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# Privacy: Pre- and Post-*Dobbs*

*Rona Kaufman\**

## INTRODUCTION

The United States Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to include a fundamental right to familial privacy. The exact contours of that right were developed by the Court from 1923 until 2015 and included: (1) the right to parent—that is the right to care, custody, and control of one’s children;<sup>1</sup> (2) a qualified right to be safe from forced sterilization;<sup>2</sup> (3) the right of married couples and single persons to determine whether to bear or beget a child, including the right to access contraception and abortion;<sup>3</sup> (4) the right to marry a person, without regard to that person’s race or sex;<sup>4</sup> and (5) a limited right to autonomy with regard to intimate conduct, association, and relationship.<sup>5</sup> In 2022, with its decision in *Dobbs v. Jackson Women’s Health*, the Supreme Court abruptly changed course and held that the right to terminate a pregnancy is no longer part of the right to privacy previously recognized by the Court.<sup>6</sup> This essay seeks to place *Dobbs* in the context of the Court’s family privacy cases in an effort to understand the Court’s reasoning and the impact the decision may have in the future. To that end, Part I reviews ninety years of Supreme Court privacy jurisprudence. Part II considers the *Dobbs* decision, including the majority, concurring, and dissenting opinions. Part III considers how *Dobbs* may impact privacy jurisprudence moving forward.

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1. *See generally* *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925).

2. *See generally* *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

3. *See generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

4. *See generally* *Loving v. Virginia*, 388 U.S. 1 (1967).

5. *See generally* *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

6. *See generally* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240 (2022).

## PART I: PRIVACY

In 1923, in *Meyer v. Nebraska*, the Supreme Court held that a state law prohibiting foreign language instruction for children was unconstitutional.<sup>7</sup> Specifically, the Court found that liberty protected by the due process clause:

[w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children, to worship God . . ., and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>8</sup>

Two years later, in *Pierce v. Society of Sisters*, the Court struck down a statute which prohibited children from being educated in parochial schools.<sup>9</sup> Relying on *Meyer*, the Court found:

that [this statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be [so] abridged by legislation which has no reasonable relation to some purpose within the competency of the state.<sup>10</sup>

In 1927, the Supreme Court had another opportunity to consider the parameters of liberty and privacy.<sup>11</sup> In *Buck v. Bell*, the Court upheld a Virginia statute that made it possible for the state to sterilize Carrie Buck, “a feeble minded white woman,” against a challenge that the law was an unconstitutional violation of her Fourteenth Amendment substantive due process and equal protection rights.<sup>12</sup> The Court reasoned that:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our

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7. *Meyer v. Nebraska*, 262 U.S. 390, 400–03 (1925).

8. *Id.* at 399.

9. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925).

10. *Id.*

11. *See generally* *Buck v. Bell*, 274 U.S. 200 (1927).

12. *Id.* at 205.

being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.<sup>13</sup>

Thus, in the case of sterilizing a feeble-minded woman, so as to prevent her from birthing undesirable offspring, the Court summarily set aside the argument that her liberty was being infringed upon.<sup>14</sup> It did not seriously consider that forced sterilization statutes might “unreasonably interfere[] with [women’s] liberty”<sup>15</sup> or their right to “establish a home and bring up children”<sup>16</sup>—rights recognized as fundamental in *Meyer* and *Pierce*. Instead, it determined that her “sacrifice” was reasonable in light of the state interest in preventing “being swamped with incompetence” and “waiting to execute degenerate offspring for crime.”<sup>17</sup>

In 1942, the Court took a very different approach in a similar case when considering the constitutionality of a state statute authorizing the sterilization of Jack Skinner and other “habitual criminals.”<sup>18</sup> In *Skinner v. Oklahoma*, the Court found that the forced sterilization of a certain class of criminals violated the equal protection clause.<sup>19</sup> In reaching its conclusion, the Court discussed the nature of the substantive rights involved:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . . Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.<sup>20</sup>

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13. *Id.* at 207 (internal citation omitted).

14. *Id.*

15. *Pierce*, 268 U.S. at 534–35.

16. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

17. *Buck*, 274 U.S. at 207.

18. Rachel Gur-Arie, *Skinner v. Oklahoma (1942)*, THE EMBRYO PROJECT ENCYCLOPEDIA, <https://embryo.asu.edu/pages/skinner-v-oklahoma-1942> (last modified July 3, 2018) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942)).

19. *Skinner*, 316 U.S. at 541.

20. *Id.*

Importantly, *Buck* concerned the forced sterilization of a woman<sup>21</sup> while *Skinner* concerned the forced sterilization of a man.<sup>22</sup> Moreover, *Skinner* did not overrule *Buck*.<sup>23</sup> While *Skinner* made it unlawful to sterilize a criminal based on a specific number and character of crimes, it did not make it unlawful for the state to forcibly sterilize feeble-minded women.<sup>24</sup> Of course, it seems clear that it would be an unconstitutional violation of the right to equal protection for the state to discriminate on the basis of sex or race with regard to forcible sterilization. Nevertheless, in practice, women, especially Black and Latina women, are much more likely to be sterilized than men or white women.<sup>25</sup>

With regard to the nature of the liberty rights upon which they rested, neither *Meyer*, nor *Pierce*, nor *Skinner* was explicit about the constitutional foundation. In all three decisions, the Court appeared to simply *know* that the particular state interference was unconstitutional because it infringed on *liberty*.<sup>26</sup> Similarly, in *Buck*, the Court did not engage in a discussion about a constitutionally based right that might call the forced sterilization statute into question—rather, it simply concluded this was not one of those instances when a state statute unconstitutionally interfered with *liberty*.<sup>27</sup> A constitutionally analyzed explication of the right to liberty in the context of family, parenting, or procreation did not come until 1965 when the Court struck down a State statute that prohibited the use of contraceptive devices by married couples.<sup>28</sup>

In *Griswold*, the Court deemed Connecticut's eighty-year-old statute unconstitutional on the basis that it interfered with the married couple's right to liberty.<sup>29</sup> Like in *Skinner*, the Court once again engaged in its discussion with lofty language noting that the

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21. *Buck*, 274 U.S. at 205.

22. *Skinner*, 316 U.S. at 537.

23. Lisa Powell, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y REV. 481, 484 (2002).

24. *Skinner*, 316 U.S. at 541.

25. Emily Medosch, *Not Just ICE: Forced Sterilization in the United States*, IMMIGR. AND HUM. RTS. L. REV. BLOG (May 28, 2021), <https://lawblogs.uc.edu/ihrhr/2021/05/28/not-just-ice-forced-sterilization-in-the-united-states/>.

26. "Although *Meyer* and *Pierce* served as precedents in support of the privacy right of couples to make decisions about procreation, they are not themselves procreative liberty cases, nor do they explain, with any particularity, the right of parents to make decisions regarding the upbringing of their children." Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 536 (2001).

27. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

28. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

29. *Id.*

rights at issue were among the “basic civil rights of man.”<sup>30</sup> The Court stated: “[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”<sup>31</sup> But then, in contrast to *Skinner*, the *Griswold* Court was very specific.<sup>32</sup> The Majority identified the source for a constitutional right to marital privacy as being found in the penumbras of the Bill of Rights—specifically—the First Amendment’s right to association,<sup>33</sup> the Third Amendment’s right against quartering soldiers in one’s home during times of peace,<sup>34</sup> the Fourth and Fifth Amendments’ rights to be safe from governmental intrusion into one’s home, papers, and self-incriminating knowledge,<sup>35</sup> and the Ninth<sup>36</sup> Amendment’s explicit retention of individual rights not expressly enumerated.<sup>37</sup> In discussing these rights, the Court focused on the right to privacy that underlies them and concluded that they “create . . . zone[s] of privacy” which the government may not “force him to surrender.”<sup>38</sup> In their concurrence, Justices Goldberg, Warren, and Brennan conceptualized the rights at issue as being grounded in the Ninth and Fourteenth Amendments, not in the penumbras as situated by the Majority.<sup>39</sup> With regard to the Ninth Amendment, they stated:

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30. *Id.* at 502 (White, J., concurring).

31. *Id.* at 486 (majority opinion).

32. As one *Griswold* commentator noted,

The most controversial, boldly-constitutional species of privacy began to take form out of bits and shreds in 1965, with the decision of the Supreme Court in *Griswold v. Connecticut*. *Griswold* exploded the world of individual liberties wide open by holding that an 80-year-old Connecticut law forbidding the use and distribution of contraceptives violated the right of “marital privacy” embodied—somewhere—in the Constitution. Six members of the Court agreed that the privacy was a fundamental right. Yet where this right took up residence in the text of the Constitution was a source of splintered opinions. Justice Douglas, who authored the opinion for the Court, offered his now-famous explication that the “right to privacy” could be found drifting amidst the “penumbras” of the First, Third, Fourth, Fifth and Ninth Amendments. Other Justices quarrelled over its source, but a majority of the Court found a fundamental right of privacy broad enough to protect the ability of married couples to decide what to do in the privacy of their marital bedrooms, without the intruding nose of the state of Connecticut.

Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1391–92 (1992).

33. *Griswold*, 381 U.S. at 484.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 486–87 (Goldberg, Warren, and Brennan, JJ., concurring).

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.<sup>40</sup>

By contrast, Justices Harlan and White found the right in the Fourteenth Amendment's concept of ordered liberty.<sup>41</sup> Finally, Justices Black and Stewart dissented, stating: "I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."<sup>42</sup> Thus, in a 7-2 decision, the Court conceptualized the right to privacy, grounding it in the Bill of Rights and the Fourteenth Amendment, and found that marital privacy, specifically the right of married couples to decide whether to use birth control, was fundamental.<sup>43</sup>

Two years later, in 1967, the Court considered privacy in the context of marriage.<sup>44</sup> In *Loving v. Virginia*, the Supreme Court struck down an anti-miscegenation statute on the basis of both equal protection and substantive due process.<sup>45</sup> The decision in *Loving* focused heavily on the equal protection analysis and had little to say about why exactly the statute denied the Lovings liberty without due process of law.<sup>46</sup> The Court simply noted that the freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>47</sup> It relied on *Meyer* and *Skinner* and identified marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival."<sup>48</sup> The Court determined that denial of the right to marriage on racial grounds "is surely to deprive all the State's citizens of liberty without due process of law."<sup>49</sup> And, finally, it recognized that the "freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."<sup>50</sup>

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40. *Id.* at 491.

41. *Id.* at 499–507 (Harlan and White, JJ., concurring).

42. *Id.* at 527, 530 (Stewart and Black, JJ., dissenting).

43. *Id.* at 479 (majority opinion).

44. *Loving v. Virginia*, 388 U.S. 1, 1 (1967).

45. *Id.*

46. *Id.*

47. *Id.* at 12.

48. *Id.*

49. *Id.*

50. *Id.*



Five years later, in 1972, the Court decided *Eisenstadt v. Baird*, a case similar to *Griswold* but where, rather than considering the infringement of a state contraceptive ban on “married couples,” it considered the constitutionality of a state contraceptive ban applied to “unmarried persons.”<sup>51</sup> To say that *Eisenstadt* revolutionized our understanding of familial privacy, is an understatement. Prior to *Eisenstadt*, the idea of a right to privacy was consistent with national respect for tradition and patriarchal prerogative. With *Eisenstadt*, that was no longer the case. In *Eisenstadt*, the Court clearly stated that the right to privacy was not a marital right but, rather, an individual right.<sup>52</sup> It famously explained:

Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If 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>53</sup>

One year later, in *Roe v. Wade*, the Court extended *Eisenstadt*'s reasoning that privacy protects the right of the individual to make her own decision as to whether to bear or beget a child, to her decision to terminate her pregnancy.<sup>54</sup> Duquesne University President, law professor, and scholar, Ken Gormley, characterized the move from earlier privacy cases to the privacy conceptualization in *Griswold* and *Roe* as “ingenious”:

The ingenious thing about *Griswold* and *Roe*, in retrospect, was that they succeeded in blending well-respected constitutional privacy notions—primarily drawing from Fourth and First Amendment cases—with forgotten turn-of-the-century “liberty” cases under the Fourteenth Amendment and swirled these together to produce a completely new form of privacy dealing with “liberty of choice.”<sup>55</sup>

The following year, the Court considered whether public school mandatory maternity leave rules—which would force pregnant

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51. *Eisenstadt v. Baird*, 405 U.S. 438, 438 (1972).

52. *Id.* at 453.

53. *Id.* (emphasis added).

54. *Roe v. Wade*, 410 U.S. 113, 169–70 (1973).

55. Gormley, *supra* note 32, at 1396.

women to leave work at a fixed point during their pregnancies—violated the women’s Fourteenth Amendment due process rights.<sup>56</sup> Relying on the “freedom of personal choice in matters of marriage and family life”<sup>57</sup> and citing to *Meyer*, *Pierce*, *Griswold*, *Eisenstadt*, *Roe*, and *Skinner*, among other cases, the Court found that such mandatory maternity leave rules violated the women’s Due Process rights.<sup>58</sup>

In 1976, the Court further affirmed the singularity of the woman’s choice to terminate a pregnancy when it struck down a state statute requiring spousal consent.<sup>59</sup> In *Danforth*, the Court expressed its respect for the husband’s concerns:

We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife’s pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society.<sup>60</sup>

Despite its recognition of the father’s “deep and proper concern and interest,”<sup>61</sup> the Court concluded that he could not be given a veto over his wife’s decision:

[I]t is difficult to believe that the goal of fostering mutual-ity and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all.<sup>62</sup>

Further, the Court found that the state could not imbue him with the power to prevent his wife from terminating her pregnancy where the state itself lacked that power: “we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right.”<sup>63</sup>

The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two

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56. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634 (1974).

57. *Id.* at 639.

58. *Id.* at 640, 646.

59. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 70 (1976).

60. *Id.* at 69.

61. *Id.*

62. *Id.* at 71.

63. *Id.* at 70.

marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.<sup>64</sup>

In 1977, in *Carey v. Population Services*, another contraceptives case, the Court summarized its privacy jurisprudence:

Although “(t)he Constitution does not explicitly mention any right of privacy,” the Court has recognized that one aspect of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment is “a right of personal privacy, or a guarantee of certain areas or zones of privacy.” This right of personal privacy includes “the interest in independence in making certain kinds of important decisions.” While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions “relating to marriage; procreation; contraception; family relationships; and childrearing and education.” *The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy . . .* This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive.<sup>65</sup>

Despite the Court’s recognition of a broad right to privacy in *Carey*, in 1986, the Court declined to extend that right to include gay sex.<sup>66</sup> In *Bowers v. Hardwick*, the Court distinguished the privacy right being sought from those the Court had already recognized, stating:

[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or

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64. *Id.* at 71.

65. *Carey v. Population Servs., Int’l*, 431 U.S. 678, 684–85 (1977) (internal citations omitted) (emphasis added).

66. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unworkable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far.<sup>67</sup>

In 1992, in *Planned Parenthood v. Casey*, the Court returned to its *Danforth* reasoning and took it a step further when it struck down a Pennsylvania law that merely required a woman to notify her spouse of her intent to have an abortion.<sup>68</sup> Through *Danforth* and *Casey*, the Court recognized that prior to the birth of a child, the woman's rights are paramount and her husband does not even have the right to know she is planning to terminate a marital pregnancy.<sup>69</sup> In so doing, the Court struck a vital blow to patriarchal power over the family and again reminded us that "marital privacy" had been replaced by "individual privacy."

In 2003, the Court seized another opportunity to consider whether the right to privacy was broad enough to include gay sex.<sup>70</sup> In *Lawrence v. Texas*, the Court overruled *Bowers v. Hardwick* and held that the criminalization of gay sex was unconstitutional.<sup>71</sup> In *Lawrence*, the Court found that liberty includes an understanding of autonomy that encompasses intimate expression and sexual orientation.<sup>72</sup> Specifically, it stated that "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>73</sup> Importantly, the Court was clear that its decision did not implicate the right to marriage, stating: "[this case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>74</sup>

Twelve years later, in 2015, the Court decided *Obergefell v. Hodges* and found that prohibitions against same-sex marriage

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67. *Id.* at 190–91.

68. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992).

69. *See generally* *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

70. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

71. *Id.* at 578–79.

72. *Id.* at 562.

73. *Id.*

74. *Id.* at 578.

were, like prohibitions against same-sex sexual conduct, unconstitutional.<sup>75</sup> In *Obergefell*, the Court went well beyond its holding in *Lawrence* by sanctioning same-sex marriage.<sup>76</sup> The Court went to great lengths to explain its decision—ostensibly, at least in part, because *Obergefell* was the realization of the *Lawrence* dissent's fear and prediction that legalization of gay sex would eventually lead to the sanction of gay marriage.<sup>77</sup> After reciting the history of same-sex relationships and various court decisions—none of which demonstrated any deeply rooted right to gay marriage in our nation's history<sup>78</sup>—the Court justified its decision to include same-sex marriage as a privacy right derived from the Fourteenth Amendment right to liberty by reasoning that “four principles and traditions . . . demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”<sup>79</sup>

In *Obergefell* the Court once again discussed its privacy jurisprudence. It explained that while many of the family privacy rights arose independently, over time they merged to form a “constellation” of constitutional rights to privacy. Scholars have noted that the “Rights to abortion, contraception, marriage, kinship, and the custody and rearing of children have, for the most part, sprung up independently of one another, only later converging into a loosely recognized constellation of ‘family privacy’ rights.”<sup>80</sup> Thus, in 2015, the Court merged the various strands of privacy recognized since 1923 in finding that the right to liberty under the Due Process clause of the Fourteenth Amendment necessarily includes a “constellation” of family privacy rights” that must extend to the right of individuals to marry someone of the same sex.

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75. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

76. *Id.*

77. *Id.* “But this [distinction] cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.” *Lawrence*, 539 U.S. at 600. “This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.” *Id.* “This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.” *Id.* at 605.

78. *Obergefell*, 576 U.S. at 659–64.

79. *Id.* at 665.

80. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 525, 528 (2000).

PART II: *DOBBS V. JACKSON WOMEN'S HEALTH*

At issue in *Dobbs v. Jackson Women's Health* was a Mississippi statute that prohibited most abortions after fifteen weeks of pregnancy.<sup>81</sup> Based on a pre-*Dobbs* understanding of the constitutional right to privacy, the Mississippi statute was a facially invalid ban on a woman's right to choose whether to bear or beget a child.<sup>82</sup> However, contrary to established privacy precedent, the Supreme Court overruled *Roe* and *Casey* and held no such right is expressly or implicitly protected by any constitutional provision, including the Due Process Clause of the Fourteenth Amendment.<sup>83</sup> Essentially, the Court carved abortion rights out of its privacy jurisprudence and out of the "constellation" of family privacy rights it had recognized just nine years prior. In doing so, it distinguished abortion from all other privacy rights on the basis that none of the other rights involve "the critical moral question posed by abortion"<sup>84</sup> and because none of the other privacy cases involve "potential life."<sup>85</sup>

In reaching its decision to overturn *Roe* and *Casey*, the majority relied on five reasons. First, the Fourteenth Amendment does not include a right to an abortion.<sup>86</sup> Second, no right to abortion is deeply rooted in the nation's history.<sup>87</sup> Third, abortion is not part of some broader entrenched constitutional right—some right to autonomy and to define one's concept of existence.<sup>88</sup> Fourth, *stare decisis* does not demand that *Roe* and *Casey* be affirmed.<sup>89</sup> And, fifth, the factors to be considered in deciding when to overrule a precedent weigh in favor of overturning *Roe* and *Casey*.<sup>90</sup>

With regard to the substantive due process aspect of the first rationale—that the Fourteenth Amendment does not include a right to abortion—the Court regressed to the language used by the majority in *Bowers*, stating:

[W]e must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy . . . . Instead, guided by the history and tradition that

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81. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022).

82. *Id.* at 2244.

83. *Id.* at 2284.

84. *Id.* at 2258.

85. *Id.* at 2260.

86. *Id.* at 2248.

87. *Id.* at 2253.

88. *Id.* at 2257.

89. *Id.* at 2261–63.

90. *Id.* at 2265.

map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to abortion.<sup>91</sup>

The Court then engaged in a historical review to support its second reason—that the right to abortion is not deeply rooted in our nation's history.<sup>92</sup> With regard to its third rationale, that abortion is not part of some broader entrenched right or a right to autonomy, the court simply summarized: "These attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drugs, prostitution, and the like."<sup>93</sup> The Court further argued that such a right need not be part of a woman's quest for autonomy given the equal status women have achieved since the 1970s:

[A]ttitudes about the pregnancy of unmarried women have changed drastically; . . . federal and state laws ban discrimination on the basis of pregnancy; . . . leave for pregnancy and childbirth are now guaranteed by law in many cases; . . . costs of medical care associated with pregnancy are covered by insurance or government assistance; . . . States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously; . . . a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.<sup>94</sup>

The Court then turned to its fourth rationale—that *stare decisis* does not mandate that *Roe* and *Casey* be upheld—arguing that it could excise the abortion cases from its privacy jurisprudence without threatening any other aspects of the right to privacy.<sup>95</sup> Finally,

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91. *Id.* at 2247–48 (internal citations omitted).

92. *Id.* at 2265–68. It should be noted that the *Dobbs* historical record has been criticized for its inaccuracies and omissions. Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022), <https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174>.

93. *Dobbs*, 142 S. Ct. at 2258 (internal citation omitted).

94. *Id.* at 2258–59.

95. *Id.* at 2262–64.

the Court turned to its fifth reason, that all relevant factors weigh in favor of overturning *Roe* and *Casey*.<sup>96</sup>

Justice Thomas concurred in the judgment, separately stating his view that there are no substantive rights under the Fourteenth Amendment and all the privacy cases should be overturned.<sup>97</sup> By contrast, Justice Kavanaugh's concurrence sought to calm those who would claim the court is minutes away from overturning the rights to contraception, gay sex, interracial marriage, and same-sex marriage.<sup>98</sup> He argued that the majority's decision was neutral on the issue of abortion, that it merely returned the issue to the states and the people.<sup>99</sup> Kavanaugh further provided specific assurance that the other privacy cases remain protected law and that if a state attempted to prevent a woman from traveling to another state to procure a legal abortion such attempt would be unconstitutional.<sup>100</sup> Meanwhile, in his own concurring opinion, Roberts chastised the Majority for judicial overreach and argued that the Court went too far, that it should have followed precedent by recognizing the right of the woman to choose, and that it simply should have adjusted *Casey*'s viability framework to find this Mississippi statute constitutional.<sup>101</sup>

In their Dissent, Justices Breyer, Kagan, and Sotomayor attacked the Majority decision on several bases. Two of their arguments are specifically relevant to the discussion in Part III below. They are: (1) that the Majority's view of abortion regulation as neutral medical regulation—irrelevant to women and women's equality—is wholly out of touch with reality;<sup>102</sup> and (2) that the Majority's assertion that its decision does not necessarily threaten all privacy cases over the last 100 years is disingenuous at best.<sup>103</sup> Specifically, they stated "one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."<sup>104</sup> Further, "[t]oday's Court . . . does not think there is anything of

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96. *Id.* at 2265.

97. *Id.* at 2301–04 (Thomas, J., concurring).

98. *Id.* at 2309–10 (Kavanaugh, J., concurring).

99. *Id.* at 2305.

100. *Id.* at 2309.

101. *Id.* at 2310–17 (Roberts, C.J., concurring).

102. *Id.* at 2328 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

103. *Id.* at 2331–33.

104. *Id.* at 2318. In listing the many ways in which women's status has improved, the Court failed to consider the role that reproductive rights, specifically the right to abortion, played such a change in status since *Roe* was decided. Caitlin Knowles, et al., *What Can Economic Research Tell Us About the Effect of Abortion Access on Women's Lives?*, BROOKINGS (Nov. 30, 2021), <https://www.brookings.edu/research/what-can-economic-research-tell-us-about-the-effect-of-abortion-access-on-womens-lives/>.



constitutional significance attached to a woman's control of her body and the path of her life."<sup>105</sup> And, finally,

[O]ne 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.<sup>106</sup>

### PART III: DOBBS AND THE "CONSTELLATION" OF FAMILY PRIVACY RIGHTS

Pursuant to *Dobbs*, the constitutional right to privacy found in the Due Process Clause of the Fourteenth Amendment does not include any right to terminate a pregnancy.<sup>107</sup> However, the constitutional right to privacy continues to protect the right of the individual to use contraception to prevent pregnancy, the qualified right to not be sterilized against one's will, the right to parent one's child, the right to marry a person of one's choosing without regard to race or sex, and the right to engage in intimate sexual conduct with another consenting adult within the privacy of one's home.

It is challenging to understand constitutional privacy as articulated by the Court from 1972 until 2015 without including the Court's decisions in *Roe*, *Danforth*, *Casey*, and other abortion cases.<sup>108</sup> It is especially difficult to distinguish the rights recognized in *Roe* and its progeny from *Eisenstadt* given that it was *Eisenstadt*, not *Roe*, that protected a woman's right to "decide whether to bear or beget a child."<sup>109</sup> Nevertheless, in *Dobbs*, the Court was clear that though the right to terminate a pregnancy is no longer included in the "constellation" of family privacy rights, this extraction does not weaken or threaten the right to contraception protected in *Griswold*, *Eisenstadt*, and *Carey*.<sup>110</sup> It is impossible to predict whether *Dobbs* will lead the Court to overrule *Griswold*, *Eisenstadt*, and *Carey*. However, regardless of whether the Court later overrules the contraception cases and further extracts rights from the "constellation" of family privacy rights, *Dobbs* is causing confusion with

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105. *Dobbs*, 142 S. Ct. at 2323 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

106. *Id.* at 2319.

107. *See generally Dobbs*, 142 S. Ct. at 2228.

108. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

109. *See generally* *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

110. *Dobbs*, 142 S. Ct. at 2332 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

regard to the right to access contraception. Specifically, elected officials and health care workers are unsure whether state laws that prohibit all abortions also include a ban on certain types of birth control.<sup>111</sup> Further, to the extent that some states are considering banning certain forms of birth control, there is confusion as to whether such laws would be constitutional under the existing constitutional framework where abortion bans are permissible but contraception bans are not.<sup>112</sup> Similarly unclear is how *Dobbs* impacts in vitro fertilization and other reproductive technologies.<sup>113</sup>

Likewise, there are questions regarding whether *Lawrence* and *Obergefell* can survive *Dobbs*.<sup>114</sup> Given that the rights to gay sex and gay marriage are less “deeply rooted in our nation’s history” than the right to terminate an early-term pregnancy; and given that, in significant part, *Dobbs* was based on the view that the right to abortion is not “deeply rooted in our nation’s history,” it is difficult to understand why *Lawrence* and *Obergefell* will remain good law.

As with contraception, and autonomy in intimate relationships, it is difficult to understand how parental rights survive *Dobbs* given that *Dobbs* very clearly distinguished abortion from other privacy rights on the basis that abortion concerns “potential life.”<sup>115</sup> At law, the state interest in protecting living children is and always has been significantly greater than any state interest in protecting potential life.<sup>116</sup> Therefore, if what separates *Dobbs* from the other privacy cases is that there is another relevant interest—that of potential life—than any privacy rights that concern living children, cases like *Meyer*, *Pierce*, and *Lafleur* are arguably under threat, or at least weakened.

Finally, with regard to the right recognized in *Skinner*, that is, a qualified right to not be forcibly sterilized, it is also unclear how or if *Dobbs* will have an impact. When thinking of one’s right to determine whether to bear or beget a child, the right appears to be both a positive and negative right—that is the right to chose to *have*

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111. Savannah Hawley, *Major Health System Stops, Then Resumes Plan B Amid Missouri’s Abortion Ban Ambiguity*, NPR (June 29, 2022), <https://www.npr.org/sections/health-shots/2022/06/29/1108682251/kansas-city-plan-b>.

112. Michael Ollove, *Some States Already are Targeting Birth Control*, PEW (May 19, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/19/some-states-already-are-targeting-birth-control>.

113. Erin Heidt-Forsythe, et al., *Roe is gone. How Will State Abortion Restrictions Affect IVF and More?*, WASH. POST (June 25, 2022), <https://www.washingtonpost.com/politics/2022/06/25/dodds-roe-ivf-infertility-embryos-egg-donation/>.

114. *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

115. *Id.* at 2258 (majority opinion).

116. *Planned Parenthood v. Casey*, 505 U.S. 833, 895–98 (1992).

a child as well as the right to choose to *not have* a child. The right infringed upon in *Skinner* was the right to choose to have a child.<sup>117</sup> The mirror image of that right, the right to choose to not have a child, is the right secured by *Roe*. Now that *Roe* has been overturned, are there consequences for the right to choose to have a child? Pre-*Dobbs*, the right, like the right to abortion, was already heavily qualified by *Buck*.<sup>118</sup> It is unclear whether *Dobbs* further qualifies the right to not be subject to forced sterilization.

*Dobbs v. Jackson Women's Health* changed our understanding of privacy law. To the extent that the "constellation" of family privacy rights that existed pre-*Dobbs* was predictable and clear, it no longer is. Also unclear is how *Dobbs* will change our remaining understanding of the Fourteenth Amendment Due Process right to liberty. While this essay does not provide any answers with regard to what the future holds, it attempts to provide a useful background to explain how the Supreme Court interpreted the fundamental right to privacy pre-*Dobbs* and how it may be interpreted post-*Dobbs*.

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117. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

118. *Buck v. Bell*, 274 U.S. 200, 205–06 (1927).