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Dobbs' Other Dangers: Dobbs and Women's Constitutional Sex Equality Rights

Dobbs painfully teaches that the Supreme Court is no longer a stalwart guarantor of a constitutional order that itself ensures women's freedom and equality in public and intimate life against the vicissitudes of politics.

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By Marc Spindelman

As predictions about how *Dobbs v. Jackson Women's Health Organization* threatens unenumerated Fourteenth Amendment rights involving contraception, sexual freedom and same-sex marriage begin to reshape American politics and law, another set of *Dobbs*' dangers—whose contours are broadly illuminated by the *Dobbs* joint dissent, but whose details have escaped wide public attention—takes on added urgency. How might Dobbs alter women's Fourteenth Amendment constitutional sex equality rights?

Central to the *Dobbs* joint dissent—filed by Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan—is a vision of what Laurence Tribe has dubbed the constitutional liberty-equality "double helix." The joint dissent explains these interlocking values underwrote Roe and Casey in ways that defeat *Dobbs'* insistence that the rulings lack secure constitutional foundations. As decisions upholding constitutional liberty and equality promises—including women's equal citizenship and the right to participate fully in the nation's social and economic life—Roe and Casey nest comfortably in sweet-spots of constitutional traditions. Now overruled, the two cases express the American spirit of equal liberty that structures constitutional rights all Americans have to make intimate life-course decisions for themselves, free from overweening state interference.

Leveraging these American ideals and the judicial decisions that help realize them, the *Dobbs* joint dissent dismisses the *Dobbs* majority's understandings of constitutional liberty and equality as overly shallow and "pinched." According to the dissent, *Dobbs* embraces a thin, formalistic conception of constitutional liberty and equality safeguards that treats them as distinctive categories of rights "hermetically sealed" off from one another. These maneuvers enable *Dobbs* to reject equal protection defenses of abortion rights, saying neither *Roe* nor *Casey* formally declared itself an equal protection ruling. *Dobbs* finishes the point by seizing hold of old-school gender binaristic thinking to venture that, because women and men are biologically different in relation to sexuality's consequences, there's ordinarily no sex equality violation when they're not treated alike where pregnancy—or ending it, as by abortion—is concerned.

Rather than tearing into this reasoning, the joint dissent academically colors it erroneous for not recognizing and affirming the equality principles within the court's formally liberty-based abortion rulings—rulings in which "constitutional values of liberty and equality go hand in hand." While sufficient in some ways as a reply to *Dobbs*' attempted pigeonholing of Roe and Casey, the dissent's restrained stance never tackles how *Dobbs'* mechanical dismissal of constitutional sex equality arguments for abortion rights dovetails with and energizes other dimensions of the opinion that also imperil women's constitutional sex equality rights.

One understanding of the dissent's approach imagines it's a strategy that tracks and reinforces the notion that *Dobbs'* sex equality reasoning runs both ways. If constitutional abortion rights have nothing to do with constitutional sex equality guarantees, as the majority says in dismissing *Roe* and *Casey*, then *Dobbs*' erasure of abortion rights likewise doesn't legally imply anything about existing constitutional sex equality protections. The dissent could be playing a long-game that bolsters efforts to cabin *Dobbs'* effects.

Unfortunately, this approach doesn't fully register *Dobbs*' infusion of biological sex differences with renewed constitutional energy and significance. Minimally, *Dobbs* indicates that biological sex differences are likely to become increasingly salient as a more expansive check on the court's generally pro-women's-equality constitutional sex equality jurisprudence. Those concerned about LGBTQ rights—including trans rights particularly—take heed. Moreover, in grounding its brief discussion of sex equality principles in naturalized sex differences, *Dobbs* scarcely cordons off its own conception of liberty from Fourteenth Amendment sex equality positions. Actually, *Dobbs* occupies their intersections while raising other, more daunting possibilities outlined by the dissent.

Dobbs' conservative constitutional originalism—which reads the Fourteenth Amendment to conform with a strict understanding of its text and original public meaning—places its own implications for women's sex equality rights into relief. As the *Dobbs* dissent, quoting Casey, explains: "[T]he men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. . . . A woman [back] then . . . 'had no legal existence separate from her husband.' . . . [Women lacked] 'full and independent legal status under the Constitution.'"

Unlike the *Dobbs* dissent, which joins Casey to herald that the Constitution no longer tolerates the state "insist[ing] on the historically dominant 'vision of the woman's role,'" *Dobbs* suggests that its conservative originalist Constitution is open to it—to a striking degree.

There is initially how *Dobbs* resubjects women to the possibilities of men's, including husbands', domestic rule, overturning precedents declaring the state cannot give husbands veto rights over wives' abortion decisions or demand wives notify husbands before ending pregnancies. In these ways at least, *Dobbs* sets the constitutional stage for bringing legally enforced patriarchy in marriage back, resuscitating historical conditions that constitutionally tolerated women's legal subordination.

Then there's the matter of how *Dobbs'* conservative originalism aligns with new-old visions of constitutional sex equality within *Dobbs'* treatment of the court's abortion precedents.

Explaining why its return of abortion rights to the political realm oughtn't worry abortion rights supporters, *Dobbs* observes that women, who are on different sides of the abortion controversy, constitute a political majority in the U.S., including Mississippi, where *Dobbs* began. As a majority, *Dobbs* suggests, women are capable of exercising political power to defend whatever abortion rights they wish to defend.

Dobbs' view of women as a not-powerless political majority is constitutionally significant beyond its abortion analysis. It sows seeds for a possible future declaration that women aren't a "discrete and insular minority" entitled to distinctive judicial protections under the Fourteenth Amendment's equal protection clause.

More than twenty-five years ago, Justice Antonin Scalia's lone dissent in *United States v. Virginia* (1996) mapped these prospects while rejecting Justice Ruth Bader Ginsburg's announcement for the Court that the Virginia Military Institute's males-only admissions policy was unconstitutional on sex equality grounds.

Whereas Ginsburg's opinion anticipated the court would soon formally treat sex-based classifications just like race-based ones as fully constitutionally suspect and thus subject to strict judicial scrutiny, Scalia responded that, were the court ever to alter its approach to sex-based classifications, it should view them less critically, not more, presuming their constitutionality and affording them only minimal rationality review.

Scalia's VMI dissent defended this conservative revisionism by observing that women aren't a discrete and insular political minority. As an electoral majority, the dissent ventured, women can produce pro-women legislative results, and it then invoked national, women's rights legal victories as proof.

Dobbs copies the crucial elements—women's political majority and their power—of Scalia's VMI dissent. *Dobbs* likewise aligns with the other big reason Scalia's dissent gave for eliminating the court's modern sex equality doctrine and remitting women's constitutional sex equality rights to the political realm. That approach conformed to the court's historical treatment of sex-based legislation, which until 1971 didn't trigger Fourteenth Amendment judicial skepticism.

How far will the court go after *Dobbs*, this heir to Scalia's VMI dissent, to continue translating conservative originalism into a legal practice that rules women's lives? Are the dreams of Scalia's VMI dissent far behind? Reverberating in *Dobbs* as they do, it's time to start thinking about what it'd mean for the court to throw the wide ground of women's constitutional sex equality rights back into political play.

The *Dobbs* dissent condemns *Dobbs* for insisting "we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages)," believing that's a sure way to "consign women to second-class citizenship." If the joint dissent doesn't generate a full tally about what *Dobbs* could do to halt or unravel existing Fourteenth Amendment sex equality guarantees—like the tally it repeatedly provides on *Dobbs'* potential meaning for other privacy and Fourteenth Amendment liberty rights—the most hopeful reason might be the dissenters couldn't fathom that even the justices who engaged in what the dissent

depicts as lawless, conservative power-grabbing would dare propound their conservative originalism to destroy constitutional sex equality guarantees on their own terms and grounds.

Here's hoping that's right, but hope alone is no salvation after *Dobbs*, the new standard-bearer for clawing back at least some non-originalist constitutional rights. The concern here isn't simply what the conservative originalist court will do next, though that's a real concern, but what faithful conservatives and traditional moralists committed to present-day versions of classically patriarchal ways of living may make of the conservative originalist weapon *Dobbs* forges and hands them—a weapon that may be used to try to discipline the court to get it to stay the course *Dobbs* sets.

Dobbs painfully teaches that the Supreme Court is no longer a stalwart guarantor of a constitutional order that itself ensures women's freedom and equality in public and intimate life against the vicissitudes of politics. Those committed to sex equality principles and visions of American life must thus now take up the larger work not only of resecuring reproductive rights but also of battening down what constitutional sex equality rights remain against the freedom-diminishing and equality-denying winds that *Dobbs* has unleashed.

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