PRIVACY AND AUTONOMY POST-*DOBBS*

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INTRODUCTION

When the Supreme Court handed down the *Dobbs*[1] decision, it was not lost on members of the Court that the majority might have just pulled on a thread that could unravel the Court's entire non-economic substantive due process jurisprudence that it kickstarted in the mid-1960s. Justice Thomas, in fact, welcomed that possibility in his concurring opinion: "[I]n future cases," he wrote, "we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents."[2]

Justice Alito rather gamely replied that those decisions were not in any danger because abortion was . . . different.[3] He wrote:

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[2] *Id.* at 2301 (Thomas, J., concurring) (citations omitted).

[3] *Id.* at 2243.

> [W]e have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed "potential life." Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.[4]

But as Justice Breyer's dissent recognized, those cases do not stand in isolation to one another; rather, they all share a common reasoning and have tended to mutually reinforce one another.[5]

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[4] *Id.* at 2280-81 (majority opinion) (citations omitted) (second alteration in original).

[5] *See id.* at 2317-51 (Breyer, J., dissenting).

> The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "cast[s] doubt on precedents that do not concern abortion." But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe*, the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.[6]

This essay is a thought experiment which attempts to brainstorm strategies for defending cases like *Griswold* or *Lawrence* in a post-*Dobbs* world. I have come up with five, though I doubt that mine is an exhaustive list.[7] The Justices themselves allude to some discussed herein in *Dobbs* itself.[8] They are: (1) utilize other provisions of the U.S. Constitution, such as the Privileges or Immunities Clause; (2) resort to *state* constitutional law; (3) more thoroughly theorize reliance interests that bolster arguments to preserve cases in the name of *stare decisis*; (4) more fully theorize "hybrid rights" cases, in which the Court suggests that a single fact situation involving two or more constitutional rights are in

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[6] *Id.* at 2319 (Breyer, J., dissenting) (citations omitted) (alterations in original).

[7] *See infra* note 105.

[8] *See infra* note 21 and accompanying text.

something of a special category; and (5) make "history and tradition" arguments to support some of the privacy and autonomy rights that might be vulnerable post-*Dobbs*.

Several of these strategies might be pursued in a single case; none are mutually exclusive. In the pages that follow, this essay will discuss each of these strategies in turn and assess the chances of their adoption by the current Court; a brief conclusion will follow. At the outset, however, let me make clear that my aims here are modest: I simply seek to initiate a discussion; I have no illusions that my observations are any more than preliminary ones.

I. FIND ALTERNATIVE TEXTUAL PROVISIONS

First, effort should be made to persuade the Court that privacy and autonomy interests are guaranteed in other provisions of the Constitution. Two that spring readily to mind—and have held appeal to some on the Court in the past—are the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment.[9] Both have benefitted from extensive recent scholarship that elucidates the Framers' intent surrounding each.

The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[10] Famously, Justice Goldberg rescued it from relative obscurity in his concurring opinion in *Griswold*.[11] Again, in *Roe*, the Court made reference to the amendment as one of the possible sources of the right to abortion.[12] While the Court has not built upon those invocations or spent much time fleshing out the contours of the amendment's scope, it has been the subject of significant scholarly interest in the last thirty years or so.[13] While the scholars (naturally) disagree on

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[9] *See* U.S. CONST. amend. IX; U.S. CONST. amend. XIV, § 1.

[10] U.S. CONST. amend. IX.

[11] Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring).

[12] Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

[13] For recent book-length treatments, see for example, DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE (2007); KURT T. LASH, THE LOST HISTORY OF THE

the scope and content of the amendment, at least some have argued persuasively that it could serve—and was intended to serve—as a source of judicially-enforceable individual rights. Certainly its very existence in the text of the Constitution and its forthright declaration that there are other rights possessed by the people make the Ninth Amendment a better vehicle for unenumerated rights than the strained reading of the word "liberty" which the Court's substantive due process cases require.[14]

Equally attractive is the Privileges or Immunities Clause of the Fourteenth Amendment.[15] Strangled in its crib at birth in the *Slaughter-House Cases*,[16] it too has been the subject of scholarly reconsideration[17] and at least one serious attempt to revive it before the Court. The scholarly consensus is now that the *Slaughter-House* Court's assumption that the Fourteenth Amendment was not intended to fundamentally alter the relationship of the citizen to the national government with the latter assuming the primary source and protector of its citizens' liberties was incorrect. We know as well that the Privileges or Immunities Clause was intended to render at least *some* provisions of the Bill of Rights applicable to the states. It's not clear, moreover, that the Framers of the Fourteenth Amendment understood "privileges or immunities" to be a closed class.

But for the late Justice Scalia's wit, the Privileges or Immunities Clause might have been rehabilitated. In 2010, when the Court took up the question whether the Second Amendment was to be incorporated through the Due Process Clause and applied to the states, Alan Gura, who represented the plaintiffs in *McDonald v. Chicago*,[18] spent much of his brief urging the Court to do so through the Privileges or Immunities Clause.[19] At oral

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NINTH AMENDMENT (2009); CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (1995).

[14] *See* U.S. CONST. amend. XIV.

[15] U.S. CONST. amend. XIV, § 1.

[16] *Slaughter-House Cases*, 83 U.S. 36 (1873).

[17] *See, e.g.,* CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014).

[18] McDonald v. Chicago, 561 U.S. 742 (2010).

[19] *See* ROBERT J. COTTROL & BRANNON P. DENNING, TO TRUST THE PEOPLE WITH ARMS: THE SUPREME COURT AND THE SECOND AMENDMENT, Ch. 8 (2023).

argument, however, Justice Scalia rendered Gura's efforts for naught when he asked him if he were bucking for a position on a law school faculty by suggesting the Court revisit a case that had been around for nearly 150 years. Gura was forced to fall back on the traditional route for incorporation, which was through the Due Process Clause. However, Gura's efforts were not totally in vain: Justice Thomas concurred in the result, preferring to rely on the Privileges or Immunities Clause.[20]

With Justice Scalia gone, Justice Thomas assuming the senior leadership of the majority, and with three new Justices who are less reluctant to revisit precedent in the name of fidelity to original meaning, it might be an ideal time to make another attempt at rehabilitating the Privileges or Immunities Clause. In his concurring opinion, in fact, Justice Thomas himself suggested this possibility. Following his expressed desire to revisit and overrule cases like *Lawrence* and *Obergefell* as "demonstrably erroneous," he wrote: "[T]he question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment."[21] There were, of course, no guarantees because "[t]o answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights."[22]

Resolution of those questions aside, rehabilitation of the Clause as a source of individual rights has at least the possibility of being ideologically cross-cutting as well. In the run-up to *McDonald*, when it became apparent that Gura was betting big on the Privileges or Immunities Clause, groups on both the left and the right filed amicus briefs urging the Court to discard the *Slaughter-House Cases*.[23] That said—and despite Justice Thomas's

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[20] *McDonald*, 561 U.S. at 805-06 (Thomas, J., concurring).

[21] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301-02 (2022) (Thomas, J., concurring).

[22] *Id.* at 2302.

[23] COTTROL & DENNING, *supra* note 19, at 249-50.

openness to giving scope to the Privileges or Immunities Clause—it is difficult to imagine him signing on to an interpretation of the Clause (or the Ninth Amendment) that would furnish a new textual bottle for the old substantive due process wine.

II. RELY ON STATE CONSTITUTIONAL LAW

Another obvious avenue of attack is to bring claims under state constitutional law. As the Burger Court began to retrench, limiting some of the Warren Court's most—or potentially—sweeping decisions in various areas, judges and scholars,[24] most notably Justice William Brennan,[25] urged state supreme courts to fashion more expansive state constitutional doctrine built on state constitutional provisions. State courts have heeded the call. I mention here three areas—school finance, prohibitions on sodomy, and abortion—in which state courts enforced rights under state law that the U.S. Supreme Court refused to recognize or, in the case of abortion, repudiated.

1. School Finance Litigation. In *San Antonio Independent School District v. Rodriguez*, the Court rejected arguments that Texas's method of funding public education constituted unconstitutional wealth discrimination.[26] It likewise refused to hold that education was a fundamental right.[27] "It is not the province of this Court," wrote Justice Powell, "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[28] The Court applied the rational basis test and acknowledged that when it came to laws governing the raising and distribution of state and local taxes "the presumption of constitutionality can be overcome only by the most explicit demonstration . . . against particular persons and classes . . . ."[29] Applying that standard with that background presumption, the Court concluded that it was constitutional.[30] Justice Powell

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[24] *See, e.g.*, A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

[25] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[26] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[27] *Id.* at 16.

[28] *Id.* at 33.

[29] *Id.* at 41 (quoting Madden v. Kentucky, 309 U.S. 83, 87-88 (1940)).

[30] *Id.* at 55.

concluded that "[t]he consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand."[31]

The *Rodriguez* case itself was inspired by plaintiff victories[32] in the first of what the literature describes as "waves" of school finance litigation.[33] The second wave invoked state constitutional equal protection guarantees as well as common provisions that "mandat[e] the provision of a free, public education. The strength of these education clauses varies, but the most common versions require states to provide a 'thorough and efficient' or 'general and uniform' education."[34] The second wave produced some victories, as did the third wave, whose focus shifted from securing "adequate" funding, which "focuses on bringing all schools up to a certain standard of quality, but once this standard is met, adequacy allows districts with greater means to supplement their local schools."[35] Second wave litigation tended to seek "equalization of school funding across districts or the creation of a system of 'fiscal neutrality' in which the same tax effort would raise the same amount of revenue in all districts regardless of local property wealth."[36] Despite the shift in the remedy sought, third wave school finance litigation relied on constitutional education guarantee clauses as their legal basis.

2. Consensual Sodomy Prohibitions. Infamously, the U.S. Supreme Court declined, in *Bowers v. Hardwick*, to strike down Georgia's criminal prohibition on sodomy as applied to a gay man.[37] In an opinion by Justice White, the Court declined to extend its

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[31] *Id.* at 58.

[32] *See* Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

[33] *See, e.g.*, James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?* 22 YALE L. & POL'Y REV. 463, 465-66 ("The first wave . . . briefly gained momentum after plaintiffs in *Serrano v. Priest I* succeeded in having the California funding system declared unconstitutional on both state and federal equal protection grounds.").

[34] *Id.* at 466 (footnotes omitted).

[35] *Id.* at 467.

[36] *Id.* at 466.

[37] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

privacy and autonomy cases, like *Griswold v. Connecticut*,[38] to cover same-sex sexual activity.[39] Noting that because throughout American history sodomy had been illegal either under common law or statute and that nearly half the states still outlawed it, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' . . . is, at best, facetious."[40] *Bowers* would remain the law for nearly two decades until it was overruled in *Lawrence v. Texas*.[41]

Once again, however, some state supreme courts did not wait on the U.S. Supreme Court. Relying on explicit constitutional protections of privacy, as well as state due process and equal protection guarantees, state court challenges to sodomy statutes in the late 80s and early 90s succeeded in a number of states.[42] In 1993, for example, the Kentucky Supreme Court relied on its judicially recognized right to privacy, in part, to invalidate its sodomy statute.[43] Another sodomy prohibition that fell pre-*Lawrence,* was, ironically, the very statute the Supreme Court upheld in *Bowers*.[44] Relying on a 1905 case holding that Georgia citizens enjoyed "liberty of privacy," the Georgia high court concluded that

> [w]hile *Pavesich* and its progeny do not set out the full scope of the right of privacy in connection with sexual behavior, it is clear that unforced sexual behavior conducted in private between adults is covered by the principles espoused in *Pavesich* since such behavior between adults in private is recognized as a private matter by "[a]ny person whose intellect is in a normal condition...." Adults who "withdraw from the public gaze" to engage in private unforced sexual behavior are exercising a right "embraced within the right of personal liberty." We cannot think of any other activity that reasonable persons would rank as more private and more deserving of

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[38] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[39] *Bowers*, 478 U.S. at 186.

[40] *Id.* at 192-94.

[41] Lawrence v. Texas, 539 U.S. 558 (2003).

[42] For a comprehensive survey of the state cases pending, see Paula A. Brantner, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495 (1992).

[43] Commonwealth v. Wasson, 842 S.W.2d 487, 492 (Ky. 1992).

[44] Powell v. State, 510 S.E.2d 18, 25-26 (Ga. 1998).

> protection from governmental interference than unforced, private, adult sexual activity.[45]

It rejected the state's proffered interests in preventing sexual assault and furthering public morality.[46] Other successful suits were brought in Tennessee[47] and Arkansas.[48]

3. Abortion. At the beginning, I said the resort to state constitutional law was an "obvious" response to *Dobbs* and no better proof of that is the fact that hardly was the ink dry on the opinion than litigants began challenging restrictive abortion laws that were either on the books or sprung into existence when *Roe* was overruled. As in the litigation over consensual sodomy prohibitions, specific language in state constitutions has proven fertile ground for state courts to protect abortion, post-*Dobbs*.[49]

In one notable case from South Carolina, that state's supreme court struck down a fetal heartbeat law that prohibits abortion after six weeks.[50] South Carolina's constitution contains a provision protecting against "unreasonable invasions of privacy."[51] The court concluded that provision was adopted in the mid-1960s against the backdrop of U.S. Supreme Court precedent recognizing the fundamental right to procreate and the marital privacy right recognized in *Griswold*.[52] Like many other state courts interpreting explicit right-to-privacy clauses in their constitutions, the South Carolina Supreme Court concluded that its right encompassed the right to abortion.[53] "[F]ew decisions in life," it wrote, "are more private than the decision whether to terminate a pregnancy. Our privacy right must be implicated by restrictions on that decision."[54] Applying strict scrutiny to the provision, it concluded:

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[45] *Id.* at 24 (second alteration in original).

[46] *Id.* at 24-26.

[47] Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

[48] Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002). Interestingly, there had been some state court successes prior to *Bowers*. For a discussion of that earlier litigation, see generally Debra McCloskey Barnhart, Commonwealth v. Bonadio*: Voluntary Deviate Sexual Intercourse — A Comparative Analysis*, 43 U. PITT. L. REV. 253 (1981).

[49] *See infra* notes 41-50 and accompanying text.

[50] Planned Parenthood S. Atl. v. State, 882 S.E.2d 770 (S.C. 2023).

[51] S.C. CONST., art. I, § 10.

[52] *Planned Parenthood S. Atl.*, 882 S.E.2d at 777-78.

[53] *Id.* at 782.

[54] *Id.*

> We hold that our state constitutional right to privacy extends to a woman's decision to have an abortion. The State unquestionably has the authority to limit the right of privacy that protects women from state interference with her decision, but any such limitation must be reasonable and it must be meaningful in that the time frames imposed must afford a woman sufficient time to determine she is pregnant and to take reasonable steps to terminate that pregnancy. Six weeks is, quite simply, not a reasonable period of time for these two things to occur, and therefore the Act violates our state Constitution's prohibition against unreasonable invasions of privacy.[55]

Other state supreme courts have recognized more limited rights to abortion. Oklahoma's supreme court, for example, recently recognized "the right of a woman to terminate her pregnancy in order to preserve her life," relying on Oklahoma's due process clause equivalent,[56] as well as a provision guaranteeing "the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."[57]

The Oklahoma high court decision followed on the heels of a decision by the North Dakota Supreme Court recognizing a similar right to abortion to preserve a mother's life or health.[58] In this case, the Court upheld a preliminary injunction imposed by a lower court judge, and in determining the likelihood the opponents of the near-total ban on abortions would be successful on the merits, the court held that the North Dakota Constitution's "inalienable rights" provision "implicitly include[d] the right to obtain an abortion to preserve the woman's life or health."[59] Applying strict scrutiny, the court concluded that the abortion statute was not "narrowly tailored to women's health" because it excluded abortions for conditions like ectopic pregnancies.[60]

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[55] *Id.* at 785-86.

[56] OKLA. CONST., art. II, § 7.

[57] OKLA. CONST., art. II, § 2; Oklahoma Call for Reproductive Justice v. Drummond, 526 P.3d 1123, 1132, 1145 (Okla. 2023).

[58] Wrigley v. Romanick, 988 N.W.2d 231 (N.D. 2023).

[59] *Wrigley*, 988 N.W.2d at 240; N.D. CONST., art. I, § 1 (1889).

[60] *Wrigley*, 988 N.W.2d at 243. *See also* Planned Parenthood of Montana v. State, 515 P.3d 301, 317 (Mont. 2022) (upholding preliminary injunction of abortion statute

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As these examples demonstrate, state constitutional law is a body of law that—though it has been effective in the past in protecting rights the Supreme Court had not yet recognized—still remains relatively underdeveloped. Many state constitutions, moreover, furnish textual hooks for rights that the U.S. Constitution lacks. Especially with abortion, state courts post-*Dobbs* will continue to make law; and would likely gap-fill should the Supreme Court go wobbly on other unenumerated autonomy rights.

III. THEORIZE RELIANCE INTERESTS

Among the arguments made in *Dobbs* to preserve *Roe* was an appeal to *stare decisis*; in particular the reliance interests that had grown up around it.[61] The Court was unmoved.[62] It first noted that conventional reliance interests involved situations "where advance[d] planning of great precision is most obviously a necessity."[63] Because people tend not to plan an abortion in advance, plaintiffs were urging "a more intangible form of reliance."[64] Justice Alito claimed that the Court was ill-suited to evaluate any but "concrete" forms of reliance.

challenged as unconstitutional under state due process and equal protection rights). As was true of the sodomy statutes, there were pre-*Dobbs* cases recognizing the right to abortion under state constitutional law. *See* Robert L. Bentlyewski, *Abortion Rights Under State Constitutions: A Fifty-State Survey*, 90 FORDHAM L. REV. 201 (2021).

[61] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276 (2022).

[62] *See id.* 2276-77.

[63] *Id.*

[64] *Id.*

> When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies."[65]

Alito also rejected reliance arguments related to the knock-on effects in other substantive due process cases, emphasizing "our decision concerns the constitutional right to abortion and no other right."[66]

Supporters of those other areas ought to consider better theorizing intangible reliance interests to be deployed when other cases owing their existence to the legacy of *Roe*—I'm thinking specifically of *Obergefell* or *Lawrence v. Texas*—are challenged. It is difficult to accept Justice Alito's assurances that "abortion is different" and that *Dobbs* has no implications for other cases; it seems that Justice Thomas's concurring opinion is the more honest assessment of *Dobbs*' implications.

In a recent article, Professor Nina Varsava argues that Justice Alito was wrong to dismiss the value of intangible reliance interests and that those ought to figure in the Court's decision to overrule a case or not.[67] She also argues that the majority discounted or overlooked concrete interests implicated by *Roe*'s abandonment.

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[65] *Id.* at 2277 (quoting Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963)).

[66] *Id.*

[67] Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845 (2023). *See also* William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681 (2023); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411 (2010).

Taking her last point first, Professor Varsava notes that there were at least *some* women who relied on the existence of "a right to abortion of substantial duration . . . under the pre-*Dobbs* precedents. Anyone who was less than twenty-four weeks pregnant at the time that those precedents were overruled could reasonably claim to have relied on them in a tangible way."[68] And yet the Court barely acknowledged, much less gave credit to, those interests.

In addition, she describes the myriad ways "[p]eople have made both minor and major decisions about their educations, careers, relationships, families, and political activities that may be less desirable in a post-*Roe* regime."[69] To give but one example, she observes that people made decisions about where to take jobs—locating to Texas instead of California—with the expectation of abortion access.[70]

She also argues that the *Dobbs* Court narrowed the definition of concrete interests for abortion in ways it does not when assessing other concrete interests. "The Court does not require evidentiary proof of reliance on precedent even in the commercial context. Nor does it treat the challenge of measuring reliance interests in that context as a reason to refrain from addressing them."[71] Instead, "[i]t considers whether people *might* have arranged their affairs in reliance on the precedent at issue and if it finds they might have, then that constitutes a reliance interest weighing against overruling."[72]

As for intangible reliance interests, Professor Varsava disputes Justice Alito's two arguments against taking them into account: (1) that the Court doesn't do so as a matter of practice and *Casey*'s consideration of them in declining to overrule *Roe* was anomalous and (2) that it is beyond the institutional competence of the Court to weight them.[73] "[B]efore *Dobbs*," she writes, "the Court had not adopted the position that only individualized reliance interests or only economic ones count for the purposes of stare decisis."[74] She offers examples in which the Court has mentioned

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[68] Varava, *supra* note 56, at 1866 (footnote omitted).
[69] *Id.* at 1868 (footnote omitted).
[70] *Id.* at 1868-69.
[71] *Id.*at 1871-72.
[72] *Id.*
[73] *Id.* at 1875.
[74] *Id.*

societal expectations among reasons not to overturn precedent, especially where constitutional liberties are involved.[75]

When it comes to "measurability" and institutional competence, she first notes that "the fact that systemic effects are 'inchoate' does not make them any 'less real.'"[76] Then she observes that "the Court is not well equipped to measure even tangible reliance interests; nor does it pretend to have competence in this regard."[77] She further argues that, in fact, "the society-wide reliance costs of overturning precedent might actually be more readily identifiable than reliance of the individualized tangible type" because it is "massive and widespread."[78]

She goes on to make the normative case for taking account of intangible reliance interests.[79] "When precedents are overturned and expectations thwarted, it comes with costs to the kind of autonomy and self-governance that stare decisis, when followed, serves to protect."[80] Disregarding those interests "offends our dignity because it expresses a complete disregard for our expectations and the thinking that rested on them."[81] Second, intangible interests reflect important societal reliance interests, which Professor Varsava defines as "individual reliance interests in the aggregate"[82] as well as "reliance on a collective good or value"[83] such as liberty, equality, or autonomy.

Finally, she argues that the *Dobbs* Court's failure to credit those intangible interests undermines systemic reliance because it destabilizes an entire doctrinal line that grew out of *Roe* and related cases.[84] "Given that the constitutional right to abortion is part of a constellation of fundamental liberty rights that the Court has recognized, overturning the right unsettles related rights too, despite the protestations of the *Dobbs* majority to the contrary."[85]

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[75] *Id.* at 1875-79.
[76] *Id.* at 1882.
[77] *Id.* at 1883-84.
[78] *Id.* at 1884.
[79] *Id.* at 1887.
[80] *Id.*
[81] *Id.* at 1889
[82] *Id.* at 1894.
[83] *Id.* at 1895.
[84] *Id.* at 1896-97.
[85] *Id.* (footnotes omitted).

Perhaps a little hyperbolically, she argues that worst case, by "overrul[ing] well-established precedent, the Court might give rise to doubts and anxieties about the entire legal order."[86]

Whatever the merits of her argument about reliance interests and abortion specifically, I think that a very strong case can be made that other privacy and autonomy cases involve the kinds of concrete reliance interests that the Court privileges in *Dobbs*. Imagine a state that, post-*Dobbs*, decides to recognize only opposite-sex marriage as a direct challenge to *Obergefell*. It seems obvious that the concrete reliance interests at stake in such a case would be many. First, there's the fact that same-sex couples got married in obvious reliance on *Obergefell*. From that follows a host of complex legal, financial, and familial arrangements that would be made in *Obergefell*'s shadow, including perhaps the joint conception of or adoption and raising of children. Even if a state did not require those extant relationships to be unwound (which would present a separate set of constitutional issues), prohibiting future same-sex marriages would relegate those marriages allowed to exist at sufferance to a kind of legal twilight zone. Much was made in *Obergefell* about the importance of the institution of marriage to a stable social order and to providing stability for children.[87] Whether one characterizes those interests as concrete or intangible, they certainly are important and discarding them by ending same-sex marriage would undoubtedly have adverse societal and systemic effects.

IV. THEORIZE "HYBRID RIGHTS" CASES

In *Employment Division v. Smith*, Justice Scalia explained that the Court's cases where it applied strict scrutiny to otherwise generally-applicable statutes incidentally impacting an individual's religious observance involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . ."[88] In other words, when faced with what Michael Coenen calls "right/right" combinations,[89] courts

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[86] *Id.* at 1900.

[87] Obergefell v. Hodges, 576 U.S. 644, 668-70 (2015).

[88] Emp. Div. v. Smith, 494 U.S. 872, 881 (1990).

[89] Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1079 (2016).

should (and do) apply judicial review with some additional verve. A recent example of a "hybrid rights" case is *Obergefell*.[90] Not only did same-sex marriage bans violate the fundamental right to marry that the Court had located in the due process clause,[91] the exclusion of same sex couples from the right violated the right to equal protection as well.[92] Describing the relationship between the two, Justice Kennedy wrote:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[93]

And yet, much like the notion of reliance interests, the notion of hybrid rights remains undertheorized. Dan Coenen has argued that perhaps people have been misled by the terminology; that "hybrid rights are simply rights" and cases involving them "exemplify the common practice by which courts consider matter extrinsic to the text of a particular constitutional provision to resolve ambiguities that inhere in that text."[94] He argues that these cases are quite common but have perhaps gone unnoticed precisely because nothing particularly special or unusual is going on in the cases.

However common or uncommon, relying on more than one right to establish a constitutional principle is certainly among the modalities the Court employs—itself a combination of textualism

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[90] *See Obergefell*, at 671-72.

[91] *Id.*

[92] *Id.* at 672.

[93] *Id.*

[94] Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2364 (2020).

and drawing inferences from constitutional structure. In a post-*Dobbs* world, the technique could serve as a bulwark against attempts to dismantle other *Roe*-adjacent cases.

Take the right to contraception, for example. The right recognized in *Griswold* was itself the product of a hybrid rights analysis.[95] Justice Douglas's opinion drew from the First, Third, Fourth, Fifth, and Ninth Amendments to extrapolate a right to martial privacy regarding family planning matters.[96] As Justice Douglas wrote, "[t]he present case . . . concerns a relationship lying within the zone of privacy *created by several fundamental constitutional guarantees*."[97] The Court later severed the link between the right and the institution of marriage, expanding the right to all individuals in *Eisenstadt v. Baird*.[98]

Even though *Eisenstadt* served as a springboard for *Roe*, the right to abortion does not involve the same concatenation of rights and interests recognized in *Griswold*, and so for that reason, *Eisenstadt* is more easily defended[99]. Likewise, same-sex marriage implicated not only a fundamental constitutional right, but also the Constitution's commitment to equal treatment under the law.

V. MAKE HISTORY AND TRADITION ARGUMENTS

File this suggestion under the heading "if you can't beat 'em, join 'em." Making originalist arguments to achieve "liberal" ends is hardly new.[100] In fact, Justice Kennedy deployed history and tradition arguments in *Lawrence v. Texas* to rebut the historical claims made in *Bowers* that outlawing homosexual conduct was consistent with a "millennia of moral teaching," to quote Chief Justice Burger.[101] In response, Justice Kennedy cited historical studies that argued "early American sodomy laws were not directed

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[95] *See* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

[96] *Id.*

[97] *Id.* at 485 (emphasis added).

[98] Eisenstadt v. Baird, 405 U.S. 438 (1972). I have criticized the reasoning employed by the Court to do so. *See* Brannon P. Denning, *Ipse Dixits, Bootstraps, and Constitutional Doctrine*, 74 BAYLOR L. REV. 555 (2022).

[99] *Compare* Griswold v. Connecticut, 381 U.S. 479 (1965), *with* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[100] *See, e.g.,* JACK M. BALKIN, LIVING ORIGINALISM (2011); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

[101] Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally."[102] He continued: "Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals."[103] He used the fact that laws targeting same-sex sodomy began to appear only in the 1970s to undercut claims that such prohibitions were part of our history and tradition.[104]

There are undoubtedly other rights recognized as part of that constellation of unenumerated fundamental rights recognized under the Court's substantive due process jurisprudence for which compelling history and tradition arguments can be made. Consider the fundamental right to procreation recognized in *Skinner v. Oklahoma*, in which a unanimous Court, speaking through Justice Douglas, held that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[105] It held it a violation of the Equal Protection Clause to sterilize one group of people who steal in one way, while exempting others. While the Court's characterization of the right to procreate as "fundamental" rests on an *ipse dixit*, one would be hard pressed to gainsay the Court's conclusion that it is part of our history and tradition. Even in a post-*Dobbs* world, it is scarcely imaginable that a state would attempt to limit that right, or that, if one did, that any court—including the U.S. Supreme Court—would countenance such an attempt.

Related to procreation is the ability of parents to superintend the rearing and education of their children. It is not often appreciated that *Lochner*-era Courts were not exclusively preoccupied with economic rights.[106] Among the Court's substantive due process jurisprudence of the time were cases like

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[102] Lawrence v. Texas, 539 U.S. 558, 568 (2003).

[103] *Id.* at 569.

[104] *Id.* at 571-72.

[105] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[106] *But see* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997).

Meyer v. Nebraska[107] and *Pierce v. Society of Sisters*.[108] In the former, the Court struck down a state law prohibiting the teaching of foreign languages before the eighth grade as violating the Due Process Clause.[109] Famously, the Court wrote that:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[110]

It went on to say that "it is the natural duty of the parent to give his children education suitable to their station in life," and that a ban on language instruction where parents might otherwise wish "is arbitrary and without reasonable relation to any end within the competency of the state."[111]

Three years later, in *Pierce*, the Court held unconstitutional an Oregon statute mandating that eight- to sixteen-year-olds attend public school.[112] Relying on *Meyer*, the Court held that it was "entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[113] It added,

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[107] Meyer v. Nebraska, 262 U.S. 390 (1923).

[108] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). For discussion of both cases, see WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917—1927 (1994).

[109] *Meyer*, 262 U.S. at 400.

[110] *Id.* at 399.

[111] *Id.* at 400, 403. Interestingly, the Nebraska Supreme Court construed the act to prohibit only instruction in modern languages, as opposed to Greek, Latin, or Hebrew. *Id.* at 401 ("Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.").

[112] *Pierce*, 268 U.S. at 530-31 ("The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the eighth grade.").

[113] *Id.*at 534-35.

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[114]

One of the reasons that *Meyer* and *Pierce* aren't remembered as *Lochner*-era substantive due process cases is that Justice Douglas blatantly mischaracterized them in *Griswold*.[115] Recall that in *Skinner*, Douglas simply declared *ex cathedra* that procreation was a fundamental right. In *Griswold*, he tried to ground the marital privacy right in the Constitution, all the while self-consciously disclaiming any return to substantive due process. Piously, he declared that "[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[116] He then proceeded to infer a right of marital privacy from various provisions of the Bill of Rights. In so doing, he mischaracterized *Meyer* and *Pierce* as First Amendment cases.[117]

In a post-*Dobbs* world, what is to become of those parental rights to superintend the education and raising of their children? Given the controversies surrounding state-sponsored efforts to conceal from parents their children's choices regarding gender identity and corresponding state efforts to ban "gender-affirming

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[114] *Id.* at 535.

[115] *See* Griswold v. Connecticut, 381 US. 479, 482 (1965).

[116] *Id.*

[117] *Id.* He wrote:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

care" for minors even if parents desire it,[118] the answer to that question is not likely to remain an academic one.

As was true with procreation, a strong history-and-tradition argument can be made in favor of the right of parents to rear and educate their child as they see fit. Certainly, English common law at the time of the Framing recognized as much. In Blackstone's *Commentaries*, he writes that "[t]he last duty of parents to their children is that of giving them an *education* suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any."[119] An undercurrent in both *Meyer* and *Pierce*, as well as in later cases, like *Wisconsin v. Yoder*, was that even important state interests had to yield to "the traditional interest of parents with respect to the religious upbringing of their children . . . ."[120]

CONCLUSION

The post-*Dobbs* outlook for unenumerated rights which sound in privacy and autonomy is not an altogether bleak one.[121] As I've described elsewhere,[122] much of the reasoning that undergirds those cases involved a cheat, causing them to seem as if, to paraphrase John Hart Ely, they felt no obligation to present

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[118] For a description of current policies, see S. Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 REGENT U. L. REV. 219, 256-62 (2022).

[119] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *450-51. The other duties were those of maintenance and protection. *Id.*

[120] Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (holding that state statute requiring compulsory education until sixteen was unconstitutional as applied to Old Order Amish who insist children leave school after eight grade).

[121] I stress that my list is hardly an exclusive one. *See supra* note 8. One might argue for a narrower conception of the state police power than has developed in recent decades. *See, e.g.,* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004); Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511 (2000). Or urge courts to adopt a less deferential version of the rational basis test, which would require government to justify curbs on liberty and autonomy regardless of whether those interests are described as "fundamental" or not. *See, e.g.,* Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008).

[122] Denning, *supra* note 83.

themselves as constitutional *law*.[123] Thus, proponents of the rights recognized in decisions like *Griswold, Lawrence,* or *Obergefell* have an opportunity to place those rights on a firmer footing, either by drawing on new sources of law, be those marginalized provisions of the U.S. Constitution or often under-appreciated state constitutional provisions. Alternatively, or in tandem, proponents could put some meat on the bones of spare phrases like "reliance interests" or "hybrid rights." Finally, one could attempt a sort of jujitsu, and leverage the new majority's affinity for history and tradition arguments to produce persuasive arguments that history and tradition favored—or at least didn't exclude the possibility of—recognizing one or more unenumerated rights. At the very least, the possibility of alternative paths to recognizing unenumerated rights, I hope, provides an antidote to the counsel of despair that permeated the immediate post-*Dobbs* commentary.

[123] John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) ("[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.").