After *Dobbs*: Can *Obergefell* Survive?

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***E.H.R.L.R.** --- *Abstract*

The majority judgment of the United States Supreme Court in Dobbs, State Health Officer of the Mississippi Department of Health et al v Jackson Women's Health Organisation et al. has returned virtually unfettered control over the regulation of abortion provision to the States. The majority judgment has also forcefully stated that this conclusion has no relevance to other landmark 'liberal' decisions, especially recognition of a Fourteenth Amendment liberty right enabling same gender persons to effect a valid marriage with each other. This paper questions both the doctrinal defensibility and the bona fides of that proposition and suggests that on both grounds the majority's assertion is distinctly unconvincing.

Introduction [A heading]

The United States Supreme Court judgment in *Dobbs, State Health Officer of the Mississippi Department of Health et al v Jackson Women's Health Organisation et a.*[1] has seemingly taken the Court into another crisis of legitimacy akin to those attending its treatment of Roosevelt's new deal legislation in the 1930s and its racial desegregation decisions in the 1950s. *Dobbs* initially began life as a narrowly focused challenge to the constitutionality of a Mississippi statute which prohibited performance of abortions on foetuses beyond 15 weeks gestational age.[2] But the case was eventually argued before the Supreme Court on a much broader basis;

[1] Argued 1 December 2012; judgment delivered 24 June 2022. References to *Dobb*s are from the slip opinion at 19-1392 Dobbs v. Jackson Women's Health Organization (06/24/2022) (supremecourt.gov). The slip opinion paginates its headnote and each individual judgment separately from p1, so references here are given as *Dobbs*, Majority, 7; *Dobbs*, Roberts, 3 etc.
[2] Enacted in 2018 and found at Title 41 of Chapter 41 of the Mississippi Code.

namely should *Roe v Wade*[3] and *Planned Parenthood of South Eastern Pennsylvania v Casey*[4] be overruled, with the result that thereafter the regulation of abortion should be reserved to the lawmaking processes of the various States subject only to rational basis review rather than the much more exacting strict scrutiny standard applicable to State interference with a Fourteenth Amendment 'liberty' entitlement.

Five members of the Court answered 'Yes' to that question in a majority opinion authored by Alito J.[5] *Dobbs* therefore opens the door for State legislatures to restrict abortion availability in their jurisdictions almost to vanishing point. *Dobbs* raises no obvious barrier to State laws preventing abortion at any point after conception.[6] Laws prohibiting chemically as well as surgically effected abortions will surely also be upheld by the current Court. One can also envisage that some States will embroil the courts in arguments as to whether they can ban use of the morning after pill, which can have the effect both of preventing and terminating pregnancy;[7] and it will surely not be long before we see pro-life activists in States which favour an expansive abortion regime seeking to establish that a foetus possesses Fourteenth Amendment rights which require, rather than just empower, States to permit abortion only in very limited circumstances.

Widespread concern has also been expressed as to the implications that *Dobbs* might have for other 'landmark' 'liberal' judgments.[8] The cases which have garnered most attention are *Obergefell v Hodges*[9] (2015), which forbade States from refusing to recognise marriages between same sex mentally competent adults; *Lawrence v Texas*[10] (2003), which prevented States from criminalising sexual activity conducted in private between consenting adults; and *Griswold v Connecticut and Eisenstadt v Baird*[11] (1965 and 1972), which prohibit States from not allowing adult couples to use contraception.

This article evaluates the credibility of those concerns in respect of *Obergefell*. It does so on the assumption (by no means a strong one) that the legal reasoning deployed by the *Dobbs* majority was offered in good faith and provides an authoritative template against which to measure the defensibility of the judgment in *Obergefell*. The first issue to address therefore is

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[3] 410 U.S. 113 (1973).

[4] 505 U.S. 883 (1992).

[5] Alito was a George W Bush nominee in 2006. The other four being Gorsuch (Trump 2017), Kavanaugh (Trump 2018), and Coney Barrett (Trump 2019).

[6] Rational basis review is akin to *Wednesbury* unreasonableness in its core sense. Its quantitative significance as a restraint on State power is minimal. It might for example require exceptions in such laws for circumstances where continuing the pregnancy presents a substantial threat to the pregnant person's life or would seriously jeopardise her own health, or where the pregnant woman became pregnant as a result of a crime of which she was the victim (rape and incest being the obvious examples). It is difficult to envisage rational basis review sustaining other restrictions.

[7] Mayo Clinic, Morning After Pill; Morning-after pill - Mayo Clinic.

[8] For example S Gilles, "Dobbs, Obergefell and the 'Critical Moral Question Posed by Abortion" (2022) 6 July SCOTUSblog; Dobbs, Obergefell, and "the critical moral question posed by abortion" - SCOTUSblog: E. Larson and E. Kinery, "Same Sex Marriage, Contraception at Risk After Roe Ruling" (2022) 24 June *Bloomberg Law;* Same-Sex Marriage, Contraception at Risk After Roe Ruling (3) (bloomberglaw.com):

[9] 576 U.S. 644 (2015). For analysis see I. Loveland, "A Right to Engage in Same Sex Marriage in the United States?' [2104] E.H.R.L.R. 10; 'Liberty, Equality and the Right to Marry under the Fourteenth Amendment" (2017) 6 British Journal of American Legal *Studies* 96.

[10] (2003) 539 U.S. 558.

[11] 381 U.S. 479 (1965): 405 U.S. 438 (1972).

to assess the basis for the *Dobbs* majority's conclusion that *Roe* and *Casey* should be overruled. The second part of the paper then transposes the reasoning underpinning that conclusion to explore the way in which the *Dobbs* majority would likely treat the question that arose in *Obergefell* as and when that question comes before the Court once again.

The *Dobbs* methodology [A heading]

Simply stated, *Roe* had held that a pregnancy was divisible into three discrete trimesters, during the course of which State capacity to regulate abortion gradually increased. There is no express textual basis within the Constitution identifying abortion as a positive right, nor relatedly, specifying that a State cannot prohibit the practice. The *Roe* majority judgment found/created such constraints on State power in one or two or more of a rather hotch-potch collection of implied constitutional sources. They might be inherent in the liberty clause of the Fourteenth per se, they might be First or Fourth Amendment values incorporated against the States through the Fourteenth, or that they might lie within the Ninth. Insofar as there was judicial support for this conclusion, it was found in a similarly hotch-potch collection of authorities which upheld Fourteenth Amendment 'liberty' rights in relation to political questions sitting at some (and often a very considerable) distance from abortion.[12]

The judgment provoked fierce and widespread criticism not simply because of its substantive impact on what was then as now a bitterly divisive political question, but also because the imprecise basis of the reasoning might credibly be seen as involving the Court stepping inappropriately into the realm of policymaking rather than adjudication.[13] *Roe* certainly did not settle the abortion controversy. Rather , in an early and continuing example of legislative and judicial dialogue about the boundaries of constitutional authority, it provoked a strong and constant stream of State legislative initiatives which, with varying degrees of success before the Court, explored what scope *Roe* provided for the imposition of new abortion restrictions.[14]

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[12] *Meyer v. Nebraska* 262 US 390 (1923) preventing States from forbidding parents to provide their children with German language tuition; *Pierce v. Society of Sisters* 268 US 510 (1925) forbidding States from requiring parents to educate their children at State schools*; Skinner v. Oklahoma,* 316 U.S. 535 (1942) prohibiting male sterilisation as criminal punishment*; Griswold v. Connecticut* 381 U.S. 479 (1965); preventing States from criminalising contraceptive use of contraception by married couples: *Eisenstadt v Baird* 405 U.S. 438 (1972) extending *Griswold* to non-married people*;* and *Loving v. Virginia* 388 US 1 (1967) denying States the power to prohibit inter-racial marriage

[13] Alito J's opinion in *Dobbs* makes much of criticism of *Roe* from 'liberal' quarters, citing especially (at 2 and 3 fn.4) J. Ely "The Wages of Crying Wolf: A Comment on Roe v. Wade" (1973) 82 Yale Law Journal 920: L. Tribe "Foreword: Toward a Model of Roles in the Due Process of Life and Law" (1973) 87 Harvard Law Review 197: R. Bader Ginsburg, "Speaking in a Judicial Voice", (1992) 67 New York University Law Review 1208.

[14] These proposed restrictions were many and varied. In *Akron v Centre for Reproductive Health* 462 U.S. 416 (1983) the contested State law required post-12 week abortions to be conducted in hospitals rather than specialised abortion clinics, that unmarried minors have parental consent, that a minimum 24 hour period had to expire between the pregnant person arranging the abortion and actually having it, and that foetal remains be disposed of in a 'humane' manner. A 5-4 majority invalidated all those provisions. In contrast in *Webster v Reproductive Health Services* a 5-4 majority upheld a Missouri statue which forbade public sector employees from performing or assisting in performing an abortion unless necessary to save the life of the pregnant person, of from counselling or encouraging a woman to do so (the

Some twenty years later in *Planned Parenthood of South East Pennsylvania v Casey*[15] only two members of a very differently composed Court were willing to uphold *Roe's* result and reasoning.[16] Three other judges[17] voiced considerable reservations about *Roe's* reasoning, but declined expressly to overrule it for *stare decisis* reasons. The various bases for that conclusion were said to lie in four key factors which the Court should evaluate when deciding if one of its precedents should be overruled. These were respectively whether the impugned judgment was in practice unenforceable; whether the judgment had fostered such significant reliance in people's behaviour that its reversal would be inequitable; whether the precedent was simply a remnant of abandoned doctrine; and whether the judgment had been overtaken by changing social, economic or cultural circumstances. O'Connor, Kennedy and Souter JJ were not persuaded that any of these matters pointed towards *Roe* being overruled, notwithstanding its problematic legal base.

These judges nonetheless modified *Roe's* ratio quite substantially, replacing the trimester approach with the principle that States could not place 'undue obstacles' in the way of people seeking an abortion at the pre-viability stage of the pregnancy,[18] and indicating that the sole legal root for the judicial regulation of State power on this issue lay in the Fourteenth's liberty proviso. *Casey* may not have overruled *Roe* in form, but certainly did so in substance.

Those members of the *Casey* Court had offered the palpably naïve hope that their judgment would definitively settle the abortion question. It manifestly did not and could not do any such thing.[19] Many States continued to dream up all manner of new legislative initiatives testing what types of obstacles to abortion might not be 'undue' in the *Casey* sense,[20] with the result that the Court has been constantly embroiled ever since in an un-ending tangle of abortion litigation.

The way in which the first question before the Court was framed by the *Dobbs* majority was whether *Roe* and *Casey* were correct in concluding that the Fourteenth's liberty component placed any restrictions (beyond rational basis review) on State power to regulate abortion? The secondary question was if *Roe* and *Casey* were not correct, would it nonetheless be improper to overrule them for *stare decisis* reasons?

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point being to prevent abortions being provided by liberally-inclined local government bodies within overall conservative States); and which required physicians to conduct viability tests if the pregnancy might have lasted for more than 20 weeks.

[15] 505 U.S. 833 (1992). The Pennsylvania legislation included inter alia provisions that the pregnant person certify that she had been provided with and read material describing the procedure's mechanics and the foetus' likely age, that persons under 18 years old have parental consent for the abortion and that married women notify their husband of their intention to have an abortion. For analysis see M. Moses, "Casey and Is Impact on Abortion Regulation" (2004) 31 Fordham Urban Law Journal 805: C. Whitman, "Looking Back on Planned parenthood v Casey" (2002) 100 Michigan Law Review 1980: I. Loveland, "Affirming Roe v Wade? Planned Parenthood v Casey" (1993) Public Law 14.

[16] Blackmun J (Nixon, 1970) was the only remaining member of the *Roe* majority. John Paul Stevens (Ford, 1975) was the second supportive justice.

[17] O'Connor (Reagan, 1981), Kennedy (Reagan, 1987) and Souter (Bush, 1990) JJ.

[18] The opinion offered no clear rule as to when viability occurred. At that time viability (assuming the availability of good medical care) would have been around 28 weeks.

[19] For a curious argument that it did see N. Devins, "How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars" (2009) 118 Yale Law Journal 1318.

[20] For example *Whole Woman's Health v Hellersted* 579 U.S. 582 (2016) concerning Texas legislation imposing stringent certification criteria on abortion providers: and similar Louisiana legislation in *June Medical services, LLC v Russo* 591 U.S. 1101 (2020).

On the correct test for 'finding' an atextual liberty right. [B heading]

One cannot dispute Alito J's starting premise; that 'abortion' is not expressly referred to either in the Fourteenth or anywhere else in the Constitution. He is on similarly firm linguistic ground in noting that there is no explicit reference either to privacy as an umbrella right under which abortion rights might be found. The *Dobbs* majority is not suggesting that atextual constitutional entitlements do not exist. The Court has long proceeded on the basis that – as it was put in *Palko v Connecticut* in 1937[21] - such entitlements could be part of a broader concept of 'ordered liberty' implicit within the Fourteenth Amendment. Alito J's consequential assertion in *Dobbs* is that for the Court to find an atextual 'liberty' entitlement within the Fourteenth the judges must be able to identify a (very?) widespread and (very?) longstanding practice within the States' respective laws of either expressly recognising or not expressly denying an entitlement to the claimed liberty value.[22]

Alito J invokes three recent Supreme Court judgments as the basis for this methodological requirement; *Timbs v Indiana*,[23] *McDonald v Chicago*,[24] and *Glucksberg v Washington*.[25] *Timbs* was a unanimous judgment, authored by Bader Ginsburg J, which invalidated an Indiana forfeiture law applied to convicted drug dealers on the basis that it amounted to a cruel and unusual punishment contrary to the Eighth Amendment which was incorporated against the States through the liberty clause of the Fourteenth. The relevant tests were whether the claimed right/restriction was "fundamental to our scheme of ordered liberty" and (and this the test which Alito J most strongly endorsed in *Dobbs*) whether the claimed right/restriction was "deeply rooted in this nation's history and tradition".[26] The principal methodological basis for answering that question seemed clear: the Court should ask itself how widespread and how longstanding State recognition of the claimed entitlement had been. In *Timbs* the answer was not in doubt:

> "In 1787, the constitutions of eight States—accounting for 70% of the U. S. population—forbade excessive fines. …. An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines….
> Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality".[27]

The reading given to this principle by Alito J in *Dobbs* appears to be that if a significant number of States have not recognised such an entitlement then it cannot be a 'liberty' value. In such circumstances for the Court to recognise such a right would improperly usurp State political autonomy. Conversely, if the (overwhelming?) majority of States have respected the

[21] 302 U.S. 319 (1937).
[22] The (very?) qualifier is added because Alito J did not specify how many States and how many years were necessary.
[23] 586 U.S. --- (2019); slip opinion at 17-1091 Timbs v. Indiana (02/20/2019) (supremecourt.gov)
[24] 561 U.S. 742 (2010).
[25] 521 U.S.702 (1997).
[26] *Timbs*, 3 and repeated at 7.
[27] *Timbs*, 5-6.

entitlement for a very long time then the Court would not be overstepping the boundaries of its proper constitutional role by imposing recognition of that entitlement on States which have thus far chosen not to respect it. But 'liberty' cannot properly be invoked by the Court to safeguard entitlements which do not attract such expansive levels of political approval.

On State historical practice and judicial authority [C heading]

The *Dobbs* majority offers a painstakingly thorough historical survey of the abortion law landscape in the United States, detailed in two separate appendices. The crux of that survey, which seems irrefutable as a statement of historical fact, is that:

"By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother." 410 U. S., at 139….
This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. See id., at 118, and n. 2 (listing States).
The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions….. Respondents and their amici have no persuasive answer to this historical evidence".[28]

The obvious historical conclusion therefore was that the 'right' identified in *Roe* or *Casey* was not "deeply rooted in this nation's history and tradition. The legal consequence of that historical conclusion was that the 'right' could not be an element of Fourteenth Amendment liberty.

Alito J sees no credible scope for rebutting that conclusion in the line of authority relied upon in *Roe* and *Casey*. That case law is dismissed as irrelevant to the abortion issue.[29] The point Alito J seems to be making here is that the absence of any direct authority pre-*Roe* to support the notion of abortion rights is a further error of reasoning on the *Roe* majority's part which exacerbates its already grievous failure to pay proper attention to State historical practice.

These shortcomings are then further compounded by what the *Dobbs* majority styles the 'legislative' character of the solution that *Roe* offered as a solution to the problem before it:

"Dividing pregnancy into three trimesters, the Court imposed special rules for each. During the first trimester, the Court announced, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." Id., at 164. After that point, a State's interest in regulating abortion for the sake of a woman's health became compelling, and accordingly, a State could "regulate the abortion procedure in ways that are reasonably related to maternal health." Ibid. Finally, in "the stage subsequent to viability," which in 1973 roughly coincided with the beginning of the third trimester, the State's interest in "the potentiality of human life" became compelling, and therefore a State could "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Id., at 164–165".[30]

On *stare decisis* [B heading]

The conclusion to which this methodology leads the *Dobbs* majority is not simply that *Roe* (and *Casey*) was (were) wrongly decided, but that it was (they were) '*egregiously wrong'*. The attribution of *extreme error* to the *Roe* majority opinion becomes significant when Alito J

[28] *Dobbs*, Alito 24-25.
[29] Id, 31, 48-49.
[30] Id, 46.

addresses the *stare decisis* issue. Alito J does not reject the proposition that there may be circumstances when the Court should uphold what it might consider an incorrectly decided precedent; when the various factors identified in *Casey* have such significant weight that, albeit reluctantly, judges will uphold a conclusion which they would have decided quite differently if it were before them for the first time. He does, however, put his own spin on this analysis.

The 'authorities' which Alito J invokes to explain the test which the Court should apply are limited to two recent decisions, one a concurrence by Kavanaugh J.[31] This is perhaps not the weightiest of sources, but Alito does not seem perturbed by that:

"overruling a precedent is a serious matter. It is not a step that should be taken lightly…..

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance".[32]

All of these factors are very much a moveable feast, an imprecision which enables the *Dobbs* majority to trivialise those *stare decisis* factors considered so significant by the O'Connor/Kennedy/Souter JJ troika in *Casey* as reasons for not (formally) overruling *Roe*, while simultaneously finding the weight of the *Roe* error and the weakness of its underlying reasoning to be overwhelming.

For Alito J and his *Dobbs* majority, *Roe* is evidently such a wrong decision that it should be exhibited alongside *Plessy v Ferguson*[33] in the Court's Hall of Shame.[34] This is in part because it was an exercise in "raw judicial power"[35] which improperly usurped State political authority, and in part because its reasoning "stood on exceptionally weak grounds".[36] The *Dobbs* majority also considers that both *Roe* and *Casey* offered 'unworkable' standards as their respective evaluative criteria were very ambiguous; *Casey's* test of 'an undue burden" provided no meaningful guidance for the exercise of legislative authority and has triggered a constant stream of litigation which has itself produced contradictory decisions within the lower federal courts.[37] Nor did Alito J regard *Roe* and *Casey* as having created any substantial reliance interests; any suggestion that many people had organised their sexual conduct on the basis that abortions would be available if contraception had failed them were simply too "intangible"[38] to be evaluated. The majority also dismissed any suggestions that reversing *Roe* and *Casey*

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[31] Id, 43. The cases being *Janus v. State, County, and Municipal Employees* 585 U. S. ___, ___–___ (2018) (slip op., at 34–35); *Ramos v. Louisiana* 590 U. S. ___, ___–___ (2020) (Kavanaugh J concurring, slip op., at 7–9).

[32] *Dobbs*, Alito 43.

[33] 163 U.S. 537 (1896). It evidently does not occur to Alito J that *Plessy* subjected people to State imposed oppression while *Roe* freed them from it. Nor that on the key *Dobbs* test – ie widespread and longstanding State acceptance of a claimed liberty right – *Plessy* was manifestly not an erroneous judgment, given that many States then operated apartheid like segregation rules respecting access to both public and private sector services. See the seminal analysis in C. Vann Woodward *The Strange Career of Jim Crow* (New York: OUP, 1966) ch. 3.

[34] *Dobbs*, Alito 43-44.

[35] *Dobbs*, Alito 44. The phrase is drawn from White J's dissent in *Roe* (410 U.S. 113, 222 (1973)).

[36] *Dobbs*, Alito 45.

[37] Id, 59-62.

[38] Id, 64.

might undermine generalised respect for the rule of law. Such considerations could not be well-founded in respect of so poorly founded a judgment. [39]

Alito's assertion in *Dobbs* as to its impact on other 'liberty' decisions [A heading]

Alito J states repeatedly that *Dobbs'* overruling of *Roe* and *Casey* has no implications at all for the continued validity of *Obergefell*, *Lawrence* and *Griswold*. This is because he says abortion concerns a unique (and uniquely grave) moral issue which simply does not arise in respect of same sex marriage, same sex sexual relations, or contraception. The unique moral issue is that abortion is necessarily and invariably intended to end a potential human life:

"*Roe's* defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."[40]

This assertion – assuming it to have been honestly made - makes very little sense. The destructive criticism which the *Dobb*s majority derives from *Timbs* and *MacDonald* and then levels at *Roe* and *Casey* is concerned with a question of general application – namely what is the legitimate methodology to adopt when deciding if a claimed 'right' falls within the Fourteenth's notion of 'ordered liberty'. For the *Dobbs* majority, the problem besetting *Roe* and *Casey*, the reason that they are 'egregiously wrong', the justification for them being overruled, is that they accorded 'ordered liberty' status to a moral principle that had no grounding in political history or in judicial authority. This is not a particularly subtle or challenging point to grasp. It is difficult to believe (and here one runs into questions concerning judicial good faith) that Alito J. and all[41] of his *Dobbs* majority colleagues were not alert to it. And this is the point that goes to the very heart of *Obergefell's* continued survival as good law.

Obergefell [B heading]

The *Obergefell* Court divided 5-4, the majority supporting the proposition that the liberty clause of the Fourteenth prevents States from denying that mentally competent same sex adults could effect a valid marriage with each other.[42] This presumed liberty could not be rooted in

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[39] Id, 66-69.

[40] *Dobbs*, Majority 5, 32, 38, 47, 49 and 71. Alito J does not acknowledge that compelling a person to continue an unwanted pregnancy imposes a 'unique' burden on the pregnant person.

[41] Clarence Thomas is a candid exception on this point. See further below.

[42] The majority comprised Ginsburg (Clinton, 1993), Breyer (Clinton, 1994), Sotomayer (Obama, 2009) and Kagan (Obama, 2010) JJ. Scalia, Thomas and Alito JJ and Roberts CJ dissented. Much criticism of the judgment has focused on its evident elevation of marriage as a desirable social construct above and beyond other forms of cohabitation: see for example M. Murray, "Obergefell v. Hodges and Non-Marriage Inequality" (2016) 104 California Law Review 1207: G. Strauss, "What's Wrong with Obergefell?" (2018) 40 Cardozo Law Review 631. For a more narrowly doctrinal analysis of the judgments see inter alia D. Herman "Extending the Fundamental Right of Marriage to Same-Sex Couples: the United States Supreme Court Decision in Obergefell v Hodges" (2016) 49 Indiana Law Review 367: I.

widespread and longstanding State practice. Prior to 2003 *every single State* limited marriage to opposite gender couples.

Faced with such an unreceptive State political environment, the *Obergefell* majority relied in part on several previous authorities which had invalidated State restrictions on marriage. *Loving v Virginia*[43] quashed a Virginia law prohibiting inter-racial marriage; *Zablocki v Redhail*[44] overturned Wisconsin legislation which prevented parents who had defaulted on child support payments from marrying; *Turner v Saffley*[45] struck down a Missouri law preventing prisoners from getting married. All three authorities identified marriage as a Fourteenth liberty entitlement: none broached the question of same gender marriage. Some weight was also given to the then recent decision in *Lawrence v Texas*,[46] which prevented States from criminalising (opposite and same sex sexual relations undertaken in private between consenting adults, and which was viewed by the *Obergefell* majority as indicative of social trends in which the previous legal disadvantages and moral stigma attached to being gay had been broadly rejected. However the primary basis of the majority opinion was that the purpose and nature of marriage in early twenty-first America had evolved to the point where it was no longer engaged in primarily for the purposes of procreation and child rearing, but rather served such purposes as a desire for intimate companionship and financial co-dependence, purposes as valid between same sex couples as between a man and woman. In that context, to deny marriage to same sex couples was to perpetuate a denial of their dignity and autonomy; in effect to impose a stigma which had become morally redundant.

There is an obvious paradox in play here. How could sexual orientation-based stigmatisation have become morally redundant if the (overwhelming) majority of the country 50 State polities were content to exclude same sex couples from their marriage laws?

In Alito J's view, the Obergefell majority had adopted not just an intrinsically illogical, but wholly illegitimate methodology, which methodology had led them to a wholly illegitimate result. If one's concern is with the defensibility of judicial methodology, it is difficult see any distinction between Alito J's position in *Dobbs* and his dissent in *Obergefell*, where he argued:[47]

"…[T]he Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U. S. 701, 720–721 (1997). And it is beyond dispute that the right to same-sex marriage is not among those rights. See *United States v. Windsor*, 570 U. S. ___, ___ (2013) (Alito, J., dissenting) (slip op., at 7). Indeed:

'In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution. *See Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N. E. 2d 941…..'.

"What [those arguing in favor of a constitutional right to same sex marriage] seek, therefore, is not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative

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Loveland, "Liberty, Equality and the Right to Marry under the Fourteenth Amendment" (2017) 6 British Journal of American Legal Studies 96.

[43] 388 U.S. 1 (1967).

[44] 434 U.S. 374 (1978).

[45] 482 U.S. 78 (1987).

[46] 539 U.S. 558 (2003). The majority also invoked *Romer v Evans* 517 U.S. 620 (1996), invalidating a Colorado constitutional amendment which forbade any public authority within the State from adopting sexual orientation as a prohibited basis for discrimination in the provision of public services. See R. Wintemute "A Fundamental Right To Be Gay in the USA? Not Yet" [1997] Public Law 420.

[47] *Obergefell*, Alito, 2.

body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility." *United States v. Windsor*, 570 U. S. ___, ___ (2013) (Alito, J., dissenting) (slip op., at 7–8) (footnote omitted)."

These claims regarding the lack of any historical grounding for a same sex marriage 'right' in the United Sates cannot seriously be contested. Nor does the *Obergefell* majority opinion garner any legitimacy in Alito J's analysis from the fact that same sex marriage does not raise the supposedly (for doctrinal purposes) 'unique' moral issue presented by abortion.

Alito J's dissent in *Obergefell* does not in terms characterise the majority opinion as 'egregiously wrong', but does describe it in several different and similarly fierce ways. So, "five unelected judges [have imposed] their personal vision of liberty upon the American people";[48] the majority view is: "far beyond the outer reaches of this Court's authority";[49] "Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed"[50]; the judgment: "evidences…the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation".[51]

As to finding judicial support for this view, Alito J adopted the admirably concise if rather quaint technique of relying in the main on just one authority: that being his evidently unassailably correct dissent in *Windsor*.[52] Alito J gives not the slightest indication in his *Obergefell* dissent that he would in future sustain the decision for *stare decisis* reasons notwithstanding his own view that the majority judgment was incorrect.

That all States now (post-*Obergefell*) recognise same-sex marriage obviously has no bearing on Alito's methodological argument, as that situation has arisen (for many States) as the result of national judicial fiat rather than State political choice. And even if the overwhelming majority or even all States had voluntarily taken that step after an alternative *Obergefell* had not required them to do so, that new norm would fall very far short in terms of longevity of what would be required to satisfy Alito's test for 'ordered liberty'.

Alito does not acknowledge in *Dobbs* that he dissented (so forcefully) in *Obergefell*. But unless Alito J has now become seized of the opinion that his dissent in *Obergefell* was wrong, or that *stare decisis* considerations requiring him to uphold that wrong decision, his assertion in *Dobbs* that *Obergefell* remains valid is – frankly – dishonest. We are here in the realm of Saturday morning kids' cinema serials, in which our hero (*Obergefell*) has been tied up in tightly fastened methodological chains and pinned to doctrinal tracks down which an overruling express train is hurtling at speed. But, dear reader, never fear, for with one jurisprudential bound - 'abortion is unique' – our protagonist is freed from that seemingly inescapable constitutional peril. The proposition is, if not dishonest, then poorly thought through. Neither quality is particularly desirable in a Supreme Court judge.

Alito J's opinion in *Dobbs* also omits to mention his 2020 concurrence (with Thomas J) in *Davis v Ermold et al*:[53]

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[48] Id, 2.
[49] Id, 5.
[50] Id, 7.
[51] Id, 8.
[52] From which he quotes at length at id, 2-3 and 5-6. For analysis of *Windsor*, in which the majority held that the federal government could not deny the validity of same sex marriages for Fifth Amendment liberty reasons, see I. Loveland, "A Right to Engage in Same Sex Marriage in the United States?' [2104] E.H.R.L.R 10.
[53] 19-926 Davis v. Ermold (10/05/2020) (supremecourt.gov); 5 October 2020; 505 U.S. --- (2020). On *Davis* (Davis being a Kentucky State official who refused to issue marriage licences to same sex couples) see A. Blinder and R. Perez-Pena "Kentucky Clerk Denies Same-Sex Marriage Licences, Defying Court" (2015) 1 September *New York Times*: "Kim Davis,

"In *Obergefell v. Hodges*, 576 U. S. 644 (2015), the Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text. ….
As a result of this Court's alteration of the Constitution, Davis found herself faced with a choice between her religious beliefs and her job…. Davis may have been one of the first victims of this Court's cavalier treatment of religion in its *Obergefell* decision, but she will not be the last…
It would be one thing if recognition for same-sex marriage had been debated and adopted through the democratic process, with the people deciding not to provide statutory protections for religious liberty under state law. But it is quite another when the Court forces that choice upon society through its creation of atextual constitutional rights….".[54]

Another notable omission from Alito J's *Dobbs* opinion is any reference to his dissent in *Bostock v Clayton County, Georgia*.[55] The majority in *Bostock* accepted that sexual orientation was (impliedly) a protected characteristic within the Civil Rights Act 1964 even though the Act offered no express textual basis for that conclusion.[56] The majority's reasoning was premised in essence on an 'always speaking' approach to statutory interpretation. The prohibition of 'sex' discrimination in the 1964 Act would not have encompassed sexual orientation in 1964, but 50 years later societal attitudes towards sexual orientation had changed so significantly that such a reading of the Act was now quite appropriate.[57]

The substance and style of Alito's dissent in *Bostock* mirrors his methodological position in *Obergefell* and *Dobbs*. The addition of sexual orientation as a protected category within the 1964 Act was a matter for Congress, where such bills had been promoted but never passed. The Act meant now what it meant in 1964.[58] For Alito J, the majority had 'usurped the constitutional authority' of Congress and the President; its method and conclusion were "preposterous":

"There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive…..
A more brazen abuse of our authority to interpret statutes is hard to recall."[59]

The majority's conclusion was, in other words, 'egregiously wrong'.

One might be taking legal naivety to remarkable extremes to think that Alito J would not be party to overruling *Obergefell* as soon as the opportunity presents itself. But what of the other members of the *Dobbs* majority?

Released From Kentucky Jail, Won't Say if She Will Keep Defying Court" (2015) 8 September *New York Times*:
U.S. judge rules against Kentucky clerk who denied same-sex marriage licenses | Reuters.

[54] *Obergefell*, Alito, 2-3.

[55] Slip opinion at 17-1618 Bostock v. Clayton County (06/15/2020) (supremecourt.gov); 15 June (2020). Kavanaugh and Thomas JJ also dissented.

[56] On the Act's origins and initial application see *Heart of Atlanta Motel v United States* 379 U.S. (1964): *Katzenbach v McLung* 379 U.S. 294 (1964). The (6-3) *Bostock* majority was Roberts CJ, Ginsberg, Breyer, Sotomayor, Kagan and Gorsuch JJ.

[57] See K. Carter "Questioning the Definition of Sex in Bostock v Clayton County, GA" 15 (2020) *Duke Journal of Constitutional Law and Public Policy Sidebar* 59: N. Berman and G. Krishnamurthi, "Bostock Was Bogus: Textualism, Pluralism, and Title VII' (2021) 97 Notre Dame Law Review 67.

[58] "[T[the question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed. The question is whether Congress did that in 1964. It indisputably did not"; *Bostock*, Alito 4.

[59] *Bostock*, Alito 1.

Clarence Thomas, now one of the Court's elder statesman (in terms of chronological longevity if not juridic brilliance) is a long-standing and inveterate opponent of all substantive due process jurisprudence, of which *Roe* and *Obergefell* are among the primest of examples. His dissent in *Obergefell* reiterates this position with perfect clarity, and makes it inconceivable to think that he will not vote to reverse *Obergefell* as soon as he is given the chance to do so:

"I have elsewhere explained the dangerous fiction of treating the Due Process Clause as a font of substantive rights. McDonald v. Chicago, 561 U. S. 742, 811–812 (2010)…). It distorts the constitutional text, which guarantees only whatever "process" is "due" before a person is deprived of life, liberty, and property. U. S. Const., Amdt. 14, §1. Worse, it invites judges to do exactly what the majority has done here—"'roa[m] at large in the constitutional field' guided only by their personal views" as to the "'fundamental rights'" protected by that document. Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 953, 965 (1992) (Rehnquist, C. J., concurring in judgment in part and dissenting in part) (quoting Griswold v. Connecticut, 381 U. S. 479, 502 (1965) (Harlan, J., concurring in judgment)). By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority".[60]

Gorsuch, Kavanaugh and Coney-Barret JJ were appointed to the Court after *Obergefell* was decided, so in personal terms they have no inconvenient dissent to resile from if they too consider that *Obergefell* remains in hearty constitutional health.[61] But they have all joined the *Dobbs* majority opinion without equivocation. They all accept that *Roe* and *Casey* were 'egregiously wrong' on the basis of their methodological shortcomings. And those shortcomings afflict *Obergefell* just as much as *Roe*.

Gorsuch J however wrote the majority opinion in *Bostock*, in effect endorsing a judicial methodology with obvious similarities to the one he joined in castigating so vehemently in *Dobbs*. That apparent circle may perhaps be squared by noting that *Bostock* involved statutory rather than constitutional interpretation and concerned the power of Congress rather than of the States. If so, there is no good reason to think that Gorsuch J would not be standing four square behind Alito J when the *Dobbs* push comes to an *Obergefell* shove.

Kavanaugh J describes his concurrence in *Dobbs* as "additional" to Alito J's opinion. On *Obergefell* Kavanaugh says this:

"First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972); *Loving v. Virginia*, 388 U. S. 1 (1967); and *Obergefell v. Hodges*, 576 U. S. 644 (2015). I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents".[62]

Kavanaugh J does not in terms explain *why* this is the case; but if he is *emphasising* what the Court holds then the explanation must be that 'abortion is unique'.[63] The argument is no more persuasive when made by Kavanaugh J than when offered by Alito J.[64]

Coney-Barrett J did not draft a separate opinion in *Dobbs* and her appointment to the Court post-dates *Bostock*. Her views on *Obergefell* were raised repeatedly at her confirmation

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[60] *Obergefell*, Thomas, 2.

[61] Gorsuch and Kavanagh JJ did not join the Thomas J concurrence in *Davis*. Coney-Barrett J was not then on the Court.

[62] *Dobbs*, Kavanaugh, 10; original emphases.

63 He does not say that *Obergefel*l was correctly decided, nor that Alito J's dissent there was erroneous. At his confirmation hearings in 2018 Kavanaugh refused to offer any view on whether *Obergefell* was correctly decided; see E. Scott "In Kavanaugh's Non-Answer on Same-Sex Marriage, Many Heard a Troubling Response" (2018) 7 September *Washington Post.* The video clip is at Kavanaugh Refuses to Answer Questions on Obergefell - YouTube.

[64] Kavanaugh was also among the dissentients in *Bostock.*

hearings, but she declined to offer a clear opinion.[65] Coney-Barrett's personal politics and morality are very obviously closely aligned to the evangelical Christian right.[66] It may be that she can sever those personal predilections from her judicial role, but there does not appear to anything in her public or judicial record to suggest that she too would not align herself with Alito J and consider *Obergefell* 'egregiously wrong' and ripe for overruling.

Roberts CJ sits in a more complex constitutional position. He wrote a very forceful dissent in *Obergefell*, premised in essence on the *Dobbs* majority thesis, which categorised the majority judgment as:

"an extraordinary step…[F]or those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."[67]

Roberts CJ saw no basis in State practice for marriage being anything other than a male-female construct. The marriage case law relied on by the majority had no bearing on the spouses' gender identity. And it was simply not legitimate for a majority of the Court to fashion new fundamental rights from its own understanding of such amorphous phenomena as social trends.

However the Chief Justice did not join the *Dobbs* majority.[68] He offered instead what he describes as "a more measured course".[69] 'More puzzling' might be a better descriptor. Roberts CJ was content to discard *Roe's* trimester framework and *Casey's* concern with viability as the point when States might exercise significant control over the availability of abortions. This one might think is to overrule *Roe* and *Casey* in all but name, particularly when the alternative principle offered to regulate the issue was that:

"Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose – but need not extend further…".[70]

Roberts CJ considered *Roe* to be "seriously"[71] (although evidently not 'egregiously') wrong in adopting its trimester framework. This was taken from "thin air".[72] The viability line adopted

[65] The official Senate transcripts have yet to be published. A relevant exchange is at Amy Coney Barrett won't comment on gay marriage ruling - YouTube

[66] For a selection of (certainly partisan) analyses see D. Rosenblum "Amy Coney Barrett, LGBT Rights and Judicial Legitimacy" *Forbes* (2020) 24 October; Amy Coney Barrett, LGBT Rights and Judicial Legitimacy (forbes.com): M. Talbot "Amy Coney Barrett's Long Game" (2022) 7 February *The New Yorker*; Amy Coney Barrett's Long Game | The New Yorker: M. Lavietes "Explainer: How Trump's Supreme Court Nominee Applies the Law to LGBT" Reuters (2020) 19 October; Explainer: How Trump's Supreme Court nominee applies the law to LGBT+ rights | Reuters.

[67] *Obergefell*, Roberts, 2.

[68] He was part of the *Bostock* majority.

[69] *Dobbs*, Roberts 1.

[70] Id.

[71] Id.

[72] Id, 3.

in *Casey* was "conjure[d] up".[73] Such sentiments might be though to point very firmly in favour of joining the majority.

That Roberts CJ declined to do so seems to have been primarily because he disapproved of the way that the parties and interveners had concocted a 'gambit' to widen the argument before the Court from the narrow question of the compatibility of the Mississippi law with *Casey* with which the litigation began to the broad issue of overruling *Roe* and *Casey* entirely. This concern was conflated with a skimpily argued suggestion that there were good *stare decisis* reasons for not engaging with that broad argument:

> "The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case."[74]

The Chief Justice has told us in *Obergefell* that the majority decision there was (very) wrong. He has told us in *Dobbs* that he will uphold (very) wrong decisions if reversal would cause a 'serious jolt' to the legal system *and* a narrowing rather than reversal of the decision is both achievable and has been pleaded by the State. Those States seeking to reverse *Obergefell* would presumably be well-advised to approach the Court with a question framed in the broadest of terms. Given that the question is essentially just one of 'Can we restrict marriage to opposite gender couples? Yes or No?' that will likely not prove a difficult task.

If we take *Dobbs* at face value, it may be that the *stare decisis* factors which weighed so lightly in Alito J's scales when it came to overruling *Roe* and *Casey* will have greater weight in respect of *Obergefell*. There is manifestly nothing 'unworkable' about a law prohibiting States from restricting marriage to opposite sex couples. States do not have to grapple with the ambiguities of 'undue obstacles' to same sex marriage. 'Reliance' factors are also rather different. This is not a question of numbers; since *Obergefell* was decided there have been more abortions conducted than same sex marriages celebrated in the United States.[75] Abortion is a chronologically isolated event. Once an abortion has occurred or a pregnancy has concluded there is nothing left for State law to bite on. Marriage, in contrast, is an ongoing event until death or divorce do the spouses part. The couple's legal status is in long term constant interaction with myriad state laws. Reliance issues will have a permanent rather than transient character.

It also does not require a particularly vivid imagination to see that overruling *Obergefell* – even though it is on Alito J's reasoning 'egregiously wrong' – would not by any means resolve political controversy over same sex marriage even within the boundaries of individual States. It would seem a reasonably safe conclusion that even the *Dobbs* majority (Thomas J perhaps being an exception) would respect the text of Article 1 section 9, which places an explicit prohibition on State enactment of retrospective laws, and so prevents a State with a homophobic political culture from refusing to recognise same-sex marriages which have

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[73] Id.

[74] Id, 11.

[75] As of early 2021, some 570,00 same sex marriages had been concluded in the United States; United States Census Bureau, "Census Bureau Releases Report on Same Sex Couples" (2021); https://www.census.gov/newsroom/press-releases/2021/same-sex-couple-households.html. By late 2022 that figure had risen to some 650,000; R. Tumin,"Same Sex Household Couples in US Surpass One Million" (2002) 2 December *New York Times*; https://www.nytimes.com/2022/12/02/us/same-sex-households-census.html. Unsurprisingly, the national figures conceal very widespread State by State variations; L. Walker and D. Taylor for United States Census Bureau, "Same Sex Couple Households 2019" (2021) https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-005.pdf

already been undertaken in that State itself. The obvious problem that prospective effect opposite-sex-only marriage laws will create in States which enact them is one of equality (from such quantitatively significant issues as tax codes, inheritance laws and child custody provision to such esoteric matters as whether a spouse can be compelled to give evidence against the other spouse in legal proceedings).

A differentiated State legal landscape will also throw up controversy over whether such States would be obliged by the full faith and credit clause to recognise same sex marriages concluded in other States. As a practical matter, there are likely to be few same sex married couples who would want to move and set up home in a State with such laws, but the issue will have obvious attractions for test case strategy litigation initiated by same sex residents in those States who have left them briefly to marry elsewhere.

Conclusions [A heading]

In *Bostock*, Alito J's castigation of the majority's method and conclusion had included the accusation that the majority were being "deceptive".[76] The accusation was not a mere one word hyperbolic slip of the pen. Alito J has no reservations about branding the *Bostock* majority as dishonest:

"The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no-one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22(1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing".[77]

It is gratifying to see that Alito J regards honesty in a judgment – and presumably therefore in the characters of judges who draft it – as such an important constitutional principle. He manifestly does not 'own up' in *Dobbs* to having created any threat to *Obergefell's* continued vitality. We will likely not have long to wait to find out just how honest that position is.

We are perhaps fortunate in the context of the ECtHR's abortion and same sex marriage jurisprudence that questions of judicial integrity in a personal, political sense need not sit at the forefront of analyses of the current legal position. But irrespective of the individual moral bona fides of the *Dobbs* majority, it is difficult to dismiss suggestions that the *Dobbs* (majority) and *Obergefell* (minority) methodologies are perfectly credible exercises in constitutional law reasoning.

For good or ill, the ECtHR has rarely shown any interest in engaging at length and in depth with United States Supreme Court decisions as a source of persuasive inspiration as to the meaning of Articles of the Convention, but one can readily forsee that the *Dobbs* methodology might offer an attractive source of 'authority' for States who wish to forestall any further development in the ECtHR's thus far rather (with a small and large 'c') conservative timid jurisprudence in respect of same sex marriage. And, conversely, if Alito J and his colleagues manage to free themselves from the fetter Antonin Scalia's reputed refusal to accept that United States constitutional jurisprudence could ever have anything to learn, let alone borrow, from

[76] *Bostock*, Alito 1.
[77] Id, 3-4.

'foreign' courts,[78] that that ECtHR jurisprudence could reinforce the legitimacy of using *Dobbs* to overrule *Obergefell*.

Some ten years on, the ECtHR's conclusion in *Schalk and Kopf v Austria*[79] that neither art.12 nor art. 8 required Member States to recognise same sex marriages remains 'good' law in several senses. The first is purely formalistic in an intra-jurisdictional sense. The second has a more cross-jurisdictional and strategic dimension for those players in the United States constitutional arena who would like to see *Obergefell v Hodges* suffer the same fate as *Roe v Wade*.[80]

The crux of the ECtHR's reasoning in *Schalk* was that nothing remotely approaching a European consensus could be found in support of the proposition that either art.12 or art.8 required the Court to conclude that States were required make provision for same sex marriage. As of 2010:

> "No more than six out of 47 Convention States allow same-sex marriage….[T]he Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterated that it must not rush to substitute its own judgment in place of the national authorities, who are best placed to assess and respond to the needs of society".[81]

In subsequent case law,[82] the ECtHR has accepted that such a consensus now exists (more precisely one might say that it has identified a consistent trend towards the establishment of such a consensus) in respect of a requirement rooted in art.8 that States offer same sex couples some form of formal recognition of their unions, which recognition goes as least some (how far is not clear) distance towards providing benefits in terms of legal status[83] that approximate to those enjoyed by married couples. That trend has been continued in *Fedotova and Others v Russia.*[84] The ECtHR notes in *Fedotova* that the six same-sex marriages States of the *Schalk* 'era' has now grown to 18, a number which (given a membership of 46) falls far short of even

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[78] On Scalia's views on the use of comparative legal methodology, which is perhaps not as simplistically anti- as is commonly supposed, see M. Waters "Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue" (2005) 12 Tulsa Journal of Comparative and International Law 149.

[79] (30141/04) (2011) 53 E.H.R.R. 20. The judgment has been much discussed. Perhaps the most insightful analysis is H. Fenwick "Same Sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" (2016) E.H.R.L.R. 248.

[80] A thought-provoking comparative analysis is offer in B. Soucek "Marriage, Morality and Federalism: The USA and Europe Compared" (2017) 15 International Journal of Constitutional Law1098. Such critiques should obviously be read with several very large pinches of salt close to hand , because of the very different political contexts within which the ECHR and the United States Constitution exist, in terms both of the heterogenity of their component polities and the possibility of coercive enforcement of unpopular (in some of the polities) court judgments.

[81] (30141/04) (2011) 53 E.H.R.R. 20, paras 58,62. The Court did not note that the laws in the six States concerned were of very recent vintage.

82 See especially *Vallianatos and Others v Greece* (29381/09) [2014] 59 E.H.R.R. 12: *Oliari and Others v Italy* (18766/111) (2017) 65 E.H.R.R. 26. For commentary see especially Fenwick fn. 78 supra: H. Fenwick and A. Hayward "From same-sex marriage to equal civil partnerships; on a path towards "perfecting" equality" (2018) 30 Child and Family Law Quarterly 97.

[83] In relation to such matters as taxation liabilities, inheritance laws and child custody.

[84] (40792/10) [2023] ECHR 55.

a 'thin majority',[85] and which cannot provide, despite the one way nature of the direction of travel, any credible basis for identifying a pro-same sex marriage European consensus.

The *Fedetova* judgment announces in very bald terms that: "The Court emphasis that a democratic society within the meaning of the Convention rejects any stigmatisation based on sexual orientation".[86] A State's refusal to permit same sex marriage presumably therefore cannot be stigmatising within the Convention's overall scheme of things. At what point in an ongoing trend towards Member State recognition of same sex marriage would lend a stigma to being gay in those States which do not do so is a question the Court has not yet broached.

It is not difficult to see why this body of ECtHR jurisprudence might provide an opportunity for some cross-jurisdictional borrowing by parties seeking to have *Obergefell* overturned.[87] The *Obergefell* majority proceeded not simply by ignoring by classifying as irrelevant the brute political fact that nowhere near even a 'thin majority' of the 50 States permitted same-sex marriage, and by classifying as determinative the stigmatisation to which same sex couples were exposed their exclusion from State marriage laws. *Schalk* and its progeny proceed on a diametrically opposite basis on both counts, and so arrive – of course – at a diametrically opposite conclusion. As noted above,[88] Alito J took the opportunity in *Dobbs* to invoke presentationally 'liberal' sources to critique the Court's *Roe* and *Casey* methodologies. The 'liberal' ECtHR offers a similar 'authority' in respect of *Obergefell*. How can we, the *Obergefell* dissentients have been wrong even from a politically liberal perspective if our methodology and outcome were on all fours with the way that question has consistently been disposed of by the European Court of Human Rights?

But that is perhaps a double-edged sword. *Schalk* will no doubt continue to be challenged before the ECtHR. At each successive step, the European consensus in respect of same sex marriage will likely be edging closer and closer to a 'thin majority'. As and when it does, complainants might find there is some merit in provoking some unease among some, perhaps many, of the judges sitting on the ECtHR by forcing them to face up to politically rather unpalatable fact that thus far their jurisprudence on same sex marriage makes them such attractive bedfellows to the United States Supreme Court *Dobbs* majority.

[85] Id, 174, The Court takes the term from its judgment in *Oliari*, where it held that the 24 of 47 Members States which recognised same-sex unions in some form was such a majority.
[86] Id, 180.
[87] For a pre-*Dobbs* predictive analysis of how and why this might be done see B. Soucek "Marriage, Morality and Federalism: The USA and Europe Compared" (2017) 15 International Journal of Constitutional Law1098.
[88] At fn 13.