

THE NEW INTERSECTIONAL AND ANTI-RACIST LGBTQIA+ POLITICS: SOME THOUGHTS ON THE PATH AHEAD

*Marc Spindelman**

Something remarkable has been happening lately inside LGBTQIA+ communities and movements. It involves the widespread stirring and shifting of individual and collective political consciousness in directions and to a scale not seen before.

These changes to LGBTQIA+ consciousness—and the politics they are producing—would not be happening without the great works of multiple generations of queer ancestors and elders, many of them trans and people of color.¹ Recalling these forbearers in no way overlooks the efforts of newer generations of activists and organizers, both in the movements for Black lives and among queer Black and trans people and collectives, all variously insisting that LGBTQIA+ communities must

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1. See, e.g., Raquel Willis, *I Believe in Black Trans Power*, YOUTUBE at 8:27 (June 17, 2020), <https://www.youtube.com/watch?v=Bq1w7glqwkU>; Marsha Johnson, *Sylvia Rivera, and the History of Pride Month*, SMITHSONIAN (June 7, 2021), <https://www.si.edu/stories/marsha-johnson-sylvia-rivera-and-history-pride-month>; Nicole Pasulka, *Ladies in the Streets: Before Stonewall, Transgender Uprising Changed Lives*, NPR: CODE SWITCH (May 5, 2015, 4:52 PM), <https://www.npr.org/sections/codeswitch/2015/05/05/404459634/ladies-in-the-streets-before-stonewall-transgender-uprising-changed-lives>. See also, e.g., Scott James, *Queer People of Color Led the L.G.B.T.Q. Charge, But Were Denied the Rewards*, N.Y. TIMES (June 22, 2019), <https://www.nytimes.com/2019/06/22/us/lgbtq-minorities-trans-activists.html>. For some commentary on queer Black trans politics and the ways they can and do refract conventional conceptions of civil rights, see Marc Spindelman, *Queer Black Trans Politics and Constitutional Originalism*, 13 CONLAWNOW 93 (2022).

respect and center Black lives, and Black queer and trans lives, in ways that they never have.²

One result of these consciousness shifts is the increasing number of LGBTQIA+-identified people and organizations reconstituting themselves, their identities, and their politics around pro-Black, anti-racist positions, and doing so as foundational elements of their LGBTQIA+ liberation work.

At the same time as these developments are unfolding, however, they are on a collision course with emergent social conservative positions and obstacles. These obstacles include developments at a Supreme Court that is increasingly regularly flying a conservative constitutional originalist banner.

Here, I collect and expose some logics and possibilities of new and impending conservative originalist constitutional developments. Doing so will begin to show how the Court's conservative originalism may confound—and perhaps, unravel—the consolidations and potential gains of pro-Black, anti-racist LGBTQIA+ political consciousness and action.

Tracing these logics and possibilities additionally suggests that—wherever you start in your thinking on pro-Black, anti-racist LGBTQIA+ politics—it is vital for everyone inside LGBTQIA+ communities to rally and join cause with them. Doing so may prove necessary to hold open the legal and political space for preserving established LGBTQ rights and for making future gains possible. Some threats to LGBTQIA+ rights are well-known after the Supreme Court's *Dobbs* ruling, like the prospect of established constitutional rights to intimacy, marriage, and family life being eliminated and returned to politics.³ Other possibilities, no less significant, but operating differently, have yet to receive similar attention.

These other possibilities are at least logically suggested by recent and impending constitutional developments, and they feature how the Court's conservative originalist march may soon begin locking down LGBTQIA+ politics in their new formations in ways that may structurally and politically lock them out.

2. Isabella Grullón Paz & Maggie Astor, *Black Trans Women Seek More Space in the Movement They Helped Start*, N.Y. TIMES (June 28, 2020), <https://www.nytimes.com/2020/06/27/us/politics/black-trans-lives-matter.html>. For an example of one such collective in central Ohio, and its stances, see *Mission & Principles*, BLACQUEER & INTERSECTIONAL COLLECTIVE, <https://bqic.net/mission-principles/> (last visited May 22, 2023).

3. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); see, e.g., Mark Joseph Stern, *The Supreme Court's Next Target is Marriage Equality. It Won't be the Last*, SLATE (June 24, 2022), <https://slate.com/news-and-politics/2022/06/supreme-court-dobbs-roe-wade-obergefell-marriage-equality.html>

At a time when the Court is moving generally against race-conscious, race-equity political projects, it may be tempting for some LGBTQIA+ people to suggest pursuing a different collective strategy for preserving established rights.⁴ But this is a mistake. The prospects of the Court moving to lock down LGBTQIA+ politics may now hold even if LGBTQIA+ people and institutions were to abandon what, for some, are newfound anti-racist and pro-Black equity commitments.

I. THE NEW LGBTQIA+ POLITICS

Some preliminaries on the new LGBTQIA+ politics to begin.

Some of you—even some in LGBTQIA+ communities—may be uncertain about what the recent pro-Black, anti-racist reconfigurations of LGBTQIA+ political consciousness and action that I’m discussing are. Whether you have experienced these shifts in your own body-mind or life or worlds—or never needed to, given how the social world is constructed—the reconfigurations I am thinking of found public expression in an important statement of political commitment and principle released several years ago.

Institutionally supported by the Human Rights Campaign, and “joined by prominent LGBTQ and civil rights organizations, condemning racism, racial violence and police brutality while calling for action to combat these scourges,” this statement declares that:

Many of our organizations have made progress in adopting intersectionality as a core value and have committed to be more diverse, equitable, and inclusive. But this moment requires that we go further—that we make explicit commitments to embrace anti-racism and end white supremacy, not as necessary corollaries to our mission, but as integral to the objective of full equality for LGBTQ people.

We, the undersigned, recognize we cannot remain neutral, nor will awareness substitute for action. The LGBTQ community knows about the work of resisting police brutality and violence. We celebrate June as Pride Month, because it commemorates, in part, our resisting police harassment and brutality at Stonewall in New York City, and earlier in California, when such violence was common and expected. We remember it as a breakthrough moment when we refused to accept humiliation and fear as the price of living fully, freely, and authentically.

4. Cf. Gregory T. Angelo, Op-ed, *I Helped Make Corporations Woke, and I Regret It*, WALL ST. J. (Apr. 12, 2023), <https://www.wsj.com/articles/i-helped-make-corporations-woke-and-i-regret-it-corporate-activism-gay-rights-abortion-blm-boardrooms-eb6a7795>.

We understand what it means to rise up and push back against a culture that tells us we are less than, that our lives don't matter. Today, we join together again to say #BlackLivesMatter and commit ourselves to the action those words require.⁵

Groundbreaking in a way that returns LGBTQIA+ communities and movements to their queer Black and trans roots, including their histories at Stonewall and Compton's, these commitments are still in their operational infancy. Just as they are taking root and their larger implications are taking shape, these developments are already facing social conservatives' opposition, including Supreme Court roadblocks in the path ahead.

The Court's *Dobbs* decision, that conservative originalist ruling eliminating constitutional abortion rights, is not the only major decision that has been or will be decided in conservative constitutional originalist terms.⁶ Two other blockbuster civil rights cases, due out soon, and involving affirmative action, may do so as well.⁷

Oral arguments in these cases indicated that the Court's conservative majority will likely offer at least in part an originalist account for declaring that what remains of affirmative action in higher education is forbidden by the Fourteenth Amendment's racial color-blindness obligations and by federal anti-discrimination law rules keyed to them.⁸

The affirmative action cases are civil rights cases in a classic sense: cases on the meaning of race, race equality, and racial equity under law. The new LGBTQIA+ political consciousness, however, with intersectional commitments built from lived experiences of queer people of color, apprehends that classic civil rights cases implicate LGBTQIA+ rights. Now they are also conditioning the prospects of queer intersectional political practice under law.

5. Elizabeth Bibi, *The Human Rights Campaign and 100+ LGBTQ Organizations Release Letter Condemning Racial Violence*, HUM. RTS. CAMPAIGN (May 29, 2020), <https://www.hrc.org/news/hrc-and-75-lgbtq-organizations-release-letter-condemning-racist-violence>.

6. *Dobbs*, 142 S. Ct. at 2242, 2284.

7. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022); *Students for Fair Admissions, Inc. v. Univ. of North Carolina*, 142 S. Ct. 896 (2022). These are not the only cases coded as being about race presently at the Supreme Court. *See also* *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022), and *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

8. Amy Howe, *Affirmative Action Appears in Jeopardy After Marathon Arguments*, SCOTUSBLOG (Oct. 31, 2022, 7:44 PM), <https://www.scotusblog.com/2022/10/affirmative-action-appears-in-jeopardy-after-marathon-arguments/>.

Most experts believe the Court will end affirmative action in higher education on legal color-blindness grounds.⁹ Doing so will almost certainly doom other dimensions of higher education that expressly take race into account, though subject—perhaps—to robust academic freedom exceptions.¹⁰ We will see.

The Court's affirmative action cases may do no more than ban express racial classifications in higher education, focusing on admissions.¹¹ Another prospect, anticipating possible academic subversions or evasions, is that the Court's affirmative action rulings will additionally insist that higher education institutions strictly adhere to legal color-blindness demands—both in the articulation of policies and practices and in their formulations.¹² Legal color-blindness rules might thus require color-blindness down to the level of institutional purposes and intentions themselves.

If so, the Court's rulings might block academic attempts to comply with the letter of color-blindness rules while flouting their spirit. Sooner or later, color-blind institutional policies and practices “really” driven by race-conscious, race-equity positions may thus be subject to legal

9. Compare Danielle R. Holley, *The History of Anti-Black Discrimination in Higher Education and the Myth of a Color-Blind Constitution*, SCOTUSBLOG: SYMPOSIUM (Oct. 26, 2022, 6:05 PM), <https://www.scotusblog.com/2022/10/the-history-of-anti-black-discrimination-in-higher-education-and-the-myth-of-a-color-blind-constitution/>, and Bethany Li, *Being Race-Conscious Is a Necessary and Effective Tool to Address Racism and Discrimination—Including for Asian Americans*, SCOTUSBLOG: SYMPOSIUM (Oct. 28, 2022, 3:40 PM), <https://www.scotusblog.com/2022/10/being-race-conscious-is-a-necessary-and-effective-tool-to-address-racism-and-discrimination-including-for-asian-americans/>, with Wen Fa, *In Higher Education and Beyond, Race-Based Policies Stifle Individualism and Ultimately Harm Everyone*, SCOTUSBLOG: SYMPOSIUM (Oct. 27, 2022, 12:05 PM), <https://www.scotusblog.com/2022/10/in-higher-education-and-beyond-race-based-policies-stifle-individualism-and-ultimately-harm-everyone/>, and Zach West & Bryan Cleveland, *The Court Should Relegate Discrimination in Higher Education to the Dustbin of History*, SCOTUSBLOG: SYMPOSIUM (Oct. 28, 2022, 5:15 PM), <https://www.scotusblog.com/2022/10/the-court-should-relegate-racial-discrimination-in-higher-education-to-the-dustbin-of-history/>.

10. Marc Spindelman, *Sunsetting Racial Justice in the Sunshine State and Florida-izing the Nation*, AM. PROSPECT (Mar. 10, 2023), <https://prospect.org/justice/2023-03-10-race-legislation-florida-supreme-court/>. See also generally, e.g., Sonja Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 STAN. L. REV. ____ (forthcoming 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4354321&dgcid=ejournal_html_email_discrimination%2C%3A1aw%3Ajustice%3Ajournal_abstractlink. See also, e.g., Steve Sanders, *Affirmative Action and Academic Freedom: Why the Supreme Court Should Continue Deferring to Faculty Judgments About the Value of Educational Diversity*, 1 IND. J.L. & SOC. EQUALITY 50, 61–62 (2013).

11. Petition for Writ of Certiorari at 2, *Students for Fair Admissions, Inc. v. Univ. of North Carolina*, No. 21-707 (argued Oct. 31, 2022); Petition for Writ of Certiorari at 1–3, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, No. 20-1199 (argued Oct. 31, 2022); Brief for Petitioner, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, Nos. 20-1199, 21-707 (argued Oct. 31, 2022), 2022 WL 2918946 at *1–3.

12. Spindelman, *supra* note 10.

challenges ferreting them out.¹³ These challenges could either directly spotlight institutional purposes or intentions or expose them through inquiries into the racially patterned effects of allegedly color-blind policies and practices. Courts, on this view, would presumably look askance at so-called “top 10 percent” admissions plans, formally color-blind means that broadly aim for racial diversity, and at diversity-equity-and-inclusion (DEI) “pipeline” programs that seek to surpass higher education institutions’ widespread racist pasts, but without expressly invoking race.¹⁴

Constitutional rules in this area of law might themselves need to be reworked by the Court in order to launch a new federal judicial bureau of race equity investigations open to surveilling higher-ed actions for telltale signs of what the Court regards as illicit racial equity thinking or drivers.¹⁵

Novel, the effort would not lack for antecedents. Chief Justice John Roberts famously proposed “[t]he way to stop discrimination on the basis of race is to stop discriminating by race,” including in pro-race-equity directions.¹⁶ More dramatically, Justice Clarence Thomas has ventured that racial equity positions, beyond “faddish,” are nefarious.¹⁷ In color-blindness terms, they are equivalent, in his view, to old white supremacist segregationist efforts that sometimes operated by formally colorblind means.¹⁸ Think here of closing—rather than integrating—public schools and other public facilities.¹⁹

Thomas’ positions are neither constitutionally nor historically supported, as Justice Ketanji Brown Jackson observed with elegant legal and moral precision in arguments in one of the affirmative action cases.²⁰ But if Thomas’ views prevail, as they might, his strict vision of color-blindness—really, a form of post-racialism—is one that, in principle, neither starts nor ends with higher education.²¹ It could easily operate

13. See Starr, *supra* note 10, at 2.

14. For some relevant discussion, see *id.* at 12.

15. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

16. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

17. *Id.* at 780 (Thomas, J., concurring).

18. *Id.* at 772–79.

19. See, e.g., *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964); *Palmer v. Thompson*, 403 U.S. 217 (1971).

20. Transcript of Oral Argument at 174–75, *Students for Fair Admissions, Inc. v. Univ. of North Carolina*, No. 21-707 (argued Oct. 31, 2022); see also Adam Harris, *Justice Jackson’s Crucial Argument About Affirmative Action*, THE ATLANTIC (Nov. 1, 2022), <https://www.theatlantic.com/politics/archive/2022/11/affirmative-action-supreme-court-ketanji-brown-jackson/671954/>.

21. Relevant commentary is in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT XIII–XXXII (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas eds.,

through rules covering the institutions of American life that are subject to anti-discrimination laws. Big business, for instance, might soon find itself, particularly some of its DEI efforts, subject to race discrimination bans indexed to constitutional anti-race-equity positions.²²

II. IMPLICATIONS FOR THE NEW LGBTQIA+ POLITICS

Understanding these possibilities, return to the new race-conscious and pro-Black LGBTQIA+ politics taking hold within LGBTQIA+ institutions and politics in recent years.

One way to understand the present situation is as a social conservative reversal of the Supreme Court's *Obergefell v. Hodges* ruling.²³ Justice Samuel Alito's *Obergefell* dissent angrily described the *Obergefell* majority opinion, recognizing LGBTQ marriage rights, as telling faithful conservatives that they remain entitled to their beliefs, but not to translate them into law or policy any longer, a kind of political closeting.²⁴ The closeting may soon turn back in more familiar directions. Following the affirmative action decisions, pro-race-equity beliefs, including inside LGBTQIA+ communities, could increasingly be politically straight-jacketed, relegated to a never-fully-liberated racialized queer closet.²⁵

Should the Court go maximally post-racial—as it might—LGBTQIA+ individuals and organizations may thus have and hold anti-white-supremacist, anti-racist, and pro-Black queer positions, but without being legally permitted to operationalize them as such in law. The proud

1995), and Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373–74 (1992). For additional observations on the “illusory” nature of post-racialism, see generally Spearlt, *Enslaved by Words: Legacies & Limitations of “Post-Racial” Language*, 2011 MICH. ST. L. REV. 705 (2011).

22. Adrian Wooldridge, *Big Business and Conservatives Are Headed for Divorce*, FIN. ADVISOR MAG., Apr. 4, 2022; Gary Fineout, “Buckle Up”: *DeSantis Escalates Disney Dispute, Eyes Hotel Taxes and Road Tolls*, POLITICO (Apr. 6, 2023, 10:32 PM), <https://www.politico.com/news/2023/04/06/desantis-disney-hotel-taxes-toll-roads-00090959>; Christopher Rufo, *Critical Race Theory: What It Is and How to Fight It*, 50 IMPRIMIS, March 2021, <https://imprimis.hillsdale.edu/critical-race-theory-fight/> (adapted from a lecture delivered at Hillsdale College, March 30, 2020); Nate Hochman, *The Long March Back: Antonio Gramsci and Us*, NAT'L REV., (Feb. 16, 2023, 3:54 PM), <https://www.nationalreview.com/magazine/2023/03/06/the-long-march-back/>. Cf. Tim Miller, *DeSantis Finds His Voice: A NatCon Culture Warrior Who Praised a Prominent White Nationalist*, THE BULWARK (Mar. 24, 2023), <https://www.thebulwark.com/desantis-finds-his-voice-a-natcon-culture-warrior-who-praised-a-prominent-white-nationalist/>. A critical perspective on some of these developments is in Kimberlé Crenshaw on *Critical Race Theory, Intersectionality & the Right's War on Public Education*, YOUTUBE, at 6:15 (Feb. 6, 2023), <https://www.youtube.com/watch?v=gD7gsNNobb0>.

23. 576 U.S. 644 (2015).

24. *Id.* at 741 (Alito, J., dissenting).

25. On the racial closet, see, for example, Siobhan B. Somerville, *Feminism, Queer Theory, and the Racial Closet*, 52 CRITICISM 191 (2010).

self-identifications of queer politics as fundamentally intersectional and anti-racist may thus soon become another reason for a conservative constitutional originalist Court to stop them legally dead in their tracks.

Note the stakes. This is not the situation *Dobbs* realizes, of abortion rights being returned to politics on grounds suggestive of similar prospects for LGBTQ constitutional rights, no different than abortion in principled conservative originalist terms.²⁶ The prospects following the affirmative action cases raise the stakes in the direction of a constitutional right-to-life turn that *Dobbs* disavows: the prospects of constitutionalizing a right to life that would foreclose laws legalizing abortion as a matter of individual choice.²⁷ We are talking constitutional-political lockout.

Following the affirmative action cases, the horizons for established constitutional LGBTQIA+ rights may thus undergo an important shift. Beyond being “downgraded” from constitutional to political rights, the affirmative action cases raise the potential that the Court’s color-blind positions could translate into a scaled post-racialism that could banish LGBTQIA+ rights, as intersectional and pro-Black race-equity rights, from politics into the domain of anti-politics. At least until some legal reversal of the Court’s authority arrives that is recognized by the Court.

These anti-political possibilities may be generally familiar to anyone who has been engaged in anti-racist, racial equity work for any length of time.²⁸ It is an old play from an old playbook. Updated and applied to LGBTQIA+ rights, as has been attempted in the past, the play could practically overwhelm the new pro-Black and anti-racist queer politics.

III. THE WHITE RACIAL CONTRACT

Of course, some people inside LGBTQIA+ communities might welcome a judicial interruption of the new queer politics, should it come to pass.²⁹

26. *Dobbs*, 142 S. Ct. at 2277–79; *but see id.* at 2258. Justice Clarence Thomas’s *Dobbs* concurrence makes the connection. *Id.* at 2301 (Thomas, J., concurring).

27. *See, e.g.*, Alliance for Hippocratic Medicine v. FDA, ___ F.3d ___, 2023 WL 2825871, at *14 (N.D. Tex. 2023) (citing Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022)). *See also, e.g.*, Cynthia Soohoo, *An Embryo Is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life*, 14 CONLAWNOW 81 (2023). *Cf. also* Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511 (2020).

28. *See, e.g.*, Bell, *supra* note 21, at 373.

29. For gestures in relevant directions, see, for example, Charles Moran, *LGBT Conservatives Don’t Buy Into the Woke Left’s Radical View That Sex and Gender Are Meaningless*, FOX NEWS (Apr. 15, 2022, 2:00 PM), <https://www.foxnews.com/opinion/lgbt-conservatives-woke-left-sex-gender-charles-moran>, and Anthony L. Fisher, *Dave Rubin’s “Don’t Burn This Country” Is His Desperate*

Nobody supportive of LGBTQIA+ rights, however, should be enthusiastic about these possibilities. If the constitutional and legal formations that may be coming down the pike look like possible bases for repudiating the pro-Black, anti-racist turn in LGBTQIA+ politics, particularly as a way of somehow saving LGBTQIA+ politics from possible legal lock-out, the reasons turn out, on inspection, not to be persuasive ones.

Part of the reason why has to do with the fact that LGBTQIA+ rights just are, descriptively, intersectional rights.³⁰ What is more, the idea that we should presently consider abandoning the pro-Black, anti-racist dimensions of LGBTQIA+ liberation because it might help preserve them in their classic formations involves magical thinking that LGBTQIA+ people cannot collectively afford.

Stare *Dobbs* in the face, and what you see is a Supreme Court ruling that had no trouble invoking conservative originalism to justify swiftly wiping out the established and repeatedly reaffirmed reproductive rights of cisheterosexual women and other people capable of becoming pregnant.³¹ Against *Dobbs*' achievement, nobody should believe that the Court, whose conservative originalist reasoning recommends similar results for LGBTQIA+ rights, could not as quickly and easily eliminate LGBTQIA+ constitutional rights, themselves of more recent and less pressure-tested vintage. The new federal Respect for Marriage Act manages, while highlighting, the existence of these threats.³²

Now that *Dobbs* has re-authorized the agents of outmoded patriarchal ideologies, ideologies that are themselves intersectionally racialized, to re-seize state power and lord it over cisheterosexual women's and other pregnant people's bodies and lives, and to do so based on conservative Christian religious scruples, nobody should believe LGBTQIA+ people would actually be above the same treatment if only LGBTQIA+ communities dropped their widening and deepening anti-

Plea for MAGA Love, DAILY BEAST (May 1, 2022, 9:15 PM), <https://www.thedailybeast.com/dave-rubins-dont-burn-this-country-is-his-desperate-plea-for-maga-love>.

30. See, e.g., 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); Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010 (2014). See also Paul Blest, *Texas GOP Calls Being Gay "Abnormal," Bans Gay Conservative Group From Convention*, VICE (June 21, 2022), <https://www.vice.com/en/article/dy7zek/texas-log-cabin-republicans-booth-banned>.

31. *Dobbs*, 142 S. Ct. 2228. For discussion of *Dobbs* as both originalist and not, see Marc Spindelman, *Dobbs' Sex Equality Troubles*, 32 WILLIAM & MARY BILL OF RTS. J. ____ (forthcoming 2023) (on file with author).

32. Respect for Marriage Act, H.R. 8404, 117th Cong. (2022).

racist commitments. Recalling that abortion rights are queer rights, for some of us, life is already defined like this.³³

The impulse to think LGBTQIA+ rights might be protected, and hence be safer and more secure, were we to jettison the new, scaled queer race equity politics shows how LGBTQIA+ constitutional rights may broadly, if tacitly, be understood as having been secured as part of, and on condition of LGBTQIA+ people upholding, what Charles Mills calls “the racial contract.”³⁴ In this setting, the racial contract is a contract among whites who may recognize one another’s rights claims provided the claims trace white racialized lines.

Some have criticized the Court’s pro-LGBTQIA+ constitutional rights jurisprudence along these lines, pointing out how the cases that comprise it, and the litigation strategies behind them, centered cis, white, and sometimes wealthy gay men and lesbian women in ways that marginalized and legitimated erasing the needs and interests of other queer people, including, in particular, queer and trans people of color.³⁵

Until now, however, few people, if any, have openly defended the Court’s pro-LGBTQIA+ decisions in white contract terms. If you are tempted now, remember: Abortion rights’ classically white racial cast, no matter their practical racialized operations, did not save them for white cisheterosexual women either.³⁶ Many of these women were confident the Court would never eliminate their rights. Nor is public opinion a meaningful ground of difference. *Dobbs* flouted public opinion supporting *Roe* and abortion rights, declaring it irrelevant to its originalist approach to constitutional interpretation.³⁷ In principle, then, public supports for LGBTQIA+ rights are similarly beside the constitutional point.

33. See, e.g., *SCOTUS Reaction Statement from Task Force Executive Director, Kierra Johnson*, NATIONAL LGBTQ TASK FORCE (Dec. 1, 2021), <https://www.thetaskforce.org/scotus-reactionstatement-from-task-force-executive-director-kierra-johnson/>; Brief for LGBTQ Organizations and Advocates as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2021).

34. CHARLES MILLS, *THE RACIAL CONTRACT* (1997); CAROLE PATEMAN & CHARLES MILLS, *CONTRACT AND DOMINATION* (2007).

35. Steps in these directions are in Angela Harris, *From Stonewall to Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006); see also generally Hutchinson, *supra* note 30, and Robinson, *supra* note 30.

36. For an historical tally of *Roe*’s whiteness, both perceived and actual, see Mary Ziegler, *Roe’s Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J.L. & FEMINISM 1 (2013). See also, e.g., Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022); Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021).

37. *Dobbs*, 142 S. Ct. at 2278.

Part of why some of us were surprised by *Dobbs*' elimination of constitutional abortion rights is we had not fully internalized the meanings and understandings that regularly travel with intersectional, pro-Black, and anti-racist politics and theory. For too long, many of us watched, mistakenly thinking ourselves, our rights, and our loved ones safe and at a distance, as the Court publicly dismantled race equity practices to the point that the Court is now close to banishing them to anti-politics. Understanding what reproductive justice advocates have been insisting for some time, *Dobbs*—in reality, and as intersectional arguments in the case showed—continues an older, conservative originalist rollback of race equality rights in the abortion setting, with *Dobbs*' terms significantly impacting cis women and other pregnant people of color, some inside LGBTQIA+ communities.³⁸

In the context of constitutional race equality guarantees, distinctively powerful historical, traditional, and contemporaneous reasons speak to why the Court should not have done what it has done and is likely about to continue doing against race equity under law in and after the affirmative action rulings. Among the obvious facts here are the Civil War and Civil War Amendments, the historical and ongoing movements for race-based civil rights, many now codified thanks to the Civil Rights Movement, as well as the large-scale, recent movements for Black Lives.³⁹ If those aspects of our nation's history and laws and living modes of engagement with fundamental national values—to redefine them—are not likely going to cause the Court to preserve affirmative action, what exactly positions LGBTQIA+ rights' escape?

38. For sources on reproductive justice, see, for example, REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE (2007), <https://www.law.berkeley.edu/phpprograms/courses/fileDL.php?fileID=4051>; Loretta Ross, *What Is Reproductive Justice?*, in *id.* at 4. On the inclusion of LGBTQ people in the reproductive justice movement, see 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-Therault, 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 within the movement, more specifically, see also *id.* at 35–37; 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/>.

39. On the Civil Rights Movement, see generally, for example, TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963 (1988), TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65 (1998), and TAYLOR BRANCH, AT CANAAN'S EDGE, AMERICA IN THE KING YEARS 1965-1968 (2006), and on the movements for Black Lives, see, for example, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 NYU L. REV. 405 (2018); Mabre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544 (2022).

Queer Black and trans people have been insisting for some time that everyone inside LGBTQIA+ communities must understand that queer Black and trans liberation is key to everyone else's, and that all our futures, fates, and freedoms are intersectional, and intertwined, such that none of us will be free until all of us are.⁴⁰ Those of us who are sure this is wrong and that queer constitutional rights—unlike traditional civil rights and unlike cis women's rights—are different and deserve and will get special constitutional treatment risk missing these lessons at our individual and collective peril.

What this means, operationally, is that even if you have reservations about the anti-white supremacy, pro-Black, and race-equity politics that are now elemental features of queer institutional and political life, it may be time to reconsider them, given what *Dobbs* did and what the Court is on the verge of doing in its affirmative action decisions and given what those rulings themselves and other cases in their own terms do or will mean for the possibilities of LGBTQIA+ politics.

IV. THE DANGERS AHEAD—IN TRADITIONAL TERMS

If you are still unpersuaded that the classic version of LGBTQIA+ rights are presently in danger of meeting the same kind of fate the Court has and is likely about to impose on sex and race equality rights, consider another case the Court will decide this Term, *303 Creative v. Elenis*, which implicates statutory sexual orientation discrimination protections also understood in old-school, non-intersectional terms.⁴¹

Technically, *303 Creative* involves the workings of Colorado's statutory anti-discrimination protections barring sexual orientation discrimination in public accommodations, and the question of whether those anti-discrimination protections violate the First Amendment's free-speech guarantees.⁴²

Substantively, *303 Creative* implicates the soaring, pro-LGBTQ vision of civil, political, and economic and social equality that Justice Anthony Kennedy's various pro-LGBTQ Supreme Court decisions announced, and that his swansong ruling in *Masterpiece Cakeshop*, the

40. See, e.g., Mission & Principles, BLACK QUEER & INTERSECTIONAL COLLECTIVE, <https://bqic.net/mission-principles/>

41. 6 F.4th 1160 (10th Cir. 2021), cert. granted, 142 S. Ct. 1106 (2022). See generally Adam Liptak, *Supreme Court to Hear Case of Web Designer Who Objects to Same-Sex Marriage*, N.Y. TIMES (Feb. 22, 2022), <https://www.nytimes.com/2022/02/22/us/colorado-supreme-court-same-sex-marriage.html>.

42. *Id.*

prequel to *303 Creative*, sought to secure against future erosion.⁴³ Against this backdrop, *303 Creative*, which looks likely to recognize the free-speech rights of a faithful conservative business owner and her business over the legal anti-discrimination rights of LGBTQIA+ people, is poised to diminish Kennedy's soaring vision of LGBTQ rights under law.

303 Creative offers the Court different ways to articulate new First Amendment speech limits on anti-discrimination laws, limits that *Masterpiece Cakeshop* subtly but unmistakably gave the back of its hand.⁴⁴ But however precisely the new free-speech limits are propounded in *303 Creative*, they will, in practice, broadly stop LGBTQIA+ people and institutions from politically doing anything about it. *303 Creative* will likely cast an important set of LGBTQIA+ rights into the domain of anti-politics.

Sexual orientation discrimination protections may be the canary in the coal mine here, showing what the Court could soon do to other civil rights protections, like those based on race and sex.⁴⁵ Those protections may soon find themselves sharing the same anti-political space.

While *303 Creative* could be the beginning of the end of meaningful anti-discrimination protections and regimes in the United States, and it might, it is also possible that anti-discrimination laws will not be wiped out.⁴⁶ If future Court cases preserve them, it may be because the Court is figuring out that constitutional and statutory anti-discrimination rules can be re-purposed in conservative post-identity directions—directions that some social conservatives are increasingly arguing for as indispensable to addressing so-called “woke” domination by the left, including through law. Meantime, *303 Creative* may give faithful conservative dissenters and perhaps others free-speech outs from social equity interpretations of anti-discrimination regimes, including their demands for what Justice Neil Gorsuch has termed cultural “re-education.”⁴⁷

43. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Cmm'n*, 138 S. Ct. 1719 (2018); Marc Spindelman, *The “Dobbs” Promise Gets Tested as the Supreme Court*, THE AM. PROSPECT (Dec. 1, 2022) <https://prospect.org/justice/dobbs-promise-gets-tested-at-the-supreme-court/>; Marc Spindelman, *Masterpiece Cakeshop’s Homiletics*, 68 CLEV. ST. L. REV. 347, 373 (2020).

44. See Spindelman, *Homiletics*, *supra* note 43, at 390–403.

45. James Romoser, *The Court is Poised to Set Jurisprudence on Race for Generations—and Not Just in Affirmative Action*, SCOTUSBLOG (Oct. 30, 2022, 7:00 PM), <https://www.scotusblog.com/2022/10/the-court-is-poised-to-set-jurisprudence-on-race-for-generations-and-not-just-in-affirmative-action/>.

46. One set of possibilities is identified in Brief for the Petitioners at *15-18, *303 Creative LLC v. Elenis*, 143 S. Ct. 1106 (No. 21-47), 2022 WL 1786990 (2022).

47. Transcript of Oral Argument at 93, *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022). See also Mark Joseph Stern, *The Frightening Implications of Gorsuch’s Angry Questions About State “Reeducation”*, SLATE (Dec. 6, 2022), <https://slate.com/news-and-politics/2022/12/gorsuch-reeducation-discrimination-lgbtq-civil-rights-303-creative.html>

From the perspective of pro-LGBTQIA+ politics, the wonders include, but exceed, what *303 Creative* may do to pro-LGBTQIA+ anti-discrimination law in a wider sense. If *303 Creative* announces a free-speech-based religious liberty check on LGBTQ equality rights under law, what might future LGBTQIA+ developments entail? In *Masterpiece Cakeshop*, Justice Thomas, embracing free-speech arguments against the same Colorado law, expressed views suggesting positional alignments that could take a ruling like the one now anticipated in *303 Creative* and expand it toward eliminating constitutional marriage protections, as in *Obergefell*.⁴⁸ If the First Amendment is keyed to protections of faithful conservatives' speech rights, why shouldn't the Fourteenth Amendment at least also be interpreted to give them political rights to define marriage in their preferred terms—terms that do not recognize same-sex “weddings” except as counterfeits?⁴⁹ *303 Creative* may thus be a stepping-stone to throwing LGBTQIA+ rights out of the constitutional high tower.

And not, or not perhaps finally, into the political open, but, as in *303 Creative*, into the domain of anti-politics, where nothing, formally short of constitutional amendment perhaps, may be done politically to reverse course.

This last prospect has distinctive resonances after *Dobbs*. In a little-discussed footnote, Footnote 22, *Dobbs* raises the specter of a new conservative originalist and socially conservative doctrine of unenumerated fundamental rights under the Fourteenth Amendment's privileges or immunities clause.⁵⁰ As I detail in forthcoming work, Footnote 22 suggests the possibility of a new social conservative jurisprudence of economic and social liberties, including rights in the marriage and family setting.⁵¹

Happily, there is no guarantee these rights will come to fruition. If they do, however, instead of simply returning LGBTQIA+ rights to marriage and family life back to politics, the risks that *Dobbs* mainly advertises, it is conceivable that the Court may yet recast the constitutional right to marriage and family life in conservative originalist terms that could function to block legislative alterations to historical and traditional definitions of marriage and family rights, short of constitutional amendment.

48. *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring).

49. See *id.* at 1744; Courtney M. Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393 (2007).

50. *Dobbs*, 142 S. Ct. at 2248 n.22.

51. Spindelman, *Dobbs' Sex Equality Troubles*, *supra* note 31, at 23–56.

Conceptually, the vision here is that a new privileges or immunities jurisprudence could entail federal constitutional positions akin to those in old state “Defense of Marriage Amendments,” prohibiting same-sex marriage under state law without further constitutional reform.⁵² Should the current Court discover ancient marriage and family rights are protected under the privileges or immunities clause as fundamental rights, it might effectively declare the Constitution already contains a national defense of marriage rule inside the Fourteenth Amendment.

We must hope not, and must work to keep the Court from going that far. *Dobbs* aids the effort by insisting it is a limited ruling, even as it opens the door to these more dystopian possibilities.

What we are witnessing is a social conservative constitutional originalist counter-revolution taking shape. Its larger racialized, cisheteropatriarchal, and pro-religious conservative positions, visible in *Dobbs* and likely differently visible in the affirmative action cases and *303 Creative*, are powerfully aligning against queer, including intersectionally-defined queer interests, and others in traditionally subordinated communities.

Hard as it may be to take in that the Court could return LGBTQIA+ rights to politics, much less practically shut them out of politics as in the past, all this is, more or less, to recognize where the logics of the Court’s positions in *Dobbs* and cases it is about to decide may lead.

But once you recognize the Court’s cases involving different individual and civil rights are intersectionally connected, it is impossible to miss how *Dobbs* has already sent LGBTQIA+ rights back to politics, threatening to do so in a wider sense. Or to miss how this political return may actually be followed by other decisions involving abortion, race equality, and LGBTQIA+ rights in their traditional terms, all bridging an intersectional anti-politics that civil rights movements, including LGBTQIA+ movements, must individually and collectively face.

V. PREPARING FOR WHAT’S AHEAD

Given what has already happened at the Court and what is likely to transpire next, and what could transpire after that, LGBTQIA+ communities, with others, must be preparing for how to operate in a newly emerging constitutional, legal, and political landscape, one that bears resemblances to those from the lived past.

This is the inevitably intersectional situation and struggle that LGBTQIA+ communities are enmeshed in. How can we preserve the new

52. See, e.g., Ohio Defense of Marriage Amendment (DOMA), OHIO CONST. art. XV, § 11, held unconstitutional by *Obergefell v. Hodges*, 576 U.S. 644 (2015).

forms of LGBTQIA+ politics that have taken us back, so powerfully, to the remarkable dreams of freedom, equality, liberation, and to the new ways of being, living, and loving that our queer ancestors and elders did so much to achieve? Theirs is the legacy we may and perhaps must now build on, even as we come to terms with how we have not all benefitted from that legacy equitably in our lives.

The work ahead is weighty. How weighty it is too soon to say. Given what we are talking about is the roll-back of individual and collective liberty and equality and freedom in a wide sense, it is understandable to anticipate that the days ahead may be filled with pessimism, gloom, and even, at times, a sense of hopeless impossibility.

Here, too, the new LGBTQIA+ politics, meaningfully driven by the work of queer Black and trans people, have resources to offer, grounded in individual and community-based practices of solidarity, hope, joy, and love, developed amidst ongoing political situations that have broadly opposed, and nowhere come close to affirming, queer Black and trans peoples' rights to liberty, equality, and flourishing.⁵³ As practices, and as politics, the queer work of solidarity, hope, joy, and love can at times be more arduous than they may initially sound, if also distinctively important as life-defining, life-sustaining, and world-changing undertakings, as their successes in helping transform LGBTQIA+ politics at scale begin to suggest.

In these directions, I close with jay dodd's "Imprecatory Prayer to the Transcestors."⁵⁴ The prayer honors the lives and knowledges of people many of us do not yet know about, but should, as part of our shared and ongoing telling of, and naming the names of, queer history. dodd's prayer invites reflection on the worlds and the dreams of trans ancestors and elders who have guided us here, and where, individually and collectively, we—a new and different "we" than has long defined the public face of LGBTQIA+ life—may choose to go next.

The prayer:

*Trans Ancestors & Elders who have guided us here:
We honor your legacy with new celebrations.*

53. See generally, e.g., Bernadette Marie Calafell, *Narrative Authority, Theory in the Flesh, and the Fight Over The Death and Life of Marsha P. Johnson*, 6 QED: A JOURNAL IN GLBTQ WORLDMAKING 26, 28-36 (2019).

54. TRANS LIVES EXIST IN THE FUTURE 23 (Nov. 2020), <https://transakcija.si/wp-content/uploads/2020/11/TDOR-2020-Zine.pdf>. A reading of the prayer is available at <https://soundcloud.com/user-830244714/jayy-dodd-imprecatory-prayer-to-the-trancestors> (last visited May 22, 2023).

May our bodies persist, let them shine whole & well.
May our minds calibrate to the call of the universe.

Let our protest songs transfigure to peace hymns.
Let our cultural knowledge produce nourishment.

May our homes bustle warm with abundant love.
May our communities flourish despite borders.

Let our love quake open any lingering shackle.
Let our joy obliterate any festering contempt.

As we bind each other closer,
we manifest futures more possible.

Amen.