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## Yes, Alito, There is a Right to Privacy: Why the Leaked Dobbs Opinion is Doctrinally Unsound

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# YES, ALITO, THERE IS A RIGHT TO PRIVACY: WHY THE LEAKED *DOBBS* OPINION IS DOCTRINALLY UNSOUND

by Nancy C. Marcus\*

## I. INTRODUCTION

On May 2, 2022, a draft majority opinion dated February 2022 and authored by Justice Alito in *Dobbs v. Jackson Women’s Health Organization*<sup>1</sup> was leaked to the public. Protests and outcries immediately erupted across the country, with those who have long relied on constitutional protections for safe and legal abortion access horrified at the draft opinion’s explicit overruling of *Roe v. Wade*<sup>2</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>3</sup> While the apparently imminent reversal of constitutional protections for access to safe and legal abortion is deeply troubling, even terrifying, for many who may potentially face unplanned pregnancies, the draft opinion could also have profoundly troubling repercussions for constitutional doctrine and liberty protections more broadly. This Essay addresses the doctrinal infirmities of the underlying analysis of the draft *Dobbs* opinion, as well as the

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1. No. 19-1392 (U.S.) (“*Dobbs* Draft Op.”).

2. 410 U.S. 113 (1973).

3. 505 U.S. 833 (1992). See also *Dobbs* Draft Op. at 5 (“We hold that *Roe* and *Casey* must be overruled.”) and articles documenting public reaction to the opinion, including Lauren Burke, *Tears and Tension as Protesters Swarm Outside US Supreme Court*, THE GUARDIAN (May 3, 2022), <https://www.theguardian.com/us-news/2022/may/03/roe-v-wade-protests-outside-us-supreme-court/>; Nicole Werbeck, *See Protests Grow Across the Country as the Supreme Court Deals with Roe v. Wade Leak*, NPR (May 3, 2022), <https://www.npr.org/sections/pictureshow/2022/05/04/1096525936/see-protests-grow-across-the-country-as-the-supreme-court-deals-with-roe-v-wade/>; Rafqa Touma et al, *Protests Swell Across Major Cities as US Reckons with Supreme Court Decision Draft—As It Happened*, THE GUARDIAN (May 3, 2022), <https://www.theguardian.com/us-news/live/2022/may/03/roe-v-wade-us-supreme-court-preliminary-vote-overtums-abortion-ruling-leaked-draft-live-updates/>

resulting dangers posed for the protection of fundamental privacy rights and liberties in contexts even beyond abortion.

The draft *Dobbs* opinion bases its rationale for overruling *Roe v. Wade* on two deeply flawed premises. First, the opinion claims that abortion had not been a recognized enumerated right prior to *Roe*, but had instead been criminalized in a number of states.<sup>4</sup> Under the apparent premise that conduct once criminalized cannot subsequently be constitutionally protected as a fundamental right, Justice Alito, the opinion's author, consequently concludes that abortion rights should be returned to their purported pre-1973 status: nonexistent.<sup>5</sup> Second, the opinion is grounded in an interpretation of substantive due process that only recognizes Fourteenth Amendment protections for unenumerated rights when the specific conduct-framed right for which protection is sought (i.e., the right to abortion, as opposed to the broader liberty interest in personal autonomy and privacy, which encompasses that right) must be “‘deeply rooted’ in this Nation’s history and traditions’ and ‘implicit in the concept of ordered liberty.’”<sup>6</sup>

The draft *Dobbs* opinion then concludes that for those and other reasons,<sup>7</sup> *Roe* was an unsound, wrongly decided opinion (although the draft opinion also acknowledges that *Roe* followed a longer line of precedent affirming substantive due process protections for “intimate sexual relations, contraception, and marriage”<sup>8</sup>). A reported majority of Justices would consequently hold under the draft opinion that neither *Roe* nor the subsequent *Casey* decision should be honored under the Court’s

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4. *Dobbs* Draft Op. at 5, 9-10, 15-30.

5. *Id.* at 65.

6. *Id.* at 5 (partially, but not fully, quoting and citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotation marks indicated as omitted in *Dobbs* draft opinion); *see also id.* at 13-14, 24-25.

7. Including the draft opinion’s refusal to honor *Casey*’s finding of reliance on the *Roe* precedent, a critical factor in deciding to abandon *stare decisis*; the *Dobbs* draft opinion rejects as legally inadequate and unconvincing *Casey*’s reliance conclusion that:

the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

*Casey*, 505 U.S. at 856. *See Dobbs* Draft Op. at 60-61 (rejecting *Casey*’s reliance holding, and rejecting *Casey* itself as binding precedent on that point).

8. *Dobbs* Draft Op. at 5, 31-32.

longstanding practice of stare decisis. Instead, both should be overruled<sup>9</sup> (assurances during their confirmation hearings that they would honor stare decisis notwithstanding).<sup>10</sup>

The remainder of this Essay details how the primary premises underlying the draft opinion's overruling of *Roe* and *Casey* are infirm as a matter of constitutional doctrine, precedent, and fact.

## II. THE DRAFT OPINION IMPROPERLY CONFLATES FORMERLY CRIMINALIZED WITH CONSTITUTIONALLY UNPROTECTED CONDUCT, ALLOWING UNCONSTITUTIONAL CRIMINAL LAWS TO EVADE SCRUTINY

The draft opinion's first premise, that formerly criminalized conduct cannot be accorded fundamental rights protections, both is flawed and could result in sweeping repercussions beyond abortion.

The Supreme Court has previously rejected such an approach to constitutional jurisprudence, emphasizing, "the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."<sup>11</sup> Disregarding that traditional approach to judicial review of unconstitutional laws, however, the *Dobbs* opinion would make conduct once deemed immoral and criminalized as virtually exempt from subsequent constitutional protection. It could become nearly impossible to successfully challenge unconstitutional criminal laws in court. Instead, those laws previously struck down as unconstitutional for criminalizing protected conduct could be reinstated and deemed constitutional after all. Even those Supreme Court decisions striking down unconstitutional miscegenation laws,<sup>12</sup> bans on contraception,<sup>13</sup> and bans on private sexual conduct between consenting adults<sup>14</sup> could be overturned, with those bans reinstated.

Furthermore, as some legal scholars have already noted, and as a dissent to the draft opinion may highlight, describing abortion as historically prohibited across the country prior to *Roe* is an overstatement, and not a sound basis for overruling *Roe* and *Casey*. Professor Aaron

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9. *Id.* at 5-6, 35-62.

10. See Oriana Gonzalez, *Collins Says Kavanaugh and Gorsuch Possibly Broke Promise on Roe v. Wade*, AXIOS (May 3, 2022), <https://www.axios.com/2022/05/03/susan-collins-kavanaugh-gorsuch-abortion-court-leak/>

11. *Lawrence v. Texas*, 405 U.S. 438, 577 (2003).

12. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

13. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

14. See, e.g., *Lawrence*, 405 U.S. 438.

Tang has documented that, contrary to the draft opinion’s assertion that at the time of the Fourteenth Amendment’s ratification, two-thirds of states prohibited “pre-quickening” (pre-fifteen week) abortions, in fact the majority of states did not ban pre-quickening abortions.<sup>15</sup>

### III. THE DRAFT OPINION IS BASED ON A FLAWED DUE PROCESS APPROACH THAT IGNORES CENTURIES OF DEEPLY ROOTED PROTECTIONS FOR FUNDAMENTAL UNENUMERATED RIGHTS

Addressing the second main premise underlying the draft *Dobbs* opinion, that there is no constitutional right to privacy in part because privacy rights are not explicitly enumerated as such, constitutions by their nature are intended to be broad frameworks, not comprehensive checklists that detail every specific act protected against government intrusion.<sup>16</sup> As Justice John Marshall wrote, the nature of the Constitution:

requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves . . . . [W]e must never forget that it is a constitution we are expounding. . . . [A] constitution, intended to endure for ages to come, and consequently, to be adapted to the various crisis of human affairs.<sup>17</sup>

The tradition of honoring unenumerated rights is a longstanding one that can be traced back to the Magna Carta of 1214, the Mayflower Compact of 1620, and early American declarations of inherent, inalienable rights.<sup>18</sup> Indeed, in the Federalist Papers, Alexander Hamilton

15. See, e.g., Aaron Tang, *Op-Ed: The Supreme Court Flunks Abortion History*, LA TIMES (May 5, 2022), <https://www.latimes.com/opinion/story/2022-05-05/abortion-draft-opinion-14th-amendment-american-history-quickening>. See also Aaron Tang, *The Originalist Case for an Abortion Middle Ground*, at 22-54, 60-63, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3921358](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921358).

16. See Victor D. Quintanilla, *Judicial Mindsets: The Social Psychology of Implicit Theories and the Law*, 90 NEB. L. REV. 611, 640 & n. 222 (2012) (citing Akhil Reed Amar, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 460-61 (2007); Letter from Thomas Jefferson to Samuel Kercheval, July, 12, 1816, <https://teachingamericanhistory.org/document/letter-to-samuel-kercheval/>).

17. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

18. See Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUMBIA J. GENDER & LAW 355, 361 (2006) (citing MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 8 (2001); *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (describing the guarantees of due process as “having their roots in Magna Carta’s ‘per legem terrae’”); The Declaration of Independence para. 2 (U.S. 1776); VIRGINIA BILL OF RIGHTS, *reprinted in* AM. JUR. 2d Desk Book, Item No. 185 (2d ed. 1979).

wrote that a Bill of Rights was unnecessary because it was so well understood, even before the Constitution's ratification, that unenumerated rights were to be reserved to the people.<sup>19</sup> However, answering Hamilton's concerns that the enumeration of some rights in the Bill of Rights might be construed to deny the existence of those not enumerated,<sup>20</sup> the Ninth Amendment itself explicitly recognizes the existence of those unenumerated rights. It provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>21</sup> As Justice Breyer has explained, the Ninth Amendment was included in the Bill of Rights "to make clear that 'rights, like law itself, should never be fixed, frozen, that new dangers and needs will emerge, and that to respond to these dangers and needs, rights must be newly specified to protect the individual's integrity and inherent dignity.'"<sup>22</sup>

The draft *Dobbs* opinion denying protections for rights not enumerated cannot be fairly reconciled with the text of the Ninth Amendment, or with the broader historical tradition of taking seriously inherent, inalienable rights and liberty interests implicit but unenumerated in the Constitution, including under the Fourteenth Amendment's Due Process Clause. As Justice Harlan has explained, underscoring the breadth of unenumerated rights entitled to constitutional protection, the full scope of liberty protections "cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."<sup>23</sup>

Regarding privacy rights more specifically, Samuel Warren and Louis Brandeis in 1890 co-authored a *Harvard Law Review* "Right to Privacy" article that traced the evolution of privacy rights from early property protections to intellectual, emotional, and spiritual autonomy.<sup>24</sup> As a Supreme Court Justice, Brandeis subsequently explained that the Constitution's drafters "conferred, as against the government, the right to

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*See also id.* at 360-78 (tracing the historic roots and evolution of the constitutional right to privacy more generally).

19. THE FEDERALIST No. 84, at 512-13 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

20. *See* Marcus, *supra* note 18, at 362.

21. U.S. CONST. amend. IX.

22. Stephen Breyer, *Our Constitutional Democracy*, 77 N.Y.U. L. REV. 245, 269-70 (2002) (quoting Bernard Bailyn, Remarks at the First Millennium Evening at the White House (Feb. 11, 1998)).

23. *Poe*, 367 U.S. at 542-44 (Harlan, J., dissenting).

24. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

*See also* Marcus, *supra* note 18, at 371-72.

be let alone—the most comprehensive of rights.”<sup>25</sup> Later, the Court in *Griswold v. Connecticut* described the right to privacy as “older than the Bill of Rights,” citing cases going back to 1886 that, as the Court described, “bear witness that the right of privacy . . . is a legitimate one.”<sup>26</sup>

However, with *Griswold* describing contraceptive rights in terms of Ninth Amendment unenumerated rights, the Bill of Rights’ penumbras, and Fourteenth Amendment due process,<sup>27</sup> if Alito’s draft *Dobbs* opinion rejecting parallel language in *Roe*<sup>28</sup> stands, the right to birth control would be hanging by a thread. The Court in *Lawrence* over a quarter of a century ago embraced the binding precedent of contraceptive rights cases and their recognition of a reproductive right to privacy quoting *Eisenstadt v. Baird* to emphasize that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>29</sup> Today’s Court has signaled no similar intention of honoring that principle in its interpretation of a right to reproductive autonomy.

While the potential repercussions of the *Dobbs* draft opinion mocking *Roe*’s description of the constitutional roots of the right to privacy—the same roots identified in *Griswold*—are disturbing, the draft opinion’s treatment of substantive due process in particular is also particularly troubling on a doctrinal level.

Those Justices joining Alito’s draft *Dobbs* opinion would limit substantive due process protections to only those specific rights that can be identified as deeply rooted in history and tradition when reduced to their most narrow articulation (i.e., the “right to abortion,” as opposed to a more broadly framed right to individual autonomy and privacy in one’s most intimate life choices).<sup>30</sup> However, requiring that abortion access

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25. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part* by *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967).

26. *Griswold*, 381 U.S. at 483-86 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Breard v. Alexandria*, 341 U.S. 622 (1951); *Public Utilities Comm’n v. Pollak*, 343 U.S. 451 (1952); *Monroe v. Pape*, 365 U.S. 167 (1961); *Lanza v. New York*, 370 U.S. 139 (1962); *Frank v. Maryland*, 359 U.S. 360 (1959); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Boyd v. United States*, 116 U.S. 616 (1886)).

27. *Griswold*, 381 U.S. at 483-85.

28. See *Dobbs* Draft Op. at 9 (discussing *Roe*, 410 U.S. at 152).

29. *Eisenstadt*, 405 U.S. at 453 (as quoted in *Lawrence*, 539 U.S. at 565).

30. Let alone *Casey*’s description of “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” as “central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human

itself be traditionally designated as a right “deeply rooted” in history and tradition, as opposed to it being protected as falling within the ambit of broader constitutionally protected privacy and personal autonomy rights, is a misapplication of substantive due process jurisprudence.

Such a narrow approach to substantive due process conflicts with precedent respecting the protection of reproductive and related privacy rights as falling under broader, deeply rooted liberty protections and principles, precedent acknowledged even by the draft *Dobbs* opinion.<sup>31</sup> The draft opinion’s overly narrow “right to abortion” framing of the liberty interest at issue in reproductive autonomy cases repeats the mistake of the sodomy-ban-affirming Court in *Bowers v. Hardwick*. As the *Lawrence v. Texas* Court explained in overruling *Bowers*, the *Bowers* Court had improperly framed the right at stake in that case in absurdly narrow “right to sodomy” terms rather than in terms of the broader liberty interests at issue, thereby “fail[ing] to appreciate the extent of the liberty at stake.”<sup>32</sup> In rejecting the *Bowers* articulation of the right at issue as a “fundamental right to engage in homosexual sodomy,” the *Bowers* dissent and *Lawrence* majority opinion explained that such narrow phrasing of liberty interests amounts to improperly “derid[ing] Hardwick’s position as ‘at best, facetious,’” thereby dishonoring the broader liberty interest at stake.<sup>33</sup> The *Lawrence* Court further explained, “[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward.”<sup>34</sup>

The approach of framing fundamental rights in terms of the broader liberty interests rather than minimizing them through narrow act-specific formulations is itself well-rooted in constitutional jurisprudence history. Long before *Glucksberg* and other modern substantive due process cases, *Corfield v. Coryell*, an 1825 opinion addressing unenumerated fundamental rights protections, addressed the question of whether the Constitution requires a state to permit other states’ citizens to fish for shellfish in its waters.<sup>35</sup> There, the Court recognized that the right at issue was not a “right to fish for shellfish,” but rather the fundamental

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life.” *Casey*, 505 U.S. at 851 (language quoted only partially, and criticized, in the draft *Dobbs* opinion, at 30).

31. See *Dobbs* Draft Op. at 31 (describing *Casey*’s reliance on precedent including, for example, contraceptive rights cases such as *Griswold*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438; *Carey v. Population Services International*, 431 U.S. 678 (1977); *Skinner*, 316 U.S. 535 (forced sterilization)).

32. See *Lawrence*, 539 U.S. at 566-67.

33. *Id.* at 596 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

34. *Id.*

35. 6 F. Cas. 546 (C.C.E.D. Pa. 1825).



citizenship rights involving trade and travel guaranteed by the Constitution.<sup>36</sup>

As Justice Harlan similarly wrote in his *Poe v. Ullman* dissent, the full scope of due process liberty protections is not confined to those specific rights enumerated in the Constitution, not being “a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on.” Rather, “[i]t is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.”<sup>37</sup>

Although the draft *Dobbs* opinion cites *Glucksberg* in support of its substantive due process approach, its description of *Glucksberg* is deceptively incomplete. The draft opinion describes *Glucksberg*’s holding regarding the Fourteenth Amendment Due Process Clause as follows: “That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”<sup>38</sup> That passage of the draft *Dobbs* opinion, however, omits not only internal quotation marks but also pertinent language from the cases cited therein, conveniently discarding the precedential context for this passage of *Glucksberg*. Specifically, the cases quoted by *Glucksberg* as the contextual foundation for its “deeply rooted . . . implicit in the concept of ordered liberty” analysis, the citations of which are omitted by the *Dobbs* draft opinion, are *Moore v. City of East Cleveland*, *Snyder v. Massachusetts*, and *Palko v. Connecticut*.<sup>39</sup> *Palko* and *Snyder*, in turn, provide that what triggers fundamental rights protection is the implication of “a principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.”<sup>40</sup> Similarly, *Palko* describes substantive due process in broad terms, as protecting “liberty of the mind as well as liberty of action.”<sup>41</sup> As such, reading of *Glucksberg* in conjunction with the *Palko* and *Snyder* passages it relies upon reveals that substantive due process analysis should be not act-specific, but rather, should focus on the underlying justice-based

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36. *Id.*

37. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

38. *Dobbs* Draft Op. at 5 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)).

39. See *Glucksberg*, 521 U.S. at 721 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *Snyder v. Massachusetts*, 219 U.S. 97, 105 (1934)).

40. *Palko*, 302 U.S. at 325 (quoting *Snyder*, 219 U.S. at 105 (emphasis added)).

41. *Id.* at 327.

principles implicated when liberties are restricted in various contexts. Furthermore, *Moore*, the very first case cited by *Glucksberg* in this passage in support of its explanation of substantive due process, affirms Fourteenth Amendment protections for “freedom of personal choice in matters of marriage and family life.”<sup>42</sup>

Similarly, in a passage also conveniently omitted by the *Dobbs* draft opinion, the *Glucksberg* opinion explicitly recognizes abortion among the many other specific rights that are encompassed within the broader liberty protections of the Due Process Clause, explaining that over time, the Supreme Court has held that along with “the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.”<sup>43</sup>

Even more pertinent is *Glucksberg*’s reliance on *Casey*, one of two cases the *Dobbs* opinion would cite *Glucksberg* to overrule. It defies logic and the bounds of irony to assert the *Glucksberg* precedent as justification for overruling *Casey* along with *Roe*, when the *Glucksberg* opinion explicitly follows and positively cites *Casey*.<sup>44</sup> As previously explained on this point:

The Court’s *Glucksberg* opinion does not preclude continued recognition of constitutional history as a fluid concept or continued acknowledgement that traditions change over time. By opening its discussion of the role of history in due process cases with citations to *Moore*, *Cruzan*, and *Casey*, cases decided in the context of changing traditions, the *Glucksberg* majority affirmed the principle of a living constitution which reflects evolving traditions.<sup>45</sup>

Similarly, while not binding precedent, Justice Stevens’ concurrence in *Glucksberg* (also not addressed by the draft *Dobbs* opinion) further explains that in due process cases, the Court has described the liberty interests at stake in intimate life decisions “as implicating ‘basic values,’ as being ‘fundamental,’ and as being dignified by history and

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42. *Moore*, 431 U.S. at 499 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974), *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925)).

43. *Glucksberg*, 521 U.S. at 720 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)); *Skinner*, 316 U.S. 535; *Meyer*, 262 U.S. 390; *Pierce*, 268 U.S. 510; *Griswold*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438; *Rochin v. California*, 342 U.S. 165 (1952); *Casey*, 505 U.S. 833.

44. See *Glucksberg*, 521 U.S. at 710.

45. Marcus, *supra* note 18, at 392-93 (citing *Glucksberg*, 521 U.S. at 710 (internal citations omitted)).

traditions.”<sup>46</sup> Stevens explained that such cases consistently reflect “the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his life intolerable.”<sup>47</sup>

In *Lawrence v. Texas*, as previously discussed, the Supreme Court provided critical clarification of the substantive due process doctrine in the context of sexual autonomy. The *Lawrence* Court embraced and adapted Justice Stevens’ dissent in *Bowers v. Hardwick* recognizing that issues of sexual autonomy implicate “the individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny. The Court has referred to such decisions as implicating ‘basic values,’ as being ‘fundamental,’ and as being dignified by history and tradition.”<sup>48</sup> Addressing the same principles previously addressed in *Glucksberg*, the *Lawrence* decision’s overruling of *Bowers* indicates that while tradition is certainly a component of substantive due process analysis, specific traditions of denying rights are not the types of traditions that are deserving of special protected. In contrast, while traditions of discrimination and rights denials receive no deference under the Fourteenth Amendment, traditionally honored liberty interests, and the rights they encompass, do. On that point, *Lawrence* affirms the Court’s traditional recognition of the historic “origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen’s right to decide how he will live his life intolerable.”<sup>49</sup>

Such powerful affirmations by the Supreme Court of the American tradition of taking personal liberty seriously stand in stark contrast with the *Dobbs* draft opinion, which undermines even the very doctrinal building blocks and principles affirmed in *Glucksberg*. The draft opinion fails to engage a meaningful analysis of *Glucksberg*, the precedents upon which it relied, and its progeny, including the subsequent clarifying language of the Supreme Court that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>50</sup>

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46. *Glucksberg*, 521 U.S. at 744-45 (Stevens, J., concurring) (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975) (citations omitted)).

47. *Id.*

48. *Bowers*, 478 U.S. at 214-20 (quoting in part *Fitzgerald*, 523 F.2d at 719-20); see also *Lawrence*, 539 U.S. at 578-79 (“Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and it should control here.”).

49. *Glucksberg*, 521 U.S. at 744-45 (Stevens, J., concurring).

50. *Lawrence*, 539 U.S. at 572 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

In addition to the draft opinion's flawed doctrinal interpretation of *Glucksberg*, its application of *Glucksberg* is also factually inaccurate. For example, in one passage, the draft opinion substitutes the assisted suicide language from *Glucksberg* with abortion language: "The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: 'Attitudes toward [abortion] have changed . . . but our laws have consistently condemned, and continued to prohibit, [that practice].'"<sup>51</sup> Here, the draft opinion both is factually misleading and substantively defeats its own argument. Even if the draft opinion were accurate in describing most states as banning even early abortion at the time of the 1973 *Roe* decision,<sup>52</sup> it is inaccurate to describe American laws as consistently prohibiting abortion even after *Roe*. To the contrary, from *Roe* until the present, while some regulations of abortion have been upheld, no pre-viability abortion bans have been upheld as constitutional in the forty-nine years since *Roe*.

For half a century, people across America of child-bearing age have come to rely on *Roe* as protecting their right to be free from state bans on abortion. To betray that reliance based on a misapplication of longstanding substantive due process doctrine would be an egregious misstep by the Supreme Court, anathema to longstanding and fundamental principles of constitutional liberty.

#### IV. THE DRAFT OPINION THREATENS OTHER REPRODUCTIVE AND PERSONAL AUTONOMY RIGHTS AND PRECEDENTS

Even while rejecting broad liberty protections for those seeking safe and legal abortions, the draft *Dobbs* opinion does acknowledge a line of precedent affirming similar substantive due process liberty protections in other cases, as previously discussed.<sup>53</sup> However, the opinion purports to distinguish those cases, including those involving the right to contraception such as *Griswold* and *Eisenstadt*, from abortion cases by contending that only abortion cases involve potential human life, or, an "unborn human being."<sup>54</sup> Considering that contraception also prevents potential life from being actualized, that distinction is disingenuous. The draft *Dobbs* opinion lacks any meaningful assurances that the precedents

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51. *Dobbs* Draft Op. at 25 (brackets in original) (quoting in part *Glucksberg*, 521 U.S. at 719).

52. As previously described, however, the draft opinion's description of the breadth of abortion bans leading up to *Roe* is an exaggeration, at best. See *supra* note 15 and accompanying text, citing Tang, *Op-Ed: The Supreme Court Flunks Abortion History*; Tang, *The Originalist Case for an Abortion Middle Ground*.

53. See *supra* notes 8 and 31 and accompanying text.

54. See *Dobbs* Draft Op. at 7 (quoting MISS. CODE ANN. § 41-41-191).

of *Griswold* and *Eisenstadt* will not be next on the chopping block. This is particularly the case when the very jurisprudential foundation for the right to privacy affirmed in *Roe* that was rejected as unsound in the draft *Dobbs* opinion mirrors and follows *Griswold*'s analysis identifying the right to privacy in a reproductive rights context as grounded in various constitutional protections of inherent and inalienable rights, including the Ninth and Fourteenth Amendments. To overrule *Roe* as based on a flawed identification of that same right to privacy would certainly pave the path for similarly overruling *Griswold* in a future case, sweeping away long-relied-upon reproductive rights to contraception free from government interference.

Reproductive freedoms are not the only rights threatened by the draft *Dobbs* opinion. The draft opinion could also be used to strip away other rights targeted by those hostile to what they deem untraditional expressions of personal liberty, including queer families and other intimate associations. The draft opinion's version of liberty, which denies protections for rights denied by past generations, is constrained by prejudices of the past. Under that approach, same-sex marriage, interracial marriage, and contraception could lose their constitutional protections, since at one time, if only in the distant past, they had been criminally prohibited and not explicitly enumerated as fundamental rights.

On that point, some may find comfort in the opinion's draft language "emphasiz[ing] that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."<sup>55</sup> Others may find that language to be empty platitudes. They may be less trusting, refusing to fall for assurances that a final *Dobbs* opinion resembling the leaked draft would leave intact other rights that have been recognized under the umbrella of Fourteenth Amendment liberty protections. After all, it is not uncommon for court opinions to hold themselves out as narrow in scope, only to have their precedential force extended to other contexts in subsequent cases.<sup>56</sup>

Finally, it is not entirely unlikely that if something substantially similar to the leaked *Dobbs* opinion draft, including its interpretation and

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55. *Id.* at 62.

56. Justice Scalia warned of such narrowly articulated holdings being applied more broadly in his strident dissents in *United States v. Windsor* and *Lawrence v. Texas*, both of which he accurately predicted would serve as foundations for an eventual decision affirming a broad right to same-sex marriage. See *United States v. Windsor*, 570 U.S. 744, 798 (2013). In that respect, the draft *Dobbs* opinion consequently may represent, in a sense, backlash to or even revenge for *Lawrence*'s decision overruling *Bowers* and leading to marriage equality.

application of *Glucksberg*, becomes the final opinion of the Court, even same-sex marriage and LGBTQ rights could be endangered. After all, there is already a pattern of same-sex marriage and LGBTQ-rights opponents invoking *Glucksberg* to deny same-sex couples and LGBTQ+ individuals substantive due process rights through arguments that parallel that in the draft *Dobbs* opinion.<sup>57</sup> The precedent set by such an opinion would not just pave the path for a slippery slope; it could lead to a tsunami of further rights deprivations of a historically unprecedented<sup>58</sup> magnitude.

## V. CONCLUSION

Ultimately, the draft *Dobbs* opinion fails to honor Justice Frankfurter's admonition in 1949 that "[g]reat concepts like . . . 'liberty' were purposely left to gather meaning from experience," because those "who founded this Nation knew too well that only a stagnant society remains unchanged."<sup>59</sup> Likewise, it fails to heed the warning of Thomas Jefferson that "[w]e might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors."<sup>60</sup>

It would not be sufficient to merely describe the draft *Dobbs* opinion as reflecting the mentality of those stuck in the past. Rather, the draft opinion reveals the intent of a majority of the Supreme Court to ignore over fifty years' of precedent recognizing fundamental reproductive rights, while forcing the nation to revert to an era of personal liberty infringements, and unsafe and illegal abortions. The justification for doing so, the lack of explicit abortion rights protections in past centuries, fails to respect the longstanding principle that constitutional rights "must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>61</sup> Allowing anything even similar in

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57. See Marcus, *supra* note 18, at 382-87 (discussing the Scalia dissent in *Lawrence* that describes the *Lawrence* majority opinion as in conflict with *Glucksberg* and also describes *Roe* and *Casey* as "eroded" by *Lawrence*, 539 U.S. at 588, 591 (Scalia, J., dissenting); and also discussing other federal court opinions invoking *Glucksberg* to limit the rights of same-sex couples in the aftermath of *Lawrence*, e.g., *Lofton v. Sec. of Dept. of Children & Family Servs.*, 358 F.3d 804, 816-17 (11th Cir. 2004) (upholding state ban on adoption by individuals engaging in "homosexual conduct"), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, No. 04-478, 73 U.S.L.W. 3399 (U.S. Jan. 10, 2005), and *Williams v. Attorney General*, 378 F.3d 1232, 1236-38, 1250 (11th Cir. 2004) (upholding state ban on the sale of sex toys)).

58. And ironically so, being done in the name of respecting history and tradition.

59. *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

60. Letter from Thomas Jefferson, *supra* note 16.

61. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). See also *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

substance to the leaked draft *Dobbs* opinion, stripping away deeply-rooted fundamental rights to privacy and personal autonomy in our most intimate life choices would be anathema to the Constitution's promises of liberty that have long stood as the foundation of an ever-evolving and enlightened constitutional democracy. To honor American tradition is to respect our ability to *increase* protections for individual rights over time, not to disregard a half century of reliance on privacy-affirming precedent, denying Americans our fundamental right to be let alone in our most intimate life choices, free from government coercion over our bodies and autonomy.