

**ANNE
COUGHLIN:**

Good evening, everyone, and welcome to our session titled "Demystifying Dobbs." We hope that this will be just one of many conversations that we have with all of you in the aftermath of the United States Supreme Court's decision to strip from the people their constitutional right to choose abortion care. I can't tell you how pleased I am to see all of you here tonight. It's been a very heavy few days for me and folks who are in my friend groups, and it's really an honor and an opportunity to be able to spend time talking to you about this case.

My name is Anne Coughlin, I'm a professor of law here at UVA Law School. I am also co-director of UVA's Sound Justice Lab. My teaching package includes courses in feminist legal theory and gender justice. I also teach criminal law and criminal procedure. Professor Bonnie Gordon is going to be joining me in leading our journey through the *Dobbs* decision. Bonnie is a professor in UVA's Music Department, and she is also co-director of the Sound Justice Lab.

She teaches courses in music history, feminist theory, and community engagement. There were many folks who helped us prepare very quickly to hold this event, and I want to do a quick word of gratitude to a bunch of people. I want to thank the student organizations that stepped up to co-sponsor the event. They include the UVA Law student chapters of If, When, How, the American Constitution Society, and the National Lawyers Guild.

Of course, I want to thank my law school for sharing this beautiful space with all of us. I send some special thanks to the building staff, who arranged and then rearranged the room so that we were sure we would have space for everyone. And we also got wonderful help from our IT folks and publications team. And last, but not least, I want to mention WTJU, our friends and collaborators there, who give us sound advice.

I also need to send out a very special word of thanks to Karen Moran. She is the true founder of this event. Most of you in this room know Karen really well, and in fact I know that most of you have turned out here because Karen invited you to come. So we're in the house tonight because we think it's essential for all of us to understand the Supreme Court's decision to eliminate a well-settled and precious constitutional liberty.

The overruling of *Roe* is going to bring many difficult questions to our doors. All of us in the room are asking a series of tough questions-- who is suffering and who needs care? What kind of care do they need, and who can supply it? What actions do we expect state legislators to take in the coming months to curb our access to reproductive care? What might the Supreme Court do next? Where can we best direct our energy?

And so we have to tackle all of these questions and many more. There are many more questions that we haven't even identified, but our thought was that for all of us to participate in these arenas effectively and assertively, we have to understand the basic moves that the Court made in *Dobbs*. And my agenda then brings me to another sponsor of tonight's conversation, and that is UVA's new Sound Justice Lab for which Nomi Dave, who is here this evening, Bonnie Gordon, and I, are co-directors.

Our lab doesn't go live until July 1, but live or not, we thought that tonight was the night to put the lab to work. Just so you'll know, UVA's Democracy Institute funded our lab to explore very specific questions about gender justice. And as the fates would have it, the *Dobbs* case is a brutal example of why those questions matter so much to everyone in 2022.

So the questions that we are asking-- what happens to our law and to our democracy when judges, politicians, and other powerful institutional players ignore the voices of women, people of color, LGBTQ folks, and Indigenous people. To pick just one example, we ask, what does justice look like and sound like when formal decision makers, including the courts, base their doctrines and their rulings on narratives that exclude the perspectives and experiences of women and girls?

When our judges and politicians silence the voices of women and girls, where do those voices go? That is a key question that we aim to explore. The voices may be omitted from official texts, but they will rise in other places. People will search for justice in ordinary, informal places, relying on community norms and creative practices. And our lab's agenda-- we hope you'll collaborate with us-- is to amplify and support those voices and their gender justice claims.

So with those big questions hovering above us, let's do it. Let's demystify *Dobbs*. Now, I daresay that many of us in this room are not experts in constitutional law, and all too often, I'm afraid-- and I know, because I don't actually teach constitutional law-- we're made to believe that we don't have anything useful to say in this sphere. If you are not a con law expert, you don't belong in the room. You can't evaluate the court's reasoning for yourself, and you have nothing useful to contribute to debates over whether the court got things right or got things wrong.

Even worse, sometimes we are made to feel-- look, the law is the law. The court is following the law, and you can't fault the court for following the law. That's what courts do. All of that stuff, it's complete nonsense. And it's really, really dangerous nonsense. Our first year law students-- I have at least one rising first year law student in the room-- our first year law students come to their con law classes with zero expertise.

They have no knowledge of the area or very little. They very quickly get up to speed. And a couple of years after they graduate, yup, they are clerking for the very judges who are deciding the scope of our constitutional protections. The other really fundamental point that I want to make is the Constitution is the law for the people, and everyone in this room, we are part of the people. Each of us has a powerful voice in understanding and evaluating the court's constitutional pronouncements.

So with a little bit of mental elbow grease, you can do it. So let's do it. So I've actually created a PowerPoint for you. And I curated the PowerPoint so that it would focus on the key language that is featured in the *Dobbs* decision. Bonnie, who teaches music and music history, created a handout which gives you the entire text of the constitutional provision. Law professors tend to edit things, but there go-- two different disciplines, two different educators, two different ways of talking about these important questions.

So here's the constitutional text that's at stake in *Dobbs*, I've put it up there. This is section 1 of the 14th Amendment to the United States Constitution. And as you can see, it reads, no state shall deprive any person of life, liberty, or property without due process of law. That's the provision that the court is construing in *Dobbs*. And just for an extra flourish, food for thought and conversation, I have added the Equal Protection Clause.

It features very lightly in the majority decision. The Equal Protection Clause provides no state shall deny to any person within its jurisdiction the equal protection of the laws. So that's the constitutional text. The next thing I want to do is to focus you very precisely on the job that the court was doing in *Dobbs*, and the nature of the dispute between the majority and the dissent.

So the legal question in *Dobbs* turns on the meaning of this word liberty for purposes of the Due Process Clause. And I want you to notice-- because this is what I tell my students. This is a routine legal question, right? This comes up all the time in law. What is the meaning of a word that appears in the governing legal text? Now, you will have noticed that the Constitution is a unique, precious legal text. It's really one of a kind in our canon of texts, but the question comes up over and over again. What does a particular word mean?

This is a basic question, but a dispositive one. The meaning of that word, liberty, the meaning of some other word in a contract, in a will, in any kind of a legal document-- the meaning of the word is going to determine the outcome of the dispute. So this is a familiar question, and it's one that comes up for all of us, not just in law circles, and in your lives too. And this is something that I tell my students all the time.

You're quite familiar with the problem. You're reading something-- what does the word mean? What does this word mean? And what do you do at that point? And when I ask my students this question, they will come up with a variety of answers. One thing is they check their internal dictionary. What does their internal common sense tell them the word means? But then they very quickly shift to, well, my internal dictionary might or might not correspond with other people's way of thinking, so I'm going to look at an actual dictionary.

Or, as they put it to me in class today, they're going to Google it, right-- they're going to-- right, that's where they're going to find their definitions. And so in a very real sense, that's what the justices in *Dobbs* are doing. They have to decide what liberty means. And so they turn to what they believe are what we might call the relevant dictionaries or sources of definitions so that they can land on the correct meaning, the correct explanation for the word.

And so that's one thing that's going on in *Dobbs*. At the end of the day, what you're seeing is a dispute between the majority of the justices, the justices that overruled *Roe v. Wade*, and the dissenters-- it's a dispute over what sources you look to decide what counts as constitutional liberty. And that's a dispute, a debate, in which all of us have a stake. And I really want all of you to pause and to think about this deeply going into the future.

So next thing-- to understand *Dobbs*, I've got to give you a very quick tour of two cases that are really important in the *Dobbs* decision, and in the whole canon of what we could call reproductive justice or abortion cases. Yes, there are many other cases. Yes, we could spend a long time on footnotes, and so on and so forth. No, we're not going to do that, and we don't do that in first year con law classes either.

We would probably spend more than one session on this line of cases, yes we would. But we heavily curate. We do not give our students the entire case to read. We edit it for them-- oh, and this is double sided, by the way, so it's a good bit heavier. So featured heavily in *Dobbs* are two cases that I want you to think about and to have in mind. The first, of course, is *Roe against Wade*, which was decided in 1972.

The other is a case which you've probably heard of. It's *Planned Parenthood of Southeastern Pennsylvania against Casey*, decided in 1992. So I'm going to give you a word or two-- really, maybe 20 or more words about *Roe*, and then turn briefly to *Casey*. So you all now *Roe*, but I want to refresh our recollection of what the case did, and to some extent what it did not do, just so that you'll understand that these were balanced and thoughtful decisions.

You may not agree with them, but I just want you to realize what it was that the court was doing in *Roe*. So *Roe* is the case where the United States Supreme Court struck down a Texas law that made it a crime to perform an abortion unless the purpose of the abortion was to save a woman's life. The seven justices-- there were seven justices in the majority in *Roe*, so seven justices agreed that the statute violated the due process clause.

And so the seven justices held that the 14th Amendment's due process clause protects a woman's decision whether or not to terminate her pregnancy. And when announcing this ruling, the court relies on a long line of cases that were also founded in the 14th Amendment that protect individual decisions related to marriage, procreation, contraception, family relationships, child rearing, and education. So there's a long line of cases that construe this clause to extend liberty protections to these sorts of activities.

But here's the other thing. At the same time in *Roe*, the court recognized that states have a valid interest in regulating the abortion decision, and the court describes what those state interests are. They include protecting potential life, maintaining medical standards, and safeguarding the health of the woman. So these are legitimate state interests. And what the court does in *Roe* is to strike a balance between the interests of the woman in having an abortion and the interests of the state.

The outcome of the balance turns on the stage of the pregnancy at which the abortion would occur. In the first trimester, the court holds the state may not interfere at all with a person's decision to terminate their pregnancy. But at any time after that point, the state may adopt regulations to protect the pregnant person's health. After viability, which is defined in *Roe* as the point when the fetus has the capability of meaningful life outside the womb, the state could ban abortions, except when they are necessary to preserve the pregnant person's life or health.

That's *Roe*. Was *Roe* a perfect decision, no. Some of you are already criticizing, thinking critically at the balance that the court struck. But no decision is perfect. They are the product of human judgment, of people just like us with a little more legal training. All legal decisions can be evaluated, criticized, clarified, and improved upon. One problem with *Roe* is that the court isn't clear that it is construing the word liberty.

It does discuss this protection in the due process clause. But instead, when speaking about the constitutional right that *Roe* protects, the court uses the word privacy. And this word, this privileging of an idea of privacy, is thought by many who oppose *Roe* to be a big problem. In other words, the text of the Constitution nowhere refers to a right to privacy, so the idea was the judges are just making this up. It's not a right to privacy.

The court uses the word privacy because it believed that getting an abortion, using contraceptions, deciding who you're going to marry, deciding how you're going to educate your children, those are private decisions. Those are decisions that should be left to individuals to make in the privacy of their homes and their communities. But the word privacy, it's a problem, it's not in the text.

So that brings us to *Casey*. And what *Casey* does is it reaffirms the core holding of *Roe* with some important departure, shall we say. But this time around, in *Casey*, the court placed the right to choose on firm constitutional ground by making clear that the right is encompassed by the constitutional definition of liberty. So *Casey* goes out of its way to say this is a due process liberty interest.

Again, as I said, *Casey*-- what *Casey* mentions is that just like the decision to get married, just like the decision to use contraception, the decision to have an abortion is central to your ability, your freedom to chart your life's course. And therefore, it's one of the decisions that deserves constitutional protections. Here's what *Casey* also did. It gives the states more authority to regulate abortions.

So it changes up the *Roe* framework. And what *Casey* decides is that the state can regulate not only to protect the woman's health in the early stages of a pregnancy, but also to promote prenatal life. At the same time, *Casey* emphasizes the courts are forbidden to enact regulations that place an undue burden or substantial obstacle in the path of a woman seeking an abortion prior to viability. The woman retains the right to exercise ultimate control over her destiny and her body.

And that, of course, brings us to *Dobbs*, and I'm going to talk a bit about the majority's decision. Bonnie is going to help us understand the history. And then we'll come back and do a tour of the concurring opinions-- one of which, the concurring opinion by Justice Thomas, causes grave concern about the status of other constitutionally protected liberties. So here's one thing you need to understand about *Dobbs*, just so you need to focus on-- OK, what's the word, it's liberty.

You also want to make sure that we're focusing on the precise question in the case, right? What is the exact question that the court had to decide in *Dobbs*? And at issue in *Dobbs* was a law, the Mississippi Gestational Age Act, which provided in part-- sorry, I'm going to read a bit of a statute, it's always a buzzkill. Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not induce an abortion of an unborn human being-- no abortion of an unborn human being if the probable gestational age has been determined to be greater than 15 weeks.

So we're calling this a 15 week rule. And I don't what you've heard, but I've been reading that the governor of our state is considering promoting a 15 week rule in the Virginia legislature, so that's the statute. OK, that was the question the court had to decide-- the constitutionality of that law. And what Chief Justice Roberts points out in his concurring opinion is that the majority of the justices could have and would have upheld that statute.

They could have done that without overruling *Roe* and without overruling *Casey*. This is really an important thing for us all to grasp. Here's what Justice Roberts had to say. If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more. You only decide that which must be decided, the constitutionality of that law, and you leave the other questions-- should *Roe* be overruled-- to be considered at another day in a case that squarely raises the question.

Dobbs did not squarely raise that question. The court could have ruled-- and Chief Justice Roberts says he would have ruled-- that abortion prohibitions before viability are not always unconstitutional. He would uphold the 15 week rule even if it were to be applied in cases where the viability threshold had not been reached. So this is one of the reasons why he expresses extreme-- Roberts' extreme, very polite-- displeasure about the overreaching by the majority.

He is worried about the legitimacy of his court because they have violated this principle of judicial restraint. And when they do that, he fears-- I'm not sure about all of you, but the Chief fears-- that we the people are going to lose our respect for the Court as an institution. Right, we're going to say they are violating the principle that makes them judges. Judges decide the questions that they must decide. They don't go further.

So Roberts was dismayed. He expressed that dismay, but nonetheless, he concurred in the judgment because he would have upheld the statute as constitutional on the ground that the 15 week rule is not a violation of *Casey*. So now we turn to Justice Alito's opinion for the majority, and it's here where I'm very quickly going to enlist the help of Bonnie Gordon, because that opinion delves into the history of what we might call the history of reproduction. I'm not really sure what it is, the history of-- she'll tell you.

But he delves deeply into history. And here's the move that he makes. Our job as judges is to construe what liberty means. He expresses some doubt that liberty has any substantive content, and we'll get to that in a minute when we talk about Justice Thomas' concurring decision. But he says, look, we don't really think that liberty has a substantive meaning. Liberty is something for the states to decide. The state legislators can give or take it away.

But we do have a line of cases that say that there is constitutionally protected liberty interest in marriage, procreation, contraception, education of children, and so forth. And so there are some fundamental liberty interests that we've recognized. But we only do that when these liberty interests are deeply rooted, deeply and objectively-- he says, deeply and objectively rooted in our history's traditions.

And the history and traditions to which he looks are the history and traditions with which the ratifiers of the Constitution and the 14th Amendment would have been familiar. So he asks, what would liberty mean to the ratifiers of this amendment? But then he makes another important move. He really doesn't focus on what liberty would have meant to those people. He instead asks, would they have believed that there was a right to an abortion?

Would they-- is there historical evidence to suggest that there was a right to an abortion at that time? Now, you can see how framing the issue in this way, you already the answer. But Bonnie is going to tell you about the evidence that the court turns to. And so again, here is what I said to you all at the beginning-- a little noise. What sources? That's the question, we are the people-- what sources should and do the justices turn to when deciding what liberty means? Take it away.

**BONNIE
GORDON:**

So in my field, we still do handouts. It's very old fashioned. And my daughter, Rebecca Lerda, made a little thing where you can click on it and get to the whole decision. You can also, if you click on the bottom one, get to-- CNN did a sort of red line of the difference between the draft decision and the final, which was unfortunately not that much. So I started thinking about this with my research assistant, Catherine Churchill, who's not here. She's in the English Department, and she studies the Middle Ages in England and France.

And I study the early modern period in Italy, so-- and Spain. So between us, we cover the 13th through the 19th century in Latin, French, Spanish, and Italian. And we wondered what we would say if we got this as a draft. This-- the draft came down as we were getting group projects in our various early classes. And this started, I have to admit, as something of a joke, but we did write a set of comments that we didn't send to anyone.

Dear students, we need to remind you of the perils of enlisting premodern sources to shed light on the meaning of words used many centuries later by the framers of our Constitution. You used sources from the 13th through the 18th centuries, an era when the science of reproduction was in its embryonic stage. Obviously, it didn't take the invention of the microscope to figure out that sex made babies, but the details of eggs and sperm were not discovered until the late 17th century.

It was not until the 19th century that scientists figured out how they actually worked together. Women's bodies were mysterious, dangerous, inferior. Early modern virginity tests involved having a woman sit over a head of garlic. If her breath smelled like garlic, she was guilty. Meanwhile, listening to violins made of vipers instead of sheep guts might cause a miscarriage. And until the 17th century, it was widely accepted that male fetuses received souls at about 40 days, whereas females received them closer to 80 days.

We are disappointed that you seem not to understand the challenges of editing sources and the perils of translation, and are surprised to see that you used the 13th century cleric and jurist Henry de Bracton of 13th century-- a hand copied text, you might recall from our many discussions, works like a game of scribal telephone. Like many manuscript traditions, Bracton has no official version. The numerous extant versions have many passages that are illegible, so it's hard to tell what the text even says.

You used a translation from 1870, which is quite sloppy by contemporary standards. You would do well to cite the authoritative 1922 translation, made from 11 editions. And of course, for very key passages, you might want to quote the original Latin, as translation is tricky. Perhaps most importantly, it's key to remember that in many of the sources you cite, the church was the state and vice versa, and laws around procreation have always been deeply political. This includes abortion.

In 1588, Pope Sixtus V issued contra abortion, which made abortion a capital offense. The ruling lasted less than three years. The next Pope declared it ineffective and brutal. His ruling that made abortion acceptable until ensoulment stuck until 1869, when Pope Pius IX brought it back, declaring abortions homicide. He was also the Pope that created papal infallibility and lived by a creed that modernity and Catholicism were mutually exclusive.

So I'll stop here. We did go on and on and on, because unfortunately, it's not a sloppy draft of an undergraduate paper. And the question is, was there a legal right to abortion from the framers, or in 1868? Obviously, the answer is no, nor was there the right for me to wear trousers. That waited until 1923. Nor could I have a passport without my husband until 1920, nor was there a telephone, nor were there zippers.

So Alito writes, the inescapable conclusion is that the right to an abortion is not deeply rooted in the nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persists from the earliest days of common law until 1973. Kavanaugh writes, but a right to abortion is not deeply rooted in American history and tradition, as the court thoroughly explains-- evidently, it was not settled.

So again, did the framers intend the right to abortion, no. The framer who founded this University did not attend me to attend it, much less teach at it. The framers wrote in a time when Black people, brown people, women, Indigenous people, may or may not have had souls. Received medical knowledge understood women as imperfect. Ben Franklin did have an abortion recipe in one of his books, but that seems to be beside the point.

The 14th Amendment, they argue, we must read as the ratifiers did. The dissent reminds us that the people who ratified the 14th Amendment were men. So let me add that when the 14th Amendment was ratified, I still could not wear pants or have my very own passport. Women also couldn't loan property. Some of the first laws around property actually came in Mississippi in 1839, when there was a law passed giving white women very limited property rights, largely over enslaved people after their husbands died.

The historical questions here are not trivial. What did precepts-- what did these sources mean by the word abortion? Was it a medical procedure? What did quickening imply? What did crime imply? So abortion comes from the Latin word *abortia*, which could refer either to a miscarriage or an abortion. Alito quotes an English translation of Bracton, saying that if a person has struck a pregnant woman or has given her poison, whereby he has caused an abortion, if the fetus be already formed and animated, and particularly if he be animated, he commits homicide.

He ignores the fact that this reflects a distinct legal concern called miscarriage by assault rather than abortion. The distinction is fuzzy. And in fact, miscarriage is still often called spontaneous abortion. This is not news to the many women who have had miscarriages. So in the early modern period through the 18th century, often trials around-- trials were around whether something was a miscarriage or an induced abortion.

Crimes, also, it's important to remember, were quite different. It was a complicated system of canon, ecclesiastical law, and civil law. Law was the province of men. Pregnancy was the province of women. It was complicated to put them together. Also, in this country, everything that happened after emancipation was very tied up in white fear and white rage, and let's remember for a moment that it was the courts of colonial Virginia that created generational child slavery in the 17th century.

And there was an investment by slaveholders in women, enslaved women, carrying pregnancies to term, particularly after 1808, when the importation of slavery was outlawed. Sojourner Truth famously asked, was she not a woman. She had borne 13 children and seen nearly every one ripped from her arms with no appeal to law or courts. She asked, wasn't she a woman too?

And the backlash in the 19th century of cases that the court refers to, interestingly-- or rather, the increasing cases against abortion in the mid 19th century interestingly come after the 1850s, when newspapers abound with ads for medical abortions, often by female practitioners. And there was a real campaign against, in fact, female practitioners. The AMA, the American Medical Association, founded in 1847, refused to admit Black doctors and women doctors.

You come from groups and-- of Black doctors. You come from groups and schools that admit women and that admit irregular practice doers. So needless to say, the founders did not mention abortion, nor did they mention many other things. They just-- and the other, the final thing I want to say is that the court very much wants to avoid the question of what quickening meant and what ensoulment meant.

That's actually at the heart of some of the deepest problems in our country, because the founders justified enslavement based on who had souls and who didn't. You could enslave people as long as they didn't have souls. And remember, of course, that the Constitution had the three fifths Compromise, meaning that five enslaved people equaled three humans to determine representation. So like so many things that this court is doing, they're talking about what counts as a person.

And I think we hope they don't go back to the 19th century and before, but we're not sure where they're going, or maybe we are.

**ANNE
COUGHLIN:**

Yeah, so we think we're sure where Justice Thomas will go. Yeah-- I think before we go there, we'll just reflect briefly on the dissent, which in less eloquent terms makes some of the points that Bonnie makes. The job is to construe the word liberty. Liberty has a much more capacious meaning than the majority seems to suggest. The job is not in the first instance to decide, do we have a right to abortion, but do we have a right to liberty. What does that liberty mean?

And one of the things that the dissent says that I wanted to share with you, in addition to their criticism of the history deployed by Justice Alito, they make the following point. And again, I think it's one that I've found very empowering when thinking about how to approach the methodological questions. And that is that the framers, the ratifiers, deliberately chose the word liberty because they knew it was capacious and they intended for that word to be one that had the power to evolve as times changed.

They deliberately did not enact a specific list of the liberties of which they approved. They knew that there were many components of liberty, or they imagined that there could be components of liberty that they had never seen, that they had never glimpsed at all, or only dimly. So the methodological point is that when the framers used the word liberty, they did not intend for the Supreme Court to construe it according to the cramped historical objective approach that the majority uses.

You are not to look back in time and ask, what were the historical practices in the 13th century up to the time of the ratification? Instead, you are to be thinking much more generously about what kinds of liberties were fundamental to our ability to live according to evolving standards-- the court uses the word decency, which isn't the greatest word, but there have it. But the idea was that the word was intended to evolve. It was designed to evolve, as we identified more precious ways of supporting our freedoms in contemporary culture.

They emphatically did not want a document, according to the dissent, that chained us to medieval understandings, let alone slave-holding understandings of what liberty meant. So that's a very different approach, as you can see, to what the work of the court is when deciding what liberty means. And I just want to make sure that we've all got that in mind when we hear, as we do, that the best way to construe this text is according to the original understanding, the original public understanding at that time.

And that inevitably requires us to turn back to these very antiquated texts, and-- you know, that's just what the law demands. And there is a robust discussion about this point. There's deep disagreement among the justices about which methodology should be used.

And up until quite recently, a majority of the court, including justices such as Justice Kennedy, who is quite a moderate guy, believed in the more capacious, the more flexible approach-- the more living Constitution approach, if you will, to this meaning of liberty, this word liberty, precisely because he, others didn't want to shackle us to these antiquated ideas.

And then as Bonnie said in the dissent-- and I encourage you to read it. It's hard. It's a lot of words, and it's hard, but the dissent is very, very moving and very powerful, and they make the point absolutely clearly that the Constitution read as the majority does consigns women to second class citizenship. The majority's core legal postulate, then, is that we in the 21st century must read the 14th Amendment just as its ratifiers did. This is what the dissent points out.

And that is indeed what the majority emphasizes over and over again. If the ratifiers did not understand something essential to freedom, then neither can we. Or said more particularly, if those people did not understand reproductive rights as part of the guarantee of liberty conferred in the 14th Amendment, those rights do not exist. As an initial matter, the dissenters, say-- note a mistake in the sentence that we just wrote. We referred there to the people who ratified the 14th Amendment.

What rights did those people have in their heads at the time? But of course, people did not ratify the 14th Amendment, the dissenters point out, men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our nation. That's the dueling methodology, if you will.

Do you endorse a reading of liberty, a methodology for construing liberty that links us to these archaic texts, or do you adopt a different approach that raises up the perspectives of women, girls, people of color, LGBTQ people. So now to get even a little less cheery, it's important, I think, to pause and discuss Justice Thomas' concurring opinion, because many of you are likely to confront questions about that.

And I am getting these questions everywhere, as are other lawyers in the room. So Justice Thomas concurs in the opinion, but he says that he would go a lot farther in terms of rolling back constitutional protections that the court has recognized, including our liberty interest in contraception, our liberty interest in gay marriage, our liberty interest in same sex sex. So he says he is prepared to overrule *Griswold*, *Obergefell*, *Lawrence v. Texas*, and potentially other decisions.

This is very frightening. And I just want to talk about it for a couple of minutes. Folks have pointed out that both Chief Justice Roberts and Justice Kavanaugh, both of whom also wrote separate opinions, have hastened to reassure us that they would not be prepared to overrule those cases. Chief Justice Roberts again emphasizes the value of stare decisis-- we've decided that which is decided, that is stare decisis.

That's the principle-- don't overrule cases that are settled, particularly cases that recognize constitutional protections, don't overrule them unless there is a very good reason to do so. If you overrule them, you are unsettling people's protections. You're taking away from them liberties that they relied on in organizing their lives. Many, many folks have organized their lives around access to contraception, for example-- on the right to have sex with people of their choosing, and not have the police burst into the room.

So what Roberts is suggesting is that he, for one, would restrain himself and not overrule those cases. Kavanaugh kind of, sort of says the same thing. He promises us that though he agreed with the majority that it was time to overrule *Roe* against *Wade*, he would not overrule these other decisions.

So some folks are telling me, and you're going to read this in the papers, that we don't have anything to be afraid of, that when push comes to shove, if and when gay marriage comes back before the Supreme Court, if and when contraception comes back before the Supreme Court, if and when *Lawrence v. Texas*, which is the same sex case-- if those cases come back, there aren't going to be five votes, because Kavanaugh and the chief will jump ship.

That may be, but just contemplate-- well, first of all, it may not be. The things that they say in these concurring opinions don't bind them in any way, shape, or form. They are free to depart from what they said there, just as we have seen them depart on other occasions. But the other thing that struck me when I was reading an op Ed in *The New York Times* that was reassuring us, that we didn't need to worry about this, because we had Kavanaugh-- and Roberts would get our back.

That may be true, but what about the people who will suffer in the meantime? That's what worries me. If a state decides tomorrow to ban gay marriage, there is going to be a great deal of suffering among the people in that state. If God forbid, a state decides to outlaw contraception, if it decides to outlaw same sex sex, if it decides to outlaw interracial marriage-- which is not unthinkable, given Thomas's position-- there's going to be a great deal of suffering. I'm sorry, I'm sorry, I'm sorry-- I know, and this is being recorded, so there go.

I'm sorry, but-- OK, great, so at some point, eight years down the line, the Supreme Court will pronounce and will say-- oh, no, we actually are going to uphold *Obergefell, Lawrence, Griswold*. You can have your contraceptions. But in the meantime, think about the folks whose lives have been disrupted. And that, to me, is the cruelty of that concurring opinion. It is a direct statement that one of the justices on the United States Supreme Court and possibly others are open for business to consider overruling these precious rights.

And so it's there that I really want to encourage each and every one of you to get engaged in conversations. There's a lot of things that we're going to have to do, a lot of people that are going to need help, a lot of votes that you're going to have to cast. But we know that casting votes, giving money, those things are important, but you're going to have to have conversations in which you work to change people's mind to understand that there is a very robust disagreement about the methodology that led to this very, very brutal case.

And I encourage you to think about it, to talk to us, to come back and talk to each other, talk to your legislators, talk to your families. And then, of course, I have a lot of other suggestions too about things you might do. But I see no way forward except to come together in communities like these, and to listen and to learn what Bonnie had to tell us about how garlic used to be the clue to whether women were virgins or not.

And it's those texts that now tell us what rights that we have as women, as girls, as people of color, as LGBTQ folks, as Indigenous people in 2022. So I think I'll stop there. You probably have many, many questions. And we may not have answers to lots of those questions. We're going to keep a list of the questions.

But we're hoping that we can hear what your questions are, and that perhaps we can come back for other conversations later this summer, and the fall, and beyond, as we begin figuring out what the solutions might be, because it's going to be an effort on many, many, many different fronts.