.C.A. § 2000e(k) (Westlaw through PL 117-26 with the exception of PL 116-283, Div. A, Title XVIII, which takes effect January 1, 2022); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2015-1, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES § I.A.4.c, § I.A.4.c n.58 (2015). See also *Doe v. C.A.R.S Prot. Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008).

63. *Bostock*, 140 S. Ct. at 1754.

64. *Casey* does, however, recognize that the state has the authority, even prior to viability, to legislate to ensure that the abortion choice is a thoughtful and meaningfully informed one. See *Casey*, 505 U.S. at 881–87 (opinion of O'Connor, Kennedy, and Souter, JJ.) (discussing 24-hour waiting

traditions of liberal political constitutional discourse, *Casey* translates its spiritual outlook on abortion into publicly accessible secular terms that officially declare abortion to be a protected aspect of constitutional liberty.<sup>65</sup>

Whether all this formally makes *Casey*'s spiritual pluralism, including its mystery-of-life language, legally binding as precedent or merely dictum remains an esoteric constitutional question of real interest and import. That question, however, need not be settled for *Casey* successfully to impart its spiritual teachings to future generations, including the justices who will soon be deciding abortion's fate in *Dobbs*.

## V. CONCLUSION: THE SPIRIT OF LIBERTY

At a unique moment in American history—during “the critical World War II year of 1944”—Judge Learned Hand delivered a famous address to a large audience gathered in New York City's Central Park.<sup>66</sup> Those in attendance included “a large number of new citizens.”<sup>67</sup> The topic of Judge Hand's address was “the spirit of liberty.”<sup>68</sup> In it, he shared aspects of his own faith in liberty as an ideal, one worthy of the heroic sacrifices Americans were making, some with their very lives, as part of the national war effort.<sup>69</sup>

As his starting point, Judge Hand invoked a distinctively American “faith, a faith in a common purpose, a common conviction, a common

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period rule as an informed consent measure). If, on one level, this sounds merely like *Casey* is allowing the state to ensure that the conditions for autonomous decision-making obtain, it also, on another level, may be seen as holding space for meaningfully deliberative spiritual reflection and choice-making that comes from it. For some related discussion, see RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 153 (1994).

65. See, e.g., *Casey*, 505 U.S. at 844, 845–46, 851–53, 857–58. On public justification, see John Rawls, *The Idea of Public Reason Revisited*, 64 *CHI. L. REV.* 765, 765–66 (1997) (describing public reason as “part of the idea of democracy itself” and explaining that “[c]itizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines” and so “they need to consider what kinds of reasons they may reasonably give to one another when fundamental political questions are at stake,” and then proposing “that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens”). *Casey*'s translation of pro-life religious and moral positions into state interests is a similar expression of the point, if one that may be less thoroughgoing.

66. Learned Hand, *The Spirit of Liberty* (1944), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 189 (Irving Dilliard ed., 1952) [hereinafter *HAND PAPERS*]. An account of the circumstances of the address and its aftermath is in GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 469–73 (2011).

67. Hand, *The Spirit of Liberty*, in *HAND PAPERS*, *supra* note 66, at 189.

68. *Id.*

69. *Id.* at 191.

devotion.”<sup>70</sup> The practice of this faith did not involve liberty in its conventional terms, such as liberty as an “unbridled will” or the “freedom to do what one likes.”<sup>71</sup> Rather, the liberty he put his stock in was an advanced, a mature, or what sounds like a judicial vision of liberty: liberty as empowered but still humble, self-restrained, moderate, and full of a sense of fellow-feeling and mutual respect in ways that might position Americans to realize common ends.<sup>72</sup> Vital to the realization of this spirit of liberty was Judge Hand’s call to his audience—and the American people in a wider sense—to hold this spirit of liberty in their hearts and to manifest it through an active interest in understanding “the minds of other men and women” and to “weigh[] their interests alongside [their own] without bias.”<sup>73</sup>

Expressed in terms of civic virtues, Judge Hand’s spirit of liberty refracted the judicial virtues famously part of his own judicial practice.<sup>74</sup> Clear-eyed, he appreciated the significance of the American people accepting—and choosing to live—the spirit of liberty as their creed. Where they chose not to, no court could force them. As he put it in another address from the same year, making a point that is sadly relevant today, given the deep, intense divides of American politics: “[A] society so riven that the spirit of moderation is gone, no court *can* save.”<sup>75</sup> However accurate as prediction, there was Judge Hand, professing his public faith in the spirit of liberty—a faith that, for him, had religious bearings—while trying to give that spirit flight and a home in American hearts.<sup>76</sup>

While the Supreme Court lacks the power to compel the American people’s embrace of the spirit of liberty as an article of civic faith, the Court, like Judge Hand did, nevertheless has its own virtues and practices to attend to when issuing its decisions. Through its “constant tending” of the nation’s laws, the Court must choose in those cases, like abortion, that

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70. *Id.* at 189.

71. *Id.* at 190.

72. *Id.*

73. *Id.*

74. For some expression, see generally LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES*, 1958 (1958).

75. Learned Hand, *The Contribution of an Independent Judiciary to Civilization* (1944), in *HAND PAPERS*, *supra* note 66, at 172, 181. Hand makes much the same point in different terms in his “The Spirit of Liberty” speech. See Learned Hand, *The Spirit of Liberty*, in *HAND PAPERS*, *supra* note 66, at 190 (“Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. . .”).

76. For Judge Hand’s text’s suggestion of its religious underpinnings, see Hand, *The Spirit of Liberty*, in *HAND PAPERS*, *supra* note 66, at 190. Gerald Gunther’s biography of Judge Hand observes that while the address had “notable religious overtones, including an invocation of Jesus Christ,” Judge Hand was “for decades an agnostic[.]” GUNTHER, *supra* note 66, at 473.

implicate it, whether to exercise its authority so as to shore up or weaken the American people's faith in the common endeavor of a republic of which we are all equal parts.<sup>77</sup>

What will happen to this faith in *Dobbs*? *Casey*'s failure to forge an enduring peace among the contending sides in the ongoing battles over abortion is one thing. Perhaps Justice Gorsuch, because of how he may see and understand the different sides in *Dobbs*, will be positioned to offer a better account for good-faith acceptance of *Casey*'s longstanding rules than *Casey* itself did. In doing so, he might explain to the American people why accepting *Casey*, with its acceptance of *Roe*'s basics, still serves the common good of the republic that people want to keep—even if one believes *Roe* was wrongly decided at the outset.

Whether he ventures this effort, consistent with the type of ruling his *Bostock* decision recommends, and with what effects on women's equal citizenship stature and for the rule of law, is now Justice Gorsuch's choice to make.

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77. GORSUCH, *supra* note 29, at 17, 21 (“Our blessings cannot be taken for granted and need constant tending.”). One aspect of *Casey*'s reflection of the point is in *Casey*, 505 U.S. at 868:

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.