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Limiting Fundamental Rights to Only Those Founded Upon Longstanding History and Tradition Undermines the Court's Legitimacy and Disavows Individual Human Dignity

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ABSTRACT

The Supreme Court's anti-abortion opinion in Dobbs v. Jackson Women's Health Org., *which overruled* Roe v. Wade *and* Planned Parenthood of S.E. Penn. v. Casey, *on the one hand suggests that the Court may be moving toward eliminating all non-enumerated fundamental rights not deeply rooted in the Nation's longstanding history and tradition. On the other hand, it may suggest only that the Court might be just opening the door to overruling specific non-enumerated rights with which it no longer agrees. Either way, many long-recognized, non-enumerated, human rights, beyond abortion that are essential to individual autonomy and human dignity are now up for grabs. Such rights in the area of privacy law will most likely include not just abortion, but also contraception, interracial marriage, and the Court's more recent recognition of same-sex marriage, and possibly still other precedents, including whether states can criminalize adult consensual same-sex behavior in private. More importantly, the proposed foundation for this Court's potential departure from its past case precedents cannot be justified even by claiming such rights are not deeply rooted in the Nation's*

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history and tradition. As I hope to show in this article, neither from the point of view of looking to this Nation's longstanding history and traditions, if properly understood, nor from the point of view of allowing Equal Protection to aid in identifying forms of discrimination not previously recognized or afforded much attention, can departures from past human rights precedents based in autonomy be justified.

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I. INTRODUCTION

The Supreme Court's 5-4 majority opinion in *Dobbs v. Jackson Women's Health Org.*,[1] which overruled *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] the two main abortion decisions, when treated alongside its previous opinion in *Washington v.*

[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). Chief Justice Roberts joined the majority concurring only in the judgment. *Id.* at 2310, 2317 (Roberts, C.J., concurring).

[2] Roe v. Wade, 410 U.S. 113 (1973).

[3] Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833 (1992).

Glucksburg[4] gives rise to a serious concern. On the one-hand, it suggests that the Court may be moving toward eliminating all non-enumerated fundamental rights, except for those that are deeply rooted in the Nation's longstanding history and tradition while, on the other hand, it may suggest only that the Court might be just opening the door to overruling specific non-enumerated rights it no longer agrees with by claiming such rights to lack any real foundation in the Nation's history and tradition.[5] Either way, many recognized, non-enumerated human rights beyond abortion that are essential to individual autonomy and human dignity but were not recognized early in the Nation's history and tradition are now in grave jeopardy.

The difference between these two concerns need not reflect any substantial difference in the kind of argument the Court will draw upon when considering other non-enumerated fundamental rights in the future, just how far it may be willing to go. This does not mean that there could not arise other differences for consideration, only that the Alito majority opinion in *Dobbs* would not necessitate the presence of any other factors to overturn previously recognized unenumerated rights nor would it require the Court to consider any other forms of argument in their defense. Either way, this seemingly new direction for the Court will not likely be confined to only rights not previously recognized but, as with abortion, will likely affect other existing rights that, in some cases, have existed for more than fifty years. If this is indeed the new direction for the Court, as would seem likely given a close reading of the majority opinion (as will be explained below), it will most probably lead to overruling many well-recognized past Supreme Court precedents including, but not limited to, in the area of constitutional privacy law, contraception, interracial marriage, and the Court's more recent recognition of same-sex marriage, and possibly still other precedents, including whether states can criminalize adult consensual same-sex behavior in private.

More importantly, the proposed foundation for this Court's potential departure from its precedents cannot be justified even by claiming such rights are not deeply rooted in the Nation's history and tradition. As the article seeks to show below, neither from the point of view of looking to this country's longstanding history and traditions, if properly understood, nor from the point of view of allowing Equal Protection to aide in identifying forms of discrimination not previously recognized or afforded much attention, can departures from past human rights precedents based in autonomy be justified. The article points this out as an urgent call for immediate attention because the *Dobbs* analysis opens the door toward other rights being overruled that many in society rely heavily upon, think of as

[4] Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that physician assisted suicide was never part of this Nation's history and tradition).

[5] This second point I owe to Professor Mark Strasser of Capital University Law School.

basic human rights, and have relied on the Court to be their protector. Such an opening of the door should encourage others in the legal community, as well as the political branches, to do whatever they can to afford protection for basic human rights and to limit the impact of the *Dobbs* decision wherever possible. A key element in this process will be for the courts to reconsider what "deeply rooted in the Nation's history and tradition" means when discussing human rights cases.

Section II discusses how to read *Dobbs v. Jackson Women's Health*. Section III then discusses how justifications of non-enumerated fundamental constitutional rights came about. Section IV provides an argument for the constitutional right to privacy as a non-enumerated fundamental autonomy right. Section V continues the process of establishing fundamental rights by showing the relevance of the Ninth and Tenth Amendments. Section VI shows why leaving questions involving fundamental rights solely to the political branches is inadequate. Section VII discusses the roles of Due Process and Equal Protection in establishing fundamental rights. Section VIII addresses how the right to an abortion fits into the analysis. Finally, Section IX shows why the Court's seemingly narrow focus on history and tradition undermines its own legitimacy and disavows individual human dignity. A brief conclusion will then follow.

II. HOW TO READ *DOBBS V. JACKSON WOMEN'S HEALTH*

In this section the article takes up the Court's majority opinion in *Dobbs v. Jackson Women's Health*, written by Justice Alito, along with the concurring opinions of Justices Thomas, Kavanaugh, and Chief Justice Roberts concurring only in the judgment. [6] The article also points to various concerns regarding how broad the Alito opinion is, as expressed by the dissenting Justices Breyer, Kagan, and Sotomayor.

It is perhaps not surprising that Justice Alito's majority opinion opens by noting as a general principle that "[c]onstitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our fundamental document means . . . ."[7] The view represents a positive formulation of judicial philosophy in which decisions begin from some well-recognized legal text.[8] Justice Alito goes on to say, "[t]he Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must

[6] *Dobbs*, 142 S. Ct. 2228 (2022).

[7] *Id.* at 2244–45 (internal citations omitted).

[8] "Treating law as a system of rules whose validity is based on their having been enacted by a sovereign or derived from an authoritative source, rather than from any considerations of morality, natural law, etc." *Positivism*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/148321?redirectedFrom=positivism#eid (last visited May 27, 2022).

show that the right is somehow implicit in the constitutional text."[9] The Court is willing to at least acknowledge that constitutional law does provide some space where a connection might be made between what the case is about and the constitutional text that is to be the basis for any decision. Unfortunately, the only linkage Justice Alito's opinion seems to recognize, namely, that the right be "deeply rooted in the Nation's history and tradition," is one that would show the liberty was sought to be protected at the time the founding documents were ratified.[10] It would not include how the Fourteenth Amendment's precepts of liberty and equality have since come to be understood in the contemporary period. This will become evident shortly. Perhaps it is not surprising that Justice Alito, who views himself as a "practical originalist,"[11] should go on to state that "[i]n deciding whether [a non-enumerated] right" is implicit in the Constitution, "the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[12] "Deeply rooted" is the giveaway of how Justice Alito is analyzing the rights involved.

The idea of looking to what rights or principles are deeply rooted in this Nation's history and tradition can be traced back to Justice Harlan's dissent in *Poe v. Ullman*.[13] This was a case in which the United States Supreme Court held that plaintiffs lacked standing to challenge a Connecticut law prohibiting the use of contraceptives and physicians giving advice on their use under the liberty protection of the Fourteenth Amendment's Due Process Clause.[14] In his dissent in that case, Justice Harlan expresses a much broader understanding of "deeply rooted" than the Court there was willing to adopt and certainly a much broader understanding than what Justice Alito expresses. This is made clear where Harlan writes:

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The

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[9] *Dobbs*, 142 S. Ct. at 2245.

[10] "*Viewing Justice Alito, in important part, as a traditionalist protecting majorities-turned-minorities in a period of cultural transition can account for his responses to a number of controversial cases."* Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L. J. FORUM 171 (2017).

[11] "I start out with originalism," he says.

> I do think the Constitution means something and that that meaning does not change. Some of its provisions are broadly worded. Take the Fourth Amendment. We have to decide whether something is a reasonable search or seizure. That's really all the text of the Constitution tells us. We can look at what was understood to be reasonable at the time of the adoption of the Fourth Amendment. But when you have to apply that to things like a GPS that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it. I think I would consider myself a practical originalist.

Matthew Walther, *Sam Alito: A Civil Man*, THE AM. SPECTATOR (Apr. 21, 2014), https://spectator.org/58731_sam-alito-civil-man/.

[12] *Dobbs*, 142 S. Ct. at 2246.

[13] Poe v. Ullman, 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting).

[14] *Id.* at 508.

> best that can be said is that, through the course of this Court's decisions, it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance by this country having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.[15]

The idea that one might begin by looking to history and tradition makes sense insofar as it provides an initial basis for believing that unelected justices should not be just imposing their own idiosyncratic idea of what the law should be onto society but rather trying to determine what the constitutional order (original document, Bill of Rights, and Fourteenth Amendment) requires. Such an interpretation of the constitutional order need neither be liberal nor conservative; it would just be one possibility for filling in the gaps the Framers of the Constitution left open by way of the language they used.[16] And it would require interpretation as often the language would be written abstractly and not concretely. Where a problem arises is when history and tradition are treated too narrowly to only unlock rights that may have been thought present at the time these documents were adopted.[17]

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[15] *Id.* at 542.

[16] Professor Ronald Dworkin criticizes Justice Scalia's use of "expectation originalism" in his interpretation of the Constitution contrary to his use of semantic originalism when saying how federal statutes should be understood. Dworkin asks,

> Why does the resolute text-reader, dictionary-minder, expectation scorner of the beginning of these lecturers [on federal statutory interpretation] change his mind when he comes to the most fundamental American statute of them all? He offers, in his final pages, an intriguing answer. He sees correctly that if we read the abstract clauses of the Bill of Rights as they were written--if we read them to say what their authors intended them to say rather than to deliver the consequences they expected them to have—then judges must read these clauses as enacting abstract moral principles and must therefore exercise moral judgment in deciding what they *really* require. That does not mean ignoring precedent or textual or historical integrity or morphing the Constitution. It means, on the contrary, enforcing it in accordance with its text, in the only way this can be done.

RONALD DWORKIN, *COMMENT* ON ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 126 (1997). For an alternative approach not inconsistent with Dworkin's that provides a grounding for many of the rights cited in the Universal Declaration of Human Rights and subsequent Human Rights conventions, as well as our own American Bill of Rights, *see* Vincent J. Samar, *Rethinking Constitutional Interpretation to Affirm Human Rights and Dignity*, 47 HASTINGS CONST. L. Q. 83, 123–41 (2019).

[17] Traditionally, originalism, as illustrated in Justice Scalia's majority opinion in the *Heller* Second Amendment case, "advises that we consult old dictionaries to ascertain the original meaning of the Constitution." Saul Cornell, *New Originalism: A Constitutional Scam*, DISSENT (May 3, 2011), https://www.dissentmagazine.org/online_articles/new-originalism-a-constitutional-scam. *See also* District of Columbia v. Heller, 554 U.S. 570, 581 (2008). "One problem with this approach is that the earliest American dictionaries were written after the

Here it is important to pay attention to the rhetoric used by Justice Alito versus Justice Harlan. For it contains, borrowing from Aristotle, "no special subject-matter" and therefore will not increase our understanding of "any particular class of things."[18] Instead, what it will do is allow for the dismantling of any past cases involving unenumerated rights with which a current majority of the Court may disagree, provided they are not part of some original understanding of the aforesaid documents with which the current majority agrees. Indeed, the approach opens the door to similar lines of attack in future cases, involving other non-enumerated fundamental rights, including but not limited to the right of married (*Griswold*[19]) and unmarried (*Eisenstadt*[20]) couples to use contraceptives, the right of non-married same-sex adults to engage in intimate sexual relations within the

Constitution and were not produced according to the rules of modern lexicography . . . . [T]he Founders were themselves deeply divided over the nature of constitutional interpretation," suggesting the need today for a more careful investigation of American history before declaring any single understanding of these earlier documents as historically correct. Cornell, *supra*. Some scholars of the period wanted to interpret the Constitution "according to the rules of ordinary language." *Id.* Others preferred adopting "a formal set of rules gleaned from Anglo-American jurists such as Sir William Blackstone." *Id.* Exactly how to understand the language of the Founding-Era manifested itself in the *Heller* debate over what authority should be assigned the preamble to the Second Amendment, "which declares that the purpose of the Amendment is to protect a well-regulated militia." *Id.* Ought it to govern the language that follows it including the "right of the people to keep and bear Arms[?]" *Heller*, 554 U.S. at 577. Or should we treat the Founders incorporation of the preamble merely as a device only be used to clarify an ambiguity in the text? *Id.* at 577. If the latter, would not the interpretation be inconsistent with "the views of then-Chief Justice John Jay," who was also "one of the coauthors of the *Federalist*." Cornell, *supra*. *See Pre. 2 Historical Background on the Preamble*, CONSTITUTION ANNOTATED, footnoting FEDERALIST Nos. 2–5 (John Jay), https://constitution.congress.gov/browse/essay/pre-1-2/ALDE_00001234/ (last visited Mar. 9 2023). However, beginning with the Ronald Reagan administration, conservative scholars have apparently departed from the old style of originalism and have developed a "new originalism," which according to Cornell appears in Scalia's opinion in *Heller*. Cornell, *supra*. However, Cornell argues that this so-called "new originalism" is based on a "misunderstanding [of] the Founding-era history," which has caused these scholars to miss important matters of historical discussion perhaps to support their own points of view. *Id.* For example, scholars within this tradition often appear like the old "Anti-Federalist opponents of the Constitution" in trying to replace the power of lawyers and judges to say what the Constitution means by what the people would have understood it to mean. *Id.* This apparent trend is exhibited in *Heller* when Scalia cites "Dissent of the Pennsylvania Minority," an Anti-Federalist paper that he uses to argue against treating the preamble's reference to militias as in any way limiting the "peoples' right to keep and bear Arms." *Id.* However, Carroll warns not to be fooled by this seeming bend toward Anti-Federalism. *See id.* New originalists are not born-again Anti-Federalists. This is particularly apparent in new originalism's description of "public meaning" when interpreting the Constitution. John Yoo, a prominent new originalist legal scholar, who helped to frame the Bush administration's novel views on torture, seems to want to expand not lessen the role that lawyers and judges should play in interpreting the Constitution, provided these advocates adopt the agenda of the new originalist conservatives as their own. Cornell, *supra*. All this should provoke concern that originalism, both old and new, is at best an incomplete theory for understanding the Constitution, which up to now has been able to hold together in our ever changing social, economic, and cultural world. *See* Samar, *supra* note 16, at 103–17.

[18] ARISTOTLE, RHETORIC Bk. 1, Ch. 2, line 20.

[19] Griswold v. Connecticut, 381 U.S. 479 (1965).

[20] Eisenstadt v. Baird, 405 U.S. 438 (1972).

home (*Lawrence*[21]), and the right to same-sex marriage (*Obergefell*[22]), which the Court points to in *Dobbs* as also not deeply rooted in the Nation's history and tradition,[23] while at the same time as it tries to disavow any present goal to undermine these rights in the future.[24]

This is shown where Justice Alito writes, "*Roe*, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned."[25] Nor do his comments toward the end of the majority opinion provide much solace that other fundamental rights would not be similarly disturbed: For example, his reference to *Casey's* recognition that "'[a]bortion is a unique act' because it terminates 'life or potential life'" or when he then goes on to say, "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[26] But if the basis for why the right to abortion is to now be discounted is that it is not found in the Constitution or part of the concern for ordered liberty sought at the time the Constitution, Bill of Rights, and Fourteenth Amendment were adopted, how are any other non-enumerated fundamental rights, which may also have not been present at the time these documents were ratified (including, as will be shown below, most privacy rights), to be thought safe from similar attack in the future?

At least Justice Thomas was more honest in his concurring approval of the Court's opinion in *Dobbs*, when he challenged the whole field of substantive due process rights that go beyond protecting process to "forbi[d] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided."[27] As he states it, "the Due Process Clause does not secure *any* substantive rights . . . ."[28] All that may hold us in waiting to overturn other so-called fundamental rights is that "no party has asked us to decide 'whether our entire Fourteenth Amendment jurisprudence must be preserved or revised.' . . . For that reason, in future cases, we should reconsider all this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[29] By contrast, Justice Kavanaugh was a bit less circumspect in his concurring opinion, stating rather unconvincingly, that "[o]verruling *Roe* does *not* mean the overruling of those precedents [including *Loving v. Virginia*, the interracial marriage case and *Eisenstadt v. Baird*, recognizing a privacy right for nonmarried couples

[21] Lawrence v. Texas, 539 U.S. 558 (2003).
[22] Obergefell v. Hodges, 576 U.S. 644 (2015).
[23] *Dobbs*, 142 S. Ct. at 2258.
[24] *Id.* at 2280.
[25] *Id.* at 2245.
[26] *Id.* at 2277–78 (alteration in original).
[27] *Id.* at 2301 (Thomas, J., concurring) (alteration in original) (emphasis in original).
[28] *Id.* (emphasis in original).
[29] *Dobbs*, 142 S. Ct. at 2301 (citation omitted).

to use contraceptives], and does not threaten or cast doubt on those precedents."[30]

Quite to the contrary, were one to give Justice Alito's majority opinion, which Justice Kavanaugh joined, the benefit of the doubt and say that the real goal of his opinion was just to challenge the abortion right, one would not only be assuming without justification a far more limited argument to be present than the one the majority opinion actually provides, but one would also be blinding themself to statements in the majority opinion such as

> [t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one in which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such rights must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty.[31]

Or, if that isn't obvious enough to raise concern over the status of other existing fundamental rights being struck down in the future, consider Alito's later remark:

> Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race;[32] the right to marry while in prison;[33] the right to obtain contraceptives;[34] the right to reside with relatives;[35] the right to make decisions about the education of one's children;[36] the right not to be sterilized without consent;[37] the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or substantially similar procedures.[38] Respondents and the Solicitor General also rely on post-*Casey* [cases]

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[30] *Id.* at 2309 (Kavanaugh, J., concurring) (emphasis in original) (citing *Griswold*, 381 U.S. at 479, *Eisenstadt*, 405 U.S. at 438, Loving v. Virginia, 388 U.S. 1 (1967), and *Obergefell*, 576 U.S. at 644).

[31] *Id.* at 2242 (majority opinion) (quoting *Glucksberg*, 521 U.S. at 721).

[32] *Id.* at 2257 (citing *Loving*, 388 U.S. at 1).

[33] *Id.* (citing Turner v. Safley, 482 U.S. 78 (1987)).

[34] *Id.* (citing *Griswold*, 381 U.S. at 479, *Eisenstadt*, 405 U.S. at 438, and Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)).

[35] *Dobbs*, 142 S. Ct. at 2257 (citing Moore v. E. Cleveland, 431 U.S. 494 (1977)).

[36] *Id.* (citing Pierce v. Soc'y Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska, 262 U.S. 390 (1923)).

[37] *Id.* (citing Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942)).

[38] *Id.* (citing Winston v. Lee, 470 U.S. 753 (1985), Washington v. Harper, 494 U.S. 210 (1990), and Rochin v. California, 342 U.S. 165 (1952)).

> like *Lawrence v. Texas*[39] and *Obergefell v. Hodges*[40] . . . . None of these rights has any claim to being deeply rooted in history.[41]

Even if it were the case that Alito's majority opinion is somehow only meant to direct attention to certain privacy claims that the majority currently disapproves of and not all constitutional privacy claims, that would be enough to raise a serious political concern as to whose rights the Court has chosen to now disavow. And similarly, whose rights may a different Court with a different membership choose to strike down in the future. For what is at stake in *Dobbs* is the taking away of a right that has been recognized to exist for close to fifty years with little or any reason for doing so. Chief Justice Roberts concurred, but only in the judgment that the state of Mississippi could prohibit abortions after 15 weeks, earlier than the *Roe/Casey* standard of viability, when the fetus would be able to survive outside the womb.[42] This he did because he found the prior *Roe* and *Casey* justifications for viability unpersuasive.[43] Still, even with holding this view, the Chief Justice nevertheless felt that the Court had gone further than necessary in overruling a woman's constitutional right to an abortion, which he saw as an unnecessary break from *stare decisis*; and for that reason, he chose not to join the majority opinion.[44]

Initially, it should be noted that the state of Mississippi had not even sought to overrule *Roe* and *Casey* when it filed for certiorari.[45] Only later, after certiorari was granted to resolve the viability question, did Mississippi then ask the Court to overrule *Roe and Casey* in its court brief,[46] perhaps sensing a desire by a majority of the Court's conservatives to now overrule *Roe* and *Casey*. This latter point is implied in the dissent authored by Justices Breyer, Kagan and Sotomayor: "[a]fter assessing the traditional *stare decisis* factors," including workability, reliance, and any legal or factual changes that may have popped up since *Roe* was decided nineteen years earlier, the *Casey* Court concluded, back in 1992, that *Roe* had been properly decided and is still properly decided under these same factors

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[39] *Id*. (citing *Lawrence*, 539 U.S. at 558) (striking down a Texas statute that made it a crime for two people of the same sex to engage in adult consensual homosexual behavior as a violation of their liberty interest protected under the Fourteenth Amendment Due Process Clause).

[40] *Id.* (citing *Obergefell*, 576 U.S. at 644) (holding that the fundamental right to marry under the Fourteenth Amendment Due Process Clause applies in the same way to same-sex couples).

[41] *Dobbs*, 142 S. Ct. at 2258 (emphasis added).

[42] *Id.* at 2316–17 (Roberts, C. J., concurring).

[43] *Id.* at 2311–12.

[44] *Id.* at 2315–16.

[45] *Id.* at 2313.

[46] Brief for Petitioner at 11-38, Dobbs v. Jackson Women's Health, 142 S. Ct. 2228 (2022), No. 19-13292.

today.[47] The only thing that had changed is the makeup of the current Court.[48]

There comes a point in any analysis where one cannot escape the conclusion that the real motivation at stake is far broader than what may be being officially proclaimed, at least to the extent of opening the door to rights claims the majority no longer appreciates. In the *Dobbs* case, it appears that the real motivation behind the Court's approach is to begin a process of unraveling sequentially fundamental, non-enumerated rights, especially those involving personal autonomy, that the Court has recognized ever since it decided *United States v. Carolene Products*,[49] but which it may no longer agree with. In the now famous footnote four in that case, the Court opened the door to recognizing the existence of non-enumerated fundamental rights involving personal autonomy, including the right of a woman to choose whether to continue a pregnancy.[50] Is the Court now intending to close that door not just on abortion but more broadly to clear out any rights with which the majority disagrees? If that is the majority's position, as the Alito opinion would seem to suggest, then laying the groundwork for doing away with rights not *deeply* rooted in the Nation's history and traditions is exactly the approach one would expect the majority to take in preparation for future decisions. Could it be that the opinion assumes certain other rights the majority might agree with would survive because they would be sufficiently longstanding even if the claims they pose today may never have been previously recognized, or at least not mentioned in the same way?[51] Or could it be that the Court does not want to appear to be doing too much while, at the same time it lays the groundwork for undercutting other fundamental rights not yet before it? If that is the case, then one should expect future grants of certiorari to include whether a current case poses a challenge to an earlier case the Court no longer finds satisfactory and is just waiting for a chance to overturn it, notwithstanding whether the earlier case may have achieved widespread social acceptance.[52]

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[47] *Id.* at 2334–35 (Breyer, Kagan, and Sotomayor JJ., dissenting).

[48] *Dobbs*, 142 S. Ct. at 2350.

[49] United States v. Carolene Prod., 304 U.S. 144 (1938) (upholding the federal government's power prohibiting filled milk from being shipped in interstate commerce).

[50] *Id.* at 151–52, n.4 ("suggesting the Court would apply a stricter standard of review to laws that on their face violate the Constitution, especially the Bill of Rights; as well as laws that restrict the political process or discriminate against "discrete and insular minorities").

[51] For example, are our prior cases involving contraception really so different from those involving abortion, unless the Court is impliedly determining when a fetus becomes a person?

[52] *See* Laura Santhanam, *Majority of Americans Don't Want Roe Overturned*, PBS NEWS HOUR (May 19, 2022), https://www.pbs.org/newshour/politics/majority-of-americans-dont-want-roe-overturned; *see also* Marina Pitofsky, *America is Changing How it Views Accepting Gay and Lesbian People, New Poll Reveals*, USA TODAY (Feb. 4, 2022), https://www.usatoday.com/story/news/nation/2022/02/02/acceptance-gay-lesbian-gallup-poll/9292788002/.

III. JUSTIFYING NON-ENUMERATED RIGHTS

In Section IX below, the article will talk more specifically about why limiting fundamental rights to only those founded upon long-standing history and traditions undermines the Court's legitimacy and disavows individual human dignity. Before doing that, however, it is important to see how the Court has sustained non-enumerated constitutional rights by making them part of an interpretative tradition that focuses on the *whole* Constitution, preamble, articles, and amendments, as well as prior Court interpretations as to its overall meaning. Obviously, reasoning by analogy plays an important role in this process, but it plays no more a role than conceptual analysis and normative justifications. The result has been that a document originally ratified in 1788 has been largely sustained for over two hundred and thirty-four years, spanning more than nine generations of American society.[53] Obviously, there has been attached to the document a number of very important amendments, effectively altering some of its earlier assumptions about human dignity and human rights, especially the Reconstruction Amendments that ended slavery,[54] guaranteed the very important human right of equal protection of the laws,[55] added the right of the former slaves to vote,[56] and would come to be understood over time by the Supreme Court to also require state governments to recognize the same rights. Among the latter are those rights contained in the first, second, fourth, fifth, sixth, and eight amendments of the Bill of Rights that previously had only applied to the federal government.[57] Unfortunately, the guarantee to former slaves of the right to vote would for some number of years be interrupted by Jim Crow laws.[58] Still, the overall number of amendments has been very small compared to the constitutions of other democratic countries.[59] This is in no small part due to the establishment of a federal judicial branch of government under the Constitution of 1788 and the Court's willingness, by way of judicial review, to slowly come to ensure, when a case or controversy arises, that the laws in question do not undermine

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[53] The span of a generation is frequently described as 20–30 years. For purposes here, I am treating it as the average, 25 years. *See Generation*, WIKIPEDIA, https://en.wikipedia.org/wiki/Generation (last visited May 18, 2022).

[54] U.S. CONST. amend. XIII.

[55] U.S. CONST. amend. XIV.

[56] U.S. CONST. amend. XV. (The right to vote would eventually be extended to women (U.S. CONST. amend. XIX) and citizens eighteen years old and older (U.S. CONST. amend. XXVI)).

[57] *Incorporation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine (last visited June 25, 2022).

[58] *Jim Crow Laws*, HISTORY (Jan. 11, 2023), https://www.history.com/topics/early-20th-century-us/jim-crow-laws.

[59] Kim Lane Scheppele, *Perspectives on the Constitution: Constitutions Around the World*, NAT'L CONST. CTR., https://constitutioncenter.org/learn/educational-resources/historical-documents/perspectives-on-the-constitution-constitutions-around-the-world (last visited May 24, 2022).

the basic constitutional protections of all people.[60] From this it follows that a complete review of the history and traditions set by and since the ratification of the original Constitution, along with its various amendments, should be reviewed to ensure, especially where a non-enumerated fundamental right is at stake, that the Court has not failed to afford adequate attention to the individuals involved but rather expanded that protection to ensure that everyone's rights are truly being protected.[61]

Now there will be those who say that what the article has just suggested is a perverted way to consider history and tradition. That what one should be doing is asking when the Constitution and its various amendments were adopted, what rights did the country expect those documents to encompass? But this would confuse a piece of constitutional history with the whole of its history, a whole that includes creation of a Supreme Court in which the "judicial power shall extend to all Cases in Law and Equity, arising under this Constitution . . . ."[62] Furthermore, it would undermine the Article VI provision, which provides that "[t]his Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land."[63] Justice Alito's majority opinion would undercut several explicit provisions that support a wide-ranging authority assigned to the Supreme Court to ensure this constitutional provision is being met. It would undercut explicit provisions such as the Ninth Amendment, which provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people,"[64] by simply leaving any such further rights to be determined by the political branches. It would also leave out any responsibility to ensure that the government created under the Constitution actually conforms to the values expressed in the Preamble, since many of the Preamble phrases describe not specific rights or duties but the reason why the government under the Constitution was created at all.

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[65]

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[60] *See id.*

[61] An example that operates in the opposite direction was the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 176 (1986), where the Court held constitutional a state law that criminalized adult, consensual same-sex sexual activities performed in private. That case would survive only seventeen years before being overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), another case criminalizing adult consensual same-sex behavior in private under the Due Process Clause of the Fourteenth Amendment.

[62] U.S. CONST. art III.

[63] U.S. CONST. art VI.

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

[65] U.S. CONST. pmbl.

Unless there is reasonable certainty, such as would be within the authority of a Supreme Court to determine, that following these provisions would somehow undermine the values they proclaim, the Preamble should be considered not merely as an aspiration but as setting forth the legitimate boundary of governmental authority.

Additionally, Justice Alito's opinion makes no room for the Framers' use of abstract language in the document, which operates as an opening to recognize changes in the social/political morality of the society that are likely to evolve, changes they themselves had experienced from previous periods.[66] Let alone does his majority opinion afford attention to the fact that many constitutional provisions, like Due Process and Equal Protection, seem to be directed toward limiting wrongful actions by the political branches where the citizens are likely to be either ill-equipped or politically powerless to prevent.[67] Clearly, the Framers were concerned against creating a government that would push them back to the tyranny they faced under the British crown.[68] And to prevent this part of their own history from repeating itself, perhaps in new ways in the future, the Framers established a Ninth Amendment to ensure the recognition of further rights as may become apparent.[69] All this too must be part of the history and tradition the Court is supposed to be considering when asked to engage in non-enumerated rights analysis. The Constitution is not meant to be a set of unbounded papers, each with its own select writings, with little to no connection between them. It is meant, as the Preamble makes clear, to be a charter of rightful government, setting forth what are its various parts and purposes, as seen at the time of its adoption, and how these parts might be best understood to operate together to meet the needs of a changing world.[70] Much the same can be said for the Amendments, which do not undermine the Preamble, but rather further other changes thought to be necessary for the Constitution to properly function with the values of the Preamble.

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[66] For example, Anthony F. Granucci has argued that in the Framers' Day punishments under English Law that were thought to be cruel and unusual were those that were excessive in proportion to the crime, torture for example. *See* Anthony F. Granucci, *Nor Cruel or Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969). So, if the Framers wanted to limit certain kinds of punishments, they could have chosen more concrete language to specify the kind of punishments to be prohibited.

[67] *See* Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 (last visited May 19, 2022).

[68] *See* Hans A von Spakovsky, *Constitution at 230: Separation of Powers Prevents a Democratic Tyranny*, THE HERITAGE FOUND. (Sept. 12, 2017), https://www.heritage.org/the-constitution/commentary/constitution-230-separation-powers-prevents-democratic-tyranny. *See also* THE FEDERALIST NO. 51 (James Madison or Alexander Hamilton).

[69] *Amdt9.2 Historical Background on the Ninth Amendment*, LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, https://www.law.cornell.edu/constitution-conan/amendment-9/historical-background-on-the-ninth-amendment (last visited May 15, 2023).

[70] *See* U.S. CONST. pmbl.

This Preamble idea is often given little attention.[71] Yet, one could venture that it is one of the most important parts of the Constitution, as it clearly lays out the purposes for the document. In this sense, the Preamble can be thought of as providing a set of higher-ordered values shaping the more specific provisions set out in the articles and amendments. If that is true, and there is no reason to think it is not, serious harm could arise onto the American experiment if the document is merely treated as a collection of disassociated articles and amendments, without paying attention to how the Preamble operates to bring them together.

There is a serious misalignment in the usual debates between expectation originalists who would interpret the Constitution in terms of only what the Framers expected the document would do and those who consider it a living document open to almost any value-laden arguments, on a par with the kinds of arguments that become part of the common law.[72] Both approaches are inadequate; the first by affording too little power to the government; the second by offering too much. The Court should adopt a new approach to constitutional interpretation, a human rights approach.[73] This approach considers what had been recognized in the past while, at the same time, adapting the past to what we find to be our best understanding of political morality in the present.[74] Making use of this approach will likely afford society some new protections and governmental agencies, as occurred during the New Deal, and as may continue to be necessary to address matters

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[71] *U.S. Constitution: Preamble*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/us (last visited June 10, 2022).

[72] "Originalism" in the form being discussed here is of "recent vintage hatched in the network of conservative organizations that served as the intellectual incubators of the Regan Revolution. Embraced by Robert Bork, the failed Supreme Court nominee, and Antonin Scalia who ascended to the Supreme Court . . . in 1986, the theory held that the only legitimate way to interpret the Constitution's words was according to their original meaning. Scalia was scathing about the notion that constitutional meaning might evolve as society arrived at new understanding of concepts like equality and liberty." LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT, xxvi (2021). *Contra* DAVID A. STRAUSS, THE LIVING CONSTITUTION 18, 21–23, 60 (2010), who notes "the differences between the framers' world and ours, and the difficulty of translating their views into our world," along with what to do "when circumstances have changed," and "[w]hy should we be required to follow decisions made hundreds of years ago by people who are no longer alive?"

[73] Vincent J. Samar, *Rethinking Constitutional Interpretation to Affirm Human Rights and Dignity*, 47 HASTINGS CONST. L. Q. 83 (2019).

[74] Other scholars have similarly argued for the need not to confine substantive due process only to past understandings but, at the same time, not to just throughout the past without considering whether it still offers insights worth considering. *See, e.g.*, Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L. J. 535, 535 (2012) (arguing "that tradition does not deserve a place in substantive due process analysis simply because it represents a fixed truth from some distant past, nor should tradition be entirely rejected as a source of substantive due process rights simply because of its connection to the past"); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006) (arguing "that, on balance, the most defensible approach is the theory of evolving national values," after reviewing three competing theories of substantive due process decision making: historical tradition, reasoned judgment, and evolving national values).

the Framers could never have foreseen. By the same token it won't be open to just any value-laden tendency that may gain momentarily notoriety. This is not sophistry. It is not allowing any smashing together of values no matter how inconsistent they might appear with what the original document was trying to achieve. All it is doing is recognizing that the original document was meant to be a template for everything that comes after, not a barrier to the inclusion of new understandings to the nation's survival. This is especially true when the very values the original document set out to promote need adaption to create a government that truly is "of the people, by the people, and for the people."[75]

One of the typical kinds of arguments made in support of originalism and by extension why courts should look to past history and traditions is that judges aren't elected; therefore, they should not be in a position where they might impose their personal views about law and morality onto the people.[76] Certainly it is true that federal judges and Supreme Court justices are not elected; they are appointed by the President with advice and consent from the Senate.[77] And if judges got into the habit of imposing their own personal beliefs on the people whom they are supposed to serve, they can be criticized. But judges are not like legislators either, who can choose how to vote on a bill for almost any reason, personal or political, so long as it is not part of a bribe.[78] The protection against legislators acting for their own purposes when not illegal is the next election.[79] Federal judges, by contrast, have life tenure and can only be removed by impeachment for treason, bribery or other high crimes and misdemeanors.[80] Additionally, federal judges are constitutionally barred from just making up a case to impose any personal idiosyncrasies they might have onto the public. The Court has interpreted Article III, Section 2 of the Constitution to disallow advisory opinions as are permitted by some state supreme courts of their state constitution and to require that the parties to any case shall have standing.[81] This latter element requires that the plaintiff be able to show before any legal action can be taken that he or she will suffer some "injury in fact," "which

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[75] Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

[76] Ian Millhiser, *Originalism, Amy Coney Barrett's Approach to the Constitution, Explained*, VOX (Oct. 12, 2020), https://www.vox.com/21497317/originalism-amy-coney-barrett-constitution-supreme-court.

[77] U.S. CONST. art. II, § 2, cl. 2.

[78] *See* Paul Stark, *The Difference Between Legislating and Judging--and Why it Matters for the Right to Life*, MINN. CITIZENS CONCERNED LIFE (Feb. 2, 2017) (reviewing a speech by then Judge Neil Gorsuch following the death of Justice Antonin Scalia), https://www.mccl.org/post/2017/02/02/the-difference-between-legislating-and-judging-and-why-it-matters-for-the-right-to-life.

[79] *Id.*

[80] United States v. Claiborne, 727 F.2d 842, 845 (9th Cir. 1984), citing U.S. CONST. art. 1I, § 4.

[81] *Case or Controversy Clause*, WIKIPEDIA, https://en.wikipedia.org/wiki/Case_or_Controversy_Clause (last visited May 19, 2022).

is (a) concrete and particularized and (b) actual or imminent."[82] Article III standing also requires "a causal connection between the injury and the conduct brought before the court," and the injury must be likely, not speculative.[83] Together these limitations on the federal courts, including the Supreme Court, prevent judges and justices from being able to too easily challenge a past case they may no longer agree with.

Additionally, what other factor controls federal judges and probably most state judges when deciding a case is the need to present well-reasoned opinions for their judgments.[84] These opinions form the intellectual justification for their decisions. If the opinions are controversial because the opinion appears insufficiently supported by reasoned arguments, other judges may dissent, lawyers will present new cases challenging the opinion, and law professors will write articles challenging the opinion.[85] Justice Alito admits this when he notes "[o]ne prominent scholar wrote that he 'would vote for a statute very much like the one the Court end[ed] up drafting' [in *Roe*] if he were 'a legislator . . . .'"[86] Alito's point being that this would then be a matter for a legislature not a court. But is it fair to say *Roe* was not constitutional law just because this scholar would have preferred a legislature to have made the determination of whether women should have a right to terminate a pregnancy? What if for political reasons the legislature is unable to afford such a right? Should such a personal decision be just a matter solely of legislative determination, especially when most legislators are men?[87] Justices Breyer, Kagan, and Sotomayor in their dissent takes note of the fact that

> we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within "the reach of majorities and [government] officials. We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices or chart their own futures. Or at least we did once."[88]

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[82] *Standing*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/standing (last visited May 19, 2022).

[83] *Id.*

[84] Michael C. Dorf and Orin Kerr, *Criticizing the Court: How Opinionated Should Opinions Be?* 105 JUDICATURE 3, 84 (2021).

[85] *See* RONALD DWORKIN, LAW'S EMPIRE 254–58 (1986) (discussing how legal reasoning should operate).

[86] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920, 926 (1973)).

[87] Nicole Gaudiano et al., *Behind a Looming Wave of State Abortion Bans, There Are a Lot of Men*, BUS. INSIDER (June 24, 2022), https://www.businessinsider.com/male-lawmakers-drove-trigger-law-abortion-bans-for-women-chart-2022-5.

[88] *Dobbs*, 142 S. Ct. at 2320 (Breyer, Kagan, and Sotomayor JJ., dissenting).

Nevertheless, it is not unreasonable to be concerned that unelected justices might impose their own idiosyncratic views on the population. Nor is it unreasonable to set out interpretative guidelines for making decisions. What is unreasonable is to blindly accept limitations on judicial authority that do not in fact protect the Constitution's broad purposes out of fear that some might mishandle that authority or that a prior decision might be wrong simply because some in the public do not like it and the right identified is not specifically mentioned in the Constitution, even though it might be widely supported or of unique importance to the group represented. All such limitations do is ensure that no constitutional change will ever come forth, except by way of amendments, which, because of the difficult process necessary to establish such amendments, [89] is likely to leave unaddressed significant changes needed to support the Preamble's purpose to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . ."[90]

IV. JUSTIFYING A RIGHT TO PRIVACY AS A NON-ENUMERATED CONSTITUTIONAL RIGHT

In 1965, following their arrest and conviction after opening a birth control clinic, Estelle Griswold, head of Planned Parenthood in Connecticut, and C. Lee Buxton, a gynecologist, joined in a case, *Griswold v. Connecticut*, challenging Connecticut's statute prohibiting the sale of contraceptives to married persons and physicians from advising on their use.[91] (It will be recalled from earlier that in *Poe v. Ullman* the Court dismissed a similar case, but there it was only a threatened application of the Connecticut law, not its actual application as in the *Griswold* case.) In a 6-3 decision, finding the statute to be unconstitutional, the Supreme Court for the first time advanced the thesis that what was violated was a constitutional privacy right of married persons to use contraceptives and physician to advise on the use.[92] Going forward, this new constitutional right to privacy would soon be extended to protect unmarried persons[93] and minors.[94] What is significant is how the Court attempted to justify its newly found recognition of this non-enumerated right. As it turned out, among the six justices in the majority who supported the right there were not six in an agreement as to where the right was located in the constitutional text. A plurality of three justices, led by Justice Douglas, believed the right might be located in the penumbras surrounding the First, Third, Fourth, Fifth, and

[89] U.S. CONST. art. V.
[90] U.S. CONST. pmbl.
[91] Griswold v. Connecticut, 381 U.S. 479 (1965).
[92] *Id.* at 485–86.
[93] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).
[94] *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

Ninth Amendments of the Bill of Rights.[95] Justice Goldberg, in a separate concurring opinion, believed it could be found in the Ninth Amendment's reservation of rights "retained by the people."[96] Separately Justice Harlan believed the right be "implicit in the concept of ordered liberty" protected by the Due Process Clause of the Fourteenth Amendment.[97] As it turned out, the question of where the right to privacy was located was not finally decided until the Court issued its abortion opinion in *Roe v. Wade*, holding that a woman had a constitutional privacy right to choose whether to continue a pregnancy before the beginning of the third trimester.[98] In that case, the Court finally held that the right to privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action as we feel it is . . . ."[99]

The dissenters in *Griswold*, Justices Black and Stewart, argued that because no provision of the Constitution expressly mentions a general right to privacy, no such constitutional right exists.[100] Even the Ninth Amendment could not give rise to such a right, according to these justices, since that amendment was only meant to afford assurance that the federal government would be one of limited powers.[101] Whatever one may think about the Connecticut law, whether it is silly or not, these Justices did not believe it to be unconstitutional.[102] The dissent's position here is reminiscent of a position that would be later adopted by Supreme Court nominee, Robert Bork, whose nomination would be rejected by the U.S. Senate, at least in part, because of his widespread rejection of any individualistic centered non-enumerated, fundamental rights, like the right to privacy.[103] Interestingly, it would be in response to fear of an overarching government that some of these Justices would fight against the one thing that might have limited excessive government, at least with regard to interferences in the private

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[95] *Griswold*, 381 U.S. at 484.
[96] *Id.* at 499 (Goldberg, J., concurring).
[97] *Id.* at 500 (Harlan, J., concurring).
[98] Roe v. Wade, 410 U.S. 113 (1973).
[99] *Id.* at 153.
[100] *Griswold*, 381 U.S. at 508 (Black, J., dissenting).
[101] *Id.* at 529–30 (Stewart, J., dissenting).
[102] *Id.* at 530–31 (Stewart, J., dissenting).
[103] ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 103 (1996) ("Radical individualism is the only explanation for the Supreme Court's creation, out of thin air, of a general and undefined right of privacy. The Court used the invented right, allegedly to protect the sanctity of the marital bedroom . . . . But marital privacy was shortly transformed into individual autonomy when the Court invalidated a Massachusetts law restricting access to contraceptives by single persons."). *Id.* at 103–04 (Bork was highly critical of the Supreme Court decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and of those justices who dissented in *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986)). *But see* DWORKIN, *supra* note 16, at 126–27 ("Justices whose methods seem closest to the moral reading of the Constitution [as opposed to only an Originalist view] have been champions, not enemies, of individual rights, and, as the political defeat of Robert Bork's nomination taught us, the people seem content not only with the moral reading but with its individualistic implications.").

lives of individuals.[104] Indeed, it is worth noting a statement written by Justice Goldberg in his concurring opinion in *Griswold*:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" . . . "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." . . . I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live."[105]

Still, notwithstanding Justice Goldberg and the five other Justices who found a right to privacy of married persons to use contraceptives and physicians to advise on their use protected by the Constitution, Justice Alito in his majority opinion in *Dobbs* would argue: "[n]one of these rights has any claim to being deeply rooted in history."[106] My past work in this area presents a means for recognizing a non-enumerated fundamental constitutional right to privacy to be brought about by a careful analysis of what values really are deeply rooted in this Nation's history and traditions.

In the United States, the right to privacy had its initial formulation in three separate areas of the law. The oldest involved the Fourth Amendment's protection against unreasonable searches. The pertinent case is *Katz v. United States*.[107] That case involved a government surveillance through attachment of a listening device to a public phone booth to gain evidence of illegal gambling. The Court held that placement of a listening device on a public phone booth by law enforcement constituted a police search without a warrant, which violated the Fourth Amendment to the U.S. Constitution.[108] Moreover, Justice Harlan, in his concurring opinion, wrote that where "a person has a constitutionally protected reasonable expectation of privacy . .

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[104] Both Justices Black and Stewart argued that the Ninth Amendment was intended to limit the powers of the federal government. *Griswold*, 381 U.S. at 520 (1965) (Black, J., dissenting); *id.* at 529–30 (Stewart, J., dissenting).

[105] *Id.* at 493–94 (Goldberg, J., concurring) (citations omitted).

[106] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258 (2022).

[107] Katz v. United States, 389 U.S. 347 (1967).

[108] *Id.* at 351.

. electronic as well as physical intrusion into [that space] may constitute a violation of the Fourth Amendment."[109]

The next area of the law where privacy protections came into effect was the tort area and specifically concerned matters of seclusion and solitude,[110] being placed in a false light,[111] having embarrassing facts reveled,[112] and commercial exploitation.[113] This area gained particular attention following many salacious publications in news media involving private persons at the turn of the nineteenth into the twentieth centuries leading to the publication by Samuel Warren and Louis Brandeis famous article, *The Right to Privacy* in the Harvard Law Review in which they argued for the existence of a tort right to privacy.[114]

Finally, the last area was the set of Supreme Court decisions beginning with *Griswold v. Connecticut* through *Roe v. Wade* involving intimate decisions. That set presented a different kind of limitation on government action. Now it was not whether evidence gathered by law enforcement in an illegal search could be introduced in a court of law but whether government could restrict certain types of personal choices made by individuals. With the idea that privacy was beginning to take hold in each of these three areas, the legal community began to ask whether the cases were sufficiently alike such that they could all be referred to as privacy cases, as well as how a right to privacy, especially at the constitutional level, might be more definitely justified, and how conflicts of rights could be resolved.[115]

To answer these questions, first find a common denominator to the conceptual question: on what basis are the courts justified in holding any of the above types of cases as falling under the rubric of privacy? The question arises because on first reading it seems like very different types of privacy claims are involved. In the Fourth Amendment area (which, of course, is part of the Constitution) and what is sometimes just referred to as constitutional privacy both represent claims against the government, although not in the same way, since the Fourth Amendment is more about the police power being regulated, not what kinds of legislation can be enacted; whereas the tort area concerns claims against other people and would not usually involve claims brought against the government. Additionally, the Fourth

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[109] *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

[110] Breard v Alexandria, 341 U.S. 622 (1951) (upholding a municipality's ordinance banning solicitations at private residents).

[111] Lord Byron v. Johnson, 2 Mer. 29, 35 Eng. Rep. 851 (1816) (finding that an alleged poem attributed to Lord Byron was so bad that even in a stupor, he could not have written it).

[112] Melvin v. Reid, 297 P. 91 (1931) (allowing a cause of action to be brought against the makers of a movie involving a former prostitute who, after being acquitted at a murder trial, had moved to a different part of the country).

[113] *See, e.g.*, Stern v. Delphi, 626 N.Y.S. 2d 694 (1995).

[114] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *see* WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971).

[115] VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION 47–49 (1991).

Amendment and torts area focus on information and what can be learned; whereas the constitutional area focuses on actions what can be done. Still, what seems common among all these different claims is first, that they are all claims to negative freedom in the sense of the self to be let alone.[116] And second, they are self-regarding claims in that no other person's basic interest is involved.[117] "Basic" here is added to avoid overly broad views about interests, which would undermine any discussion about privacy from ever being initiated.

Using these two common characteristics of privacy cases, the following definition of a private act can be set out:

> *An action is self-regarding (private) with respect to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interests of the actor and not on the interests of the specified class of actors.*[118]

Notice that the definition acknowledges the relevance of group interests.[119] Notice also that it focuses on private acts as opposed to information or states of affairs. This is because privacy of information or states of affairs can be shown to be in furtherance of the possibility of private acts, even though historically the Fourth Amendment and tort areas of the law preceded the constitutional area, nevertheless there is a sense in which private acts are logically prior to private information and states of affairs (to be explained below).[120] Two additional phrases relevant here to make this definition meaningful are "in the first instance" and "basic interests."

To avoid vagueness in allowing any act to be so constructed as to avoid a privacy conflict "in the first instance" means that the *mere* description of the act without the inclusion of any additional facts or causal theories does not give rise to a conflict.[121] And similarly, to avoid overly broad definitions of interest, the locution "basic interests" identifies only those interests that do not already contain conceptions about facts or causal theories.[122] Thus, a teacher testifying before a city council in favor of a human rights ordinance proscribing sexual orientation discrimination is asserting a privacy interest in the act itself, not about what is being spoken but just about the act sought to be protected.[123] Whereas, the Supreme Court's decision in *Roe v. Wade* that acknowledged a woman's privacy interest to continue a pregnancy presupposed, what Justice Blackmun took pains to acknowledge, that the

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[116] *Id.* at 65.
[117] *Id.*
[118] *Id.* at 68.
[119] *Id.* at 68–69.
[120] *Id.* at 75.
[121] SAMAR, *supra* note 115, at 66–67.
[122] *Id.* at 67.
[123] *Id.* at 68–69.

law had never before treated the fetus as a person, thereby making the interest in the first instance solely about the woman.[124]

From this definition of a private act a second, corollary definition, can be ascertained that recognizes the relevance to individual psychology and personal behavior of what other people can learn about one's private actions. This corollary definition provides:

> *A state of affairs is private with respect to a group of other actors if and only if there is a convention, recognized by the members of the group, that defines, protects, preserves, or guards that state of affairs for the performance of private acts.*[125]

Examples of societal conventions recognized for the selective disclosure of information include, but are not limited to, closing shutters to one's home or apartment, labeling a space as private, restricting access to a social media or other online account, attaching a label "Confidential" to an envelope or file being mailed or transmitted, locking up one's personal papers; restricting access to one's bank account, or even posting a "Do Not Disturb" sign on one's hotel room.[126] Each of these various conventions, and there are many more, support performance of various acts deemed private, including the making of intimate decisions. All of these bits of information and states of affairs are private too, because the acts they support might not have been undertaken absent their protection.[127]

Having thus answered how privacy is defined, we can now turn to how a right to privacy might be justified. Justice Alito makes a serious error when he references the Solicitor General's brief that relies "on post-*Casey* decisions like *Lawrence v. Texas* . . . and *Obergefell v. Hodges*" in order "to justify abortion through appeals to a broader right to autonomy," and then

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[124] *Id.* at 69; *see* Roe v. Wade, 410 U.S. 113, 151; *see also* Vincent J. Samar, *Personhood Under the Fourteenth Amendment*, 101 MARQ. L. REV. 287, 302–10, 317–29 (2017).

[125] SAMAR, *supra* note 115, at 73.

[126] Stanley Benn points out:

> "Private" used in this second, immunity-claiming is both norm-dependent and norm-invoking. It is norm-dependent because *private affairs* and *private rooms* cannot be identified without some reference to norms. So any definition of the concept "private affairs" must presuppose the existence of *some* norms restricting unlicensed observation, reporting, or entry, even though no norm in particular is necessary to the concept. It is norm-invoking in that one need say no more than "This is a private matter" to claim that anyone not invited to concern himself with it ought to stay out of it. That is why the normative implications of "Private" on a letter or a notice board do not need to be spelled out.

Stanley I. Benn, *Privacy, Freedom and Respect for Persons, in* PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 223–24 (Ferdinand D. Schoeman ed., 1984).

[127] The Fourth Amendment requirement states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. art. IV. It is also where much of the tort area of privacy law allowing individual lawsuits for intrusions into one's private affairs or disclosures of personal information is located.

states that "[n]one of these rights has any claim to being deeply rooted in history."[128] First, the fear that Justice Alito asserts is that such attempts to focus on autonomy, "at a high level of generality, could somehow license fundamental rights to illicit drug use, prostitution, and the like."[129] Yet, nowhere does he offer what this so-called "high level of generality" would consist of, let alone how it would operate to achieve the results he expresses. Fears should not be based just on personal whims but on actual harms caused to oneself or others. Additionally, if rights are limited to only those that were recognized at the time of the adoption of the Constitution or any of its amendments, there would be no non-enumerated rights for presumably they all would have been set forth when the Constitution and its amendments were adopted. But that is not the way the Constitution works, nor does it explain how it came to be that our Constitution should continue to exist as "the oldest written national framework of government in the world."[130] If Alito's view expressed how our Constitution really worked there would have been no need for creation of the Ninth and Tenth Amendments in the Bill of Rights.[131]

V. THE NINTH AND TENTH AMENDMENTS

Some conservative scholars have argued that the Ninth and Tenth Amendments were meant to only be a reminder that the federal government was a government of limited powers confined to operate no further than the powers specifically assigned to it by the Constitution.[132] Obviously, if this were true, then the preamble to the Bill of Rights already serves that purpose and these amendments would not have been necessary.[133] Now, the Ninth

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[128] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022).

[129] *Id.* at 2258.

[130] Steven Mintz, *Historical Context: The Survival of the U.S. Constitution*, GILDER LEHRMAN INST. AM. HIST., https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-survival-us-constitution (last visited May 26, 2022):

> At the end of the Constitutional Convention, George Washington said, "I do not expect the Constitution to last for more than 20 years." Today, the United States has oldest written constitution in the world. Why has the Constitution survived? The framers of the Constitution established the broad structure of government but also left the system flexible enough to adapt to changing conditions. A document of less than 6,000 words, the Constitution is not overly detailed. Over the years, Congresses, presidents, and the courts have reinterpreted the document to meet the needs of the moment.

[131] The Ninth Amendment states: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Tenth Amendment says, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[132] *See* Gary Lawson & Robert Schapiro, *The Tenth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-x/interps/129 (last visited May 22, 2022).

[133] The Preamble to the Bill of Rights states:

Amendment does not mention a specific right. Rather, it affirms that there are rights beyond those specifically enumerated in the Constitution so as not to limit the rights that may exist to only those specifically identified at the time the Constitution was adopted. Still, such rights, under the Ninth Amendment are stated to be held by the people just as there are non-enumerated powers under the Tenth Amendment, such as "running elections, creating [most] marriage laws, operating schools," held by the states.[134] What exactly are these rights and powers is left to the Court to decide as part of its limited duty to only resolve Article III cases and controversies that come before it.[135] But that there are such non-enumerated rights seems pretty obvious, given the Bill of Rights Preamble, since there would be no other reason for the Ninth Amendment to exist, let alone exist as the second to last amendment of the Bill of Rights guaranteeing individual rights.

Additionally, Justice Alito's argument totally ignores the fact that autonomy rights are central to rights deeply a part of this nation's history. The adoption of the Constitution in 1788 was itself premised on an agreement that, as the first order of business for the new Congress, a Bill of Rights would be proposed and sent to the states for ratification.[136] This compromise came about to resolve a serious concern raised by some states that the Constitution's creation of a strong central government over the previous, very weak, national congress that existed under the Articles of Confederation could possibly lead to undermining individual and state liberties.[137] Hence, as a compromise for adopting the federal Constitution,

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> The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: and as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

U.S. CONST. pmbl.

[134] *The Tenth Amendment – Reserving Power for the States*, FIND LAW, JULY 27, 2022, https://constitution.findlaw.com/amendment10.html (last visited May 15, 2023).

[135] This point has a bearing on why the federal courts should not be in the business of affording advisory opinions and only in the business of resolving cases that meet the Article III standing requirement. Since to do otherwise could too easily afford the federal courts the power to limit rights that should be held by the people or expand the powers of the federal government, except where there are good interpretative reasons for doing so.

[136] *Creating the United States: Creating the Bill of Rights*, THE LIBR. CONG., https://www.loc.gov/exhibits/creating-the-united-states/creating-the-bill-of-rights.html (last visited May 20, 2022). At the time of the Constitution's adoption the Anti-Federalists believed that "'the powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government—[i]t reaches to everything which concerns human happiness—Life, liberty, and property, are under its control. There is the same reason, therefore, that that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments.'" HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 66 (1981), (quoting Brutus II, *in Essays of Brutus*, NEW YORK J. 2.9.26 (Oct. 1787–Apr. 1788)). *See also* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, 438 (Adrienne Koch and William Peden eds., 1944).

[137] *See Creating the United States*, *supra* note 136.

the Bill of Rights was to be proposed in the first Congress and after ratification by the states, according to the provisions of Article VII of the Constitution, would become the first ten amendments to the U.S. Constitution.

These aspects of Justice Alito's majority opinion are worth pointing out because the justification for a right to privacy is easily grounded in autonomy, as a value that has long been a part of the American ethos. Autonomy means self-rule.[138] From the very beginning of its history, concern for self-rule had been a part of this Nation's history. In the Declaration of Independence, Thomas Jefferson notes the many abuses against self-rule by the British crown including, but not limited to, calling legislative bodies to distant meetings to fatigue them into compliance; dissolving non-compliant representative houses who opposed "invasions of the rights of the people"; denying elections of new representatives; obstructing the administration of justice; creating new administrations "to harass our people and eat out their substance"; requiring citizens, in times of peace, to quarter soldiers; rendering the military independent of civil authority; creating mock trials to hear the crimes of military personnel; cutting off trade "with all parts of the world"; imposing "taxes without our consent"; denying "the benefits of trial by jury"; "taking away our charters"; abolishing our most valuable laws"; "suspending our own legislatures"; "ravag[ing] our coasts"; "burn[ing] our towns"; transporting "foreign mercenaries to complete the works of death, desolation, and tyranny"; taking "our fellow citizens . . . captive on the high seas, to bear arms against their country"; and "excit[ing] domestic insurrections amongst us."[139] All these are examples of the colonists' concerns at the beginning of the American revolution over how their individual abilities to rule themselves were being threatened. And all are part of this country deeply rooted history.

Additionally, if one previews the Bill of Rights, one finds present a set of personal liberty rights in the first eight amendments that can be traced directly back to the concerns in the Declaration and are specifically directed to the protection of individual autonomy. Those rights include rights to free exercise of religion; no establishment of religion by government; freedom of speech and the press; freedom of association; right to bear arms; right not to quarter soldiers in times of peace; "[t]he rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures"; "not to be held to answer for a capital offense, or otherwise infamous crime" . . . unless on presentment or indictment of a Grand Jury .

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[138] "By individual autonomy I mean that the conditions that govern a person's participation in a rule-governed activity are only those conditions that are set by the activity itself. In this sense, individual autonomy is to be understood always in relation to an activity . . . ." Samar, *supra* note 115, at 86–87. This contrasts with privacy, which is understood to "involve the nature of one's actions, because privacy is concerned with the effects one's actions have on other persons in the specified group." *Id.* at 87.

[139] THE DECLARATION OF INDEPENDENCE paras. 4–28 (U.S. 1776).

. ."; no double jeopardy, or compulsion to be a witness against oneself; a right to a fair, "speedy and public trial, by an impartial jury"; to be informed of the charges and witnesses against one, and to have compulsory process to bring forth witnesses in one's favor; "the right to trial by jury"; and the right not have excessive bail, excessive fines, or cruel and unusual punishments imposed.[140] Also to be eventually included here is the Fourteenth Amendment's Equal Protection Clause, adopted in 1868, which guaranteed to all persons the Equal Protection of the law and the Due Process Clause, which has been interpreted by the Supreme Court to apply most of the protections of the Bill of Rights to the states.[141] The Fifth Amendment Due Process Clause has also been interpreted to reverse incorporate the Equal Protection Clause of the Fourteenth Amendment to apply against the federal government.[142]

Taken together what all these protections signify is not a view of autonomy that is arguably overly general as Justice Alito alludes to when he speaks of creating rights to drug use, etc., but rather one that is deeply involved with this Nation's commitment to upholding individual liberty from its very founding. Put another way, it is not whether the Founders had women, transgendered persons, or gay rights in mind when they adopted the various provisions in the Bill of Rights and Fourteenth Amendment. It is that they choose provisions, which on their face signaled a deep concern to protect individual freedom and well-being where no one else's interest was involved, a matter that previously had only been referred to generally in the Preamble to the Constitution. The specific interests the provisions focused upon simply represented the most prevalent examples in their day where autonomy was being challenged. They were not meant to be the only possible autonomy challenges, or the adoption of the Ninth Amendment would have been totally unnecessary.[143] The Bill of Rights and the Fourteenth Amendment weren't meant as a limitation but to keep a check on those in government who might seek too much power. Thus, for a right to privacy to apply where no interest of another is involved, it must be recognized as the ideal case example for protecting individual autonomy. Given the definitions stated earlier, if autonomy is a basic freedom, then certainly a right to privacy must exist to protect that basic freedom. In this

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[140] U.S. CONST. amends. I–VIII.

[141] *See Incorporation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine (last visited Mar. 19, 2023).

[142] *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[143] To offset the claim that Aristotle's virtues are relative to his time and locality, Professor Martha Nussbaum argues similarly that Aristotle intentionally offers a "thin account" of the virtues in context to various spheres of human experience like mortality, pleasure versus pain, and how to operate with limited resources, to name just a few. This allows him to avoid having to hold the virtues fixed to a specific conception or tradition that would "prevent ethical progress." Instead, it allows for critiquing the various conceptions offered in order to make them more inclusive to human needs. *See* Martha Nussbaum, *Non-Relative Virtues: An Aristotelean Approach*, *in* THE QUALITY LIFE 244–50 (Martha Nussbaum & Amartya Sen eds., 1988).

sense, issues involving private acts, as described, give rise to cases where the ideal of autonomy will need to be protected. Similarly, issues concerning private information and states of affairs will also need protection to provide the necessary space for the performance of private acts and to allow voters space to discover what their real interests are.[144] That is why such protections are properly an end of democratic government.[145] They preserve the ability of the individual to make their own informed decisions.

Finally, finding a grounding for a right to privacy based in autonomy does not address conflict of rights concerns where the claimed privacy right conflicts with another right or a compelling governmental interest. To address these issues a further distinction is needed. For not all rights are alike. The right to privacy in an example of an *active* right. "Active rights are those that permit the holder of the right to perform an action, such as making a speech, publishing a news report, or practicing a particular religious belief."[146] "Active rights involve negative freedom in that the respondent has a duty not to interfere with the right holder.[147] Active rights also contrast with *passive* rights, which provide the holder of the right a benefit such as "trial by his or her peers, a speedy and public trial, and the right to compulsory process to obtain the testimony of witnesses, and the right to the assistance of counsel."[148] "Passive rights involve positive freedom in the sense that the respondent of the right has the duty to afford the holder certain benefits,"[149] while negative rights by contrast restrict what others and especially the government may do. Why this distinction is important is because it provides a basis for resolving conflicts of rights. Given the definition of a private act, and its corollary definition of private information and states of affairs, any intrusion on a passive right automatically rules out a privacy claim because the privacy claim presupposes no basic interest of another has been interfered with.[150] The same would not be the case were the conflict to be with another important active right like freedom of religion or of the press. Because active rights set out the boundaries where the holder of the right might act, a court can draw upon the right's relation to autonomy, as the common dominator for resolving active rights conflicts.[151] Thus, to resolve conflicts of rights involving a valid privacy claim, the test is to determine which right better fosters autonomy in general.[152] As an example of this considers freedom of the press to report on politicians and public figures. This should be upheld

[144] *See* SAMAR, *supra* note 115, at 91–93.
[145] *See id.* at 102–03.
[146] *Id.* at 104.
[147] *Id.*
[148] *Id.*
[149] *Id.* at 104–05.
[150] SAMAR, *supra* note 115, at 105.
[151] *Id.* at 107.
[152] *Id.*

over the privacy claims of the politicians or public figures because it best supports the autonomy of citizens to decide who to elect to public office by learning how they think or act, or of the public to determine whose views should be paid attention to, or, as in the *Time, Inc. v. Hill* case,[153] whether a current event involving private citizens is newsworthy.[154] The same would not be true if the report were to involve a private citizen on a matter that is no longer newsworthy, as noted earlier in the *Melvin v. Reid* case.[155]

Before closing off the discussion of privacy, it is important to recognize that there will no doubt arise circumstances where a claim to privacy would undermine a compelling interest of the government. "Compelling interest" means one where there is no other reasonable way for the government to provide the protection it is obligated to do under the Constitution without undermining an individual's privacy. Take, for example, the claim to be free to travel where the person traveling is infected by a deadly airborne virus.[156] In this instance, the government's concern to protect the health and well-being of all people who may contact the infected individual overrides the individual's privacy right to travel. Why is this the case? The justification for the right to privacy is fundamentally grounded in protecting individual autonomy. That means that in instances where the government can show that the interest it seeks to protect is more essential to fostering autonomy generally than is protecting individual privacy, the right to privacy must yield to the government's compelling interest.[157] However, these situations require careful consideration. The fact that the state has adopted a particular method to secure its compelling interest may not be enough to justify overriding a privacy right unless the method is also the minimum necessary to achieve the state's compelling interest.[158] Consider, for example, the way this country came to deal with the AIDS crisis. It did not, as a general rule, quarantine those who were infected by HIV; rather, it put out the information that the public could use to protect itself, since the AIDS virus was not transmitted by an airborne virus but by human behavior, it did not warrant a more intrusive means such as a general quarantine.[159] In other words, when a compelling interest overrides a right to privacy, the concern to protect privacy is not removed from the table. Instead, one might think of it as being put on the back burner, as a kind of regulatory standard designed to ensure that the maximum intrusion on an individual's privacy is the

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[153] *See* Time, Inc. v. Hill, 385 U.S. 374 (1967), where the Court held that Time, Inc.'s liability for misrepresentations required a showing that it knew the statements were false or were in reckless disregard of their truth.

[154] SAMAR, *supra* note 115, at 109–10.

[155] Melvin v. Reid, 112 Cal. App. 285, 290 (1931).

[156] Gregg Gonsalves & Peter Staley, *Panic, Paranoia, and Public Health—The AIDS Epidemic's Lessons for Ebola*, 371 NEW ENG. J. MED 2348–49 (2014).

[157] SAMAR, *supra* note 115, at 112–13.

[158] *Id.* at 115.

[159] *See generally* Bayer & Fairchild-Carrino, *AIDS and the Limits of Control: Public Health Orders, Quarantine, and Recalcitrant Behavior*, 83 AM. J. PUB. HEALTH 1471–76 (1993).

minimum necessary for the state to meet its compelling interest. The relevance of this approach in the *Dobbs* case goes directly to the Chief Justice's concern of balancing Mississippi's interest to protect human life without at the same time undermining a woman's right to choose whether to continue her pregnancy. So, it is not surprising where two interests' conflict that something along the lines of a regulatory discussion involving viability, as *Roe* and *Casey* set forth, should be brought into the discussion. Below, the article will discuss what should be the fetus' status to determine if a conflict of rights might also be present. For now, note that that if the above-described test is followed along with the aforesaid test for resolving conflicts of rights, the right to privacy will not only be consistent with this Nation's deeply rooted history and traditions. It will help explain why the public continues to recognize the Constitution's authoritative role and the Supreme Court as a legitimate interpreter of its meaning.

VI. WHY LEAVING QUESTIONS CONCERNING NON-ENUMERATED RIGHTS SOLELY TO THE POLITICAL BRANCHES IS INADEQUATE AS A MATTER OF LAW

The concern that some important freedoms might not be protectable if simply left to democratic decision-making was noted in *Federalist 51* by James Madison when he wrote:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods in providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of the majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary of self-appointed authority. This, at best, is but a precarious security; because a power independent of society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States.[160]

[160] THE FEDERALIST NO. 51 (James Madison or Alexander Hamilton).

Professor John Hart Ely, in his book, *Democracy and Distrust: A Theory of Judicial Review*, attempts to further Madison's concern by calling upon the judiciary to adopt "a participation-oriented, representation-reinforcing approach to judicial review" over "the standard characterization of the Constitution as 'an enduring but evolving statement of general values.'"[161] This he does because he came to believe "that freedoms are more secure to the extent they find foundation in the theory that supports our entire government," which he sees at all levels as an attempt to ensure that everyone's interest will be represented without discrimination.[162] And while there is truth to the claim that participation and representation are certainly important, a problem arises when Justices, like Alito, cite Ely's argument to limit their judicial review of federal government cases only to challenges involving matters providing for adequate citizen participation and representation.

Take, for example, gerrymandering of congressional districts in which the Court has largely focused on one person/one vote[163] but, especially in the past twenty years, has more limitedly focused on impermissible uses of race.[164] Still, even with its more limited focus on race, given that it recently struck down a key provision in the Voting Rights Act, it does not appear minority representation will continue to be very much protected.[165] With the exception of race, and probably not even then, the Court's more recent approach has not proved very effective to overcome powerful local majorities from overcoming minority representation.[166] Moreover, given the current political climate involving "culture wars," one may seriously doubt whether past aspects of the Court's jurisprudence involving protection of fundamental rights will likely continue into the future. Take, for example,

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[161] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980). Justice Alito references Professor Ely as having said he would have voted for a statute "like the one the Court end[ed] up drafting," supporting an intent against the constitutional right. *See also* Dworkin, *supra* note 85, at 19, n. 79.

[162] Ely, *supra* note 161, at 102.

[163] *One-Person One-Vote Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/one-person_one-vote_rule (last visited Mar. 14, 2023).

[164] *Redistricting and the Supreme Court: The Most Significant Cases*, NAT'L CONF. STATE LEGISLATURE (Sept. 14, 2021), https://www.ncsl.org/research/redistricting/redistricting-and-the-supreme-court-the-most-significant-cases.aspx.

[165] The Court in Shelby Cnty. v. Holder, 570 U.S. 529 (2013), held unconstitutional use of Section 4(b) of the Voting Rights Act that specified which jurisdictions (mostly southern states) required preclearance under Section 5 by the Justice Department or the United States District Court for District of Columbia before any changes can be made in the voting process in the state or its subdivisions to prevent discrimination based on race, color, or membership in a language minority group. *See About Section 5 of the Voting Rights Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/about-section-5-voting-rights-act (last visited Mar. 17, 2023).

[166] Annika Kim Constantino, *Gerrymandering Could Limit Minority Voters' Power Even Though Census Shows Population Gains*, CNBC (Aug. 13, 2021), https://www.cnbc.com/2021/08/13/gerrymandering-could-limit-minority-voters-power-even-after-census-gains.html.

participation of gays, lesbians, transgendered, or non-binary individuals in the society's political branches.

In *Romer v. Evans*,[167] voters in the state of Colorado adopted Amendment 2 to their state constitution which barred the legislative, executive, and judicial branches, both at the state governmental level and its municipalities, from affording any protection against discrimination of "homosexual, lesbian, [or] bisexual orientation, conduct, practices or relationships." Following passage of Amendment 2, the only way antidiscrimination protections could be achieved in these areas was if the group could pass an amendment to the state's constitution to allow such protections. In effect, Amendment 2 significantly limited access to the political branches by requiring gay, lesbian, and bisexual people to first obtain a constitutional amendment, itself requiring a much higher standard of attention than would be required of other actors, and only then obtain the antidiscrimination measure they may have hoped for. This was an obvious attempt by those opposed to the passage of such anti-discrimination measures to not only prohibit any further considerations by the state or its municipalities of such measures, but to undue ordinances that had already passed in Aspen and Boulder and the cities and counties of Denver that prohibited sexual orientation discrimination in "housing, employment, education, public accommodations, and health and welfare services."[168] In other words, the effort was to remove the participation and representation of these groups that had already been established within these particular communities.

In a 6-3 vote, the U.S. Supreme Court struck down Amendment 2 for violating the Fourteenth Amendment's Equal Protection Clause. The Court's opinion, written by Justice Kennedy, found that the Amendment could not be sustained even under the Court's lesser rational basis standard of review, since it was obviously based on animus against gay and lesbian people, which is not a legitimate governmental interest.[169] Kennedy then went on to note, "[i]f the constitutional conception of 'Equal Protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[170] The case raised a hackle from Justice Scalia, who in dissent, argued that "[t]he Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a 'bare . . . desire to harm' homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores

[167] Romer v. Evans, 517 U.S. 620 (1996).
[168] *Id.* at 623–24.
[169] *Id.* at 633.
[170] *Id.* at 635.

through use of the laws."[171] What Justice Scalia goes on to write not only further shows his personal disregard for what the gay, lesbian and bisexual groups had achieved with the enactment of antidiscrimination laws, but how little he viewed an Equal Protection violation arising when a group "may not obtain *preferential* treatment without amending the State Constitution."[172] Note that his italicized use of "*preferential* treatment" suggests a bias against the group in question (lesbian, gay, and bisexual people) who would not be allowed to participate in seeking legislative change in the way *everyone else in the society could*. Obviously, Justice Scalia regards groups, like gays and lesbians, and bisexuals who seek not to be discriminated against in the same way others would not want to be discriminated against to somehow be a call for preferential treatment. Apparently, he finds no problem with Colorado's attempt to change its constitution to make it significantly more difficult for these groups to participate and be represented in the political branches of the state from how it treats other groups. Only because at the time there existed on the Court a group of justices who were willing to find an Equal Protection violation in what Colorado had adopted with passage of Amendment 2 was the Court able to strike the state's attempt to write discrimination into its law. But that required the Court to look beyond whether some level of participation and representation was allowed to determine how significant was the representation.

Ely's focus is important, but by itself it may not provide as much security for individual freedom as he might have hoped to ensure unless fundamental rights are also recognized under the Due Process and Equal Protection clauses. Thus, what needs to be continued to provide an extra layer of security is what, based on past precedent, the Court had done in other cases to find that Fourteenth Amendment's Due Process and Equal Protection Clause applies.[173] That may not be so likely going forward if the Court begins to undue past case precedents, as with *Dobbs* case, simply because they do not share what the Court believes to be a foundation deeply rooted in the Nation's history and tradition. Consider the Court's damage to the Voting Rights Act. Put another way, the enumeration of certain rights, both in the Bill of Rights and the Fourteenth Amendment, provides opportunities for the protection of individual liberty but only when afforded a sufficiently general level of application, not inconsistent with the broader purposes of the documents, and without which would serve little if any purpose whatsoever.

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[171] *Id.* at 636 (Scalia, J., dissenting).

[172] *Id.* at 638–39 (Scalia, J., dissenting) (citation omitted).

[173] *See, e.g.*, City Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), in which a unanimous Court held that the denial of a special use permit for a living center for persons mentally challenged was based on prejudice in violation of the Fourteenth Amendment Equal Protection Clause. *But see, e.g.*, Heller v. Doe, 509 U.S. 312 (1993), upholding a Kentucky statute for involuntary commitment of "mentally retarded" persons under the Court's lowest level of scrutiny, the rational basis test.

VII. HOW ARE DUE PROCESS AND EQUAL PROTECTION IMPLICATED IN ESTABLISHING NON-ENUMERATED RIGHTS

The Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without Due Process of law; nor deny to any person within its jurisdiction the Equal Protection of the laws.[174]

Unenumerated rights under this Amendment are found mostly to fall within the scope of either the Due Process or the Equal Protection Clauses. This means that to understand what rights there are under the Fourteenth Amendment requires a close examination of how each of these two clauses are thought to operate.

It is worth noting that the Due Process Clause does not define the specific rights that are protected. Rather it states that no state shall "deprive any person of life, liberty, or property, without Due Process of law." An obvious procedural concern of this clause is the process requirement, that before life, liberty, or property are taken "the person must be given notice, the opportunity to be heard, and a decision [must be made] by a neutral decisionmaker."[175] But what should be the standards for determining whether life, liberty, or property are even involved is not stated.

This is an important question that the Court first acknowledged it had authority to decide in the *Carolene Products* case.[176] There, after holding that Congress had the power to restrict shipments of certain milk products, without restricting butter, to ensure public welfare, the Court went on to acknowledge in footnote 4 that

> [t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the

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[174] U.S. CONST. amend. XIV.

[175] *Procedural Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/procedural_due_process (last visited Mar. 21, 2023).

[176] United States v. Carolene Products Co., 304 U.S. 144 (1938).

> general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities. . . . [Or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[177]

What this footnote makes clear is the Court's authority under the Fourteenth Amendment Due Process and Equal Protection clauses to set forth specific rights and obligations for clarity as necessary for it to carry forth its responsibility to ensure that the Preamble goals "to promote the general Welfare, and secure the Blessings of Liberty to ourselves and our prosperity" are indeed being met.[178] Professor Erwin Chemerinsky points out that "[t]he Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe upon them unless strict scrutiny is met."[179] On the Due Process side, these rights include "a constitutional right to refuse medical care as an aspect of the 'liberty' protected in the due process clause."[180] Other examples that have been protected under Equal Protection include the right to travel, to be free of governmental racial discrimination from voting (also under the Fifteenth Amendment), and most of the rights that have been founded under a right to privacy, such as access to contraception.[181] This later set of cases falls under both the Due Process and Equal Protection clauses.[182] Chemerinsky notes, for example, that "[i]n *Zablocki v. Redhail*," where the Court struck down a state court's denial of the right to marry to one who was behind in child support payments, that "the majority opinion found the right to marry to be a fundamental right protected under the liberty of the due process clause, but the concurring opinion by Justice Powell used an equal protection approach" suggesting that in some cases both approaches might be available.[183] He goes on to suggest that what distinguishes a fundamental right found under Due Process from one found under Equal Protection may be more than just semantics. "If

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[177] *Id.* at 152 n.4.

[178] The focus on Equal Protection is how it supports fundament rights, not how it aids a determination of whether a governmental classification might be thought discriminatory. The latter is also a focus of Equal Protection separate from this discussion.

[179] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 792 (2006).

[180] *Id.* at 793 (citing Cruzan v. Director, Mo. Dep't Health, 497 U.S. 261 (1990)).

[181] *Id.*

[182] *Id.* (citing Harper v. Va. State Bd. Elections, 383 U.S. 663 (1966)).

[183] *Id.* (citing Zablocki v. Redhail, 434 U.S. 374 (1978) and 434 U.S. at 400 (Powell, J., concurring)).

a law denies the right to everyone, then due process would be the best grounds for analysis; but if a law denies the right to some, while allowing it to others, the discrimination can be challenged as offending equal protection, or the violation of the right can be objected to under due process."[184] This latter point shows that these two approaches are not so different. Although they may focus on somewhat different concerns, it is fair to say that in the right circumstances each can afford support for the conclusions of the other.

In the above examples, the rights falling under Due Process are often referred to as comprising an area of substantive versus procedural due process.[185] For the concern is not whether the holder of the right has been afforded proper process but whether there is a fundamental right in the holder to begin with. What constitutes fundamental rights has been a matter of great debate.[186] Elsewhere the argument was made that such rights cannot be solely decided by what the Founders may have intended; nor should it be an open-ended issue what rights exist to be left to current public opinion, which may not always be very well-founded.[187] Instead, they should be founded upon a set of human rights that may not have been fully recognized at the beginning of the Nation but which have, over time, gained both international status and exhibit a strong commitment to those values our founding documents could readily uphold.[188] The constitutional right to privacy fits these requirements.

Moreover, not to acknowledge the existence of such rights, leaves application of the procedural Due Process requirement solely to the determination of the political branches as the sole determiners of what liberties or property might exist, at least when no enumerated constitutional right is present. Alternatively, it leaves one wanting from having been able to only discover from some earlier understanding what these terms might have meant at the time the Constitution and the Fourteenth Amendment were adopted to where they might be placed in today's world. This latter, all too narrow, approach to what is meant by "deeply rooted in the history and traditions of the Nation" undermines not only what people have come to expect from past Supreme Court decisions,[189] but also provides very little

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[184] *Id.* at 793–94 (footnote omitted). Here it is worth noting that the Court's holding in *Loving v. Virginia*, 388 U.S. 1 (1967), found Virginia's miscegenation statute to violate both due process (because marriage was held to be a fundamental right) and equal protection (because whites could not marry non-whites) as a way to provide for "racial purity."

[185] *See Substantive Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/substantive_due_process (last visited Mar, 21, 2022).

[186] *See* CHEMERINSKY, *supra* note 179, at 795 (footnotes omitted).

[187] *See* SAMAR, *supra* note 115, at 108–12, 114.

[188] *See id.* at 121–22.

[189] In Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833 (1992), Justice O'Connor, in her majority opinion, noted:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test

hope going forward that the Constitution will offer much if any assistance toward meeting new challenges that could not have been imagined by the Framers.[190] In short, the approach would seriously abridge the Preamble aspiration that the document would continue to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosperity . . . ."

Now, consider the role Equal Protection serves in our constitutional understanding of non-enumerated fundamental rights. What does it mean to say "nor [shall any state] deny to any person within its jurisdiction the Equal Protection of the laws[?]" Traditionally, it was thought that the Equal Protection Clause operated on a different track from the Due Process Clause. Professor Cass Sunstein has noted,

> From its inception, the Due Process Clause has been interpreted largely (although not exclusively) to protect traditional practices against long-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.
>
> The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. The Due Process Clause often looks backwards; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidated practices that were widespread at the time of its ratification and were expected to endure.[191]

Here, it is important to not provide too expansive a view of the distinction Professor Sunstein is making between a due process and an equal protection approach, as he is only pointing out how the two approaches have

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> the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

(citations omitted).

[191] Cass R. Sunstein, *Sexual Orientation & the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) (footnote omitted).

traditionally been viewed, not how they should continue to be viewed going forward.[192] His approach should not be understood, for example, in the way Justice Alito seems to adopt, that when a fundamental rights claim is raised under the Due Process Clause the only consideration permitted is backward looking to the founding, even when today that will not be sufficient to unpack forms of discrimination not previously recognized. Alito writes, "a fundamental right must be 'objectively, deeply rooted in this Nation's history and tradition.'"[193] He then goes on to state, after claiming that the word "liberty" provides little guidance in assisting courts in how to decide cases, that "[i]n interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we 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."[194] All this he does presumably to protect liberty, but does restricting what liberties there are to only what might have been thought to be present in 1868 when the Fourteenth Amendment was adopted really protect liberty today? Instead, the meaning he should have bound himself to is the one that was adopted by Justice Kennedy in *Obergefell v. Hodges*.[195] Kennedy writes, "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present."[196] If the Constitution, Bill of Rights, and the Fourteenth Amendment are going to be meaningful and have their authority relevant for today's generation more needs to be said than what the various clauses may have meant at the time they were adopted.[197]

The Fourteenth Amendment was not meant to be just a short-term fix to be disregarded once the concerns that gave it rise were no longer relevant,

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[192] Cass Sunstein goes on to argue, notwithstanding that the traditional approach associated with Due Process fitted the Court's decision in Bowers v. Hardwick, 478 U.S. 186 (1986), that an Equal Protection approach could be brought into the analysis "to forbid discrimination on the basis of sexual orientation." Sunstein, *supra* note 191. Exactly how such an Equal Protection approach might be brought into the analysis would wait until the Court's later decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers*, 478 U.S. at 578, where Justice Kennedy stated:

> Equality of treatment and the Due Process right to demand respect for conduct protected by substantive guarantees of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.

Lawrence, 539 U.S. at 575.

[193] *Dobbs*, 142 S. Ct. at 2247.

[194] *Id.*

[195] Obergefell v. Hodges, 576 U.S. 644 (2015).

[196] *Id.* at 664 (citing Lawrence v. Texas, 539 U.S. 558, 572 (2003)).

[197] "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, 'has not been reduced to any formula.' Rather it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them respect." *Id.* at 663–64 (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

not to say that those concerns may not still be relevant today.[198] If that was meant to be the framework for how future decisions would be decided it presumably would never have been possible to respond to new sets of issues that each generation encounters.[199] That is why, for example, although adopted at the end of slavery, the Fourteenth Amendment did not just refer to the former slaves having equal protection of the laws but "persons" having that protection. Certainly, in 1868 the word "person" was broader than former slaves even though, at the time, women and Native Americans did not have the right to vote.[200] In *Obergefell v. Hodges*, the Court was asked to decide "whether the Fourteenth Amendment requires a state to license a marriage between two people of the same-sex"; also whether it "requires a State to recognize a same-sex marriage licensed and performed in a State which does not grant that right." In holding that the Fourteenth Amendment does require states to license and recognize same-sex marriages, Justice Kennedy, writing for the majority, first sought to "demonstrate that the reasons marriage is fundamental under the Constitution appl[ies] with equal force to same-sex couples."[201] His approach here was first to show "that the right to personal choice regarding marriage is inherent in the concept of individual autonomy;"[202] second, "that the right to marriage . . . supports a two-person union unlike any other in its importance to the committed individuals";[203] third, that the right to marriage "safeguards children and families and draws meaning from related rights of childbearing, procreation, and education";[204] and finally, "that marriage is a keystone of our social order."[205] Together, these are all examples of a Due Process approach that looks to history and traditions without being bound by it in order to determine why marriage continues to be important, as opposed to asking whether same-sex couples were allowed to marry when the country was founded or the Fourteenth Amendment adopted. And that is because Justice Kennedy recognized that history and tradition by itself may not be enough, if treated too narrowly, to uncover deeply held biases that would otherwise be overlooked.

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[198] *See Fourteenth Amendment*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fourteenth_amendment_0 (last visited Mar. 21, 2023) (illustrating the way the Court has or has not used the Fourteenth Amendment to address concerns long after it was adopted).

[199] *See 14th Amendment to the U.S. Constitution: Primary Documents in American History*, LIBR. CONGR., https://guides.loc.gov/14th-amendment (last visited Mar. 21, 2023).

[200] Women did not have the right to vote until the Nineteenth Amendment was adopted in 1920. *See* U.S. CONST. amend. XIX. Native Americans were not afforded the right to vote until Congress passed the Indian Citizenship Act, Pub. L. 68-175, 43 Stat. 253 (1924).

[201] *Obergefell*, 576 U.S. at 665.

[202] *Id.*

[203] *Id.* at 666.

[204] *Id.* at 667.

[205] *Id.* at 669.

To this point, Justice Kennedy writes, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justifications and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."[206] With respect to the right to marry, the Court had rejected such an approach in *Loving v. Virginia*, when the state of Virginia criminally prohibited interracial marriage between a white person and a non-white person.[207] With respect to gays and lesbians, the Court had previously held in *Lawrence v. Texas* that Due Process prohibited a state from criminalizing adult consensual same-sex relationships.[208] What Kennedy is describing here is the need sometimes when determining whether a non-enumerated fundamental right exists to connect a Due Process approach with an Equal Protection approach to ensure that past biases are unlikely to have present effect. This will not always be the case. If all that is at stake in a case is whether a fundamental right is present, as was the situation in *Washington v. Glucksburg*,[209] where the Supreme Court had to decide whether there existed a right to physician assisted suicide, the lack of any history in support of such a right may be sufficient, as a Due Process matter, to determine that no such right exists. However, where the answer to the Due Process question is likely to be misdirected if a hidden bias may be operating, as with the marriage question in the *Obergefell* case, because marriage itself had been defined only to apply to opposite-sex couples, an investigation into whether the marriage definition itself bears a hidden bias needs to be investigated. This is what Kennedy found necessary to do in *Obergefell v. Hodges*. In that case, reliance only on history and traditions would not have uncovered a deeply held bias over who had the right to marry, since only opposite-sex couples had been previously recognized as suitable for marriage. To unravel whether a likely bias might lie behind the marriage right, Kennedy had to consider whether the needs of same-sex couples to marry was relatively different from opposite-sex couples, which it was not.[210] For our purposes, Kennedy's description of how the two clauses operated in this case is worth noting:

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[206] *Id.* at 671 (citations omitted).

[207] Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that marriage is a fundamental right and Virginia's law prohibiting whites from marrying non-whites violated the Equal Protection Clause because it served no legitimate purpose "independent of invidious racial discrimination").

[208] Lawrence v. Texas, 539 U.S. 558 (2003) (holding unconstitutional under the Due Process Clause a Texas statute making it a crime for two adult persons of the same-sex in engage in sexual intercourse in the home).

[209] Washington v. Glucksberg, 521 U.S. 702 (1997).

[210] After going through the four principles and traditions that give rise to a fundamental right to marry and noting how the States have contributed to the fundamental character of marriage by placing that institution at the center of so many facets of the legal and social order," Kennedy concludes:

> 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.[211]

Justice Kennedy's point here is not that due process and equal protection should operate in the same way. Rather, as Cass Sunstein had earlier suggested they may pull in different directions.[212] Still, Kennedy's point goes further to state that sometimes due process and equal protection would need to overlap where a right that may be deeply rooted in the Nation's history and tradition encompasses within it scope a bias against certain groups, which was the case both in *Loving v. Virginia*[213] and *Obergefell v. Hodges*.[214] In those instances where Due Process is called upon to answer a question such as "[i]s there a right to same-sex marriage," if the answer would be "no" only because of a longstanding bias built into the definition of marriage, then Equal Protection must be brought in to unlink the bias. Otherwise, no better understanding of a right would be possible because no new group could ever be successful at invoking a right that had been previously denied.

> There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

[211] *Id.* at 672 (citations omitted).

[212] *See* Cass R. Sunstein, *Sexual Orientation & the Constitution: A Note on the Relationship Between Due Process and Equal Protection,* 55 U. CHI. L. REV. 1161, 1163 (1988).

[213] Loving v. Virginia, 388 U.S. 1 (1997)

[214] *Obergefell*, 576 U.S. at 644.

VIII. HOW SHOULD THE RIGHT TO AN ABORTION FIT INTO THIS ANALYSIS?

At this point, it is important to take note of a distinction Justice Alito raises early in his majority opinion. Alito writes:

> The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of liberty. *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abo*rtion* is fundamentally different, as both *Roe* and *Casey* acknowledge, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."[215]

One may hesitant to think these statements represent a narrowing of the question in Alito's draft to be only about abortion, since so much of what has already been said would suggest the view expressed to be much wider. Still, the issue before the Court is the abortion question. Therefore, consideration at this juncture is warranted for Justice Alito and Mississippi's point that this case might be different because "it destroys . . . what the law now before us describes as an 'unborn human life.'"[216]

Ever since the *Roe* decision came down there has been a debate over the proper characterization of the fetus. And like many issues where a characterization is involved the answer is likely to depend on one's point of view. In an earlier piece, *Personhood Under the Fourteenth Amendment*, various understandings, especially religious understanding, of when "human life" begins were reviewed.[217] It was pointed out that no definite answer has ever been adopted among the various religious traditions as to how this question should be answered.[218] Indeed, even within the Catholic Church, it wasn't until the seventeenth century that the prohibition against abortion focused on life beginning at conception.[219] This is important because the

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[215] Dobbs v. Jackson's Women's Health Org., 142 S. Ct. 2228, 2243 (2022) (citing MISS. CODE ANN. § 41-41-191(4)(b) (West 2022)).

[216] *Dobbs*, 142 U.S. at 2243.

[217] Samar, *supra* note 124, at 305–10.

[218] *See id.* at 308.

[219] "[P]rior to that time, the Church accorded with the view of St. Thomas Aquinas, who, following Aristotle, held that an embryo is not ensouled 'until several weeks into the pregnancy.'" *Id.* at 307 (citing JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY 57, 59–60 (Cynthia Ward, et al. eds., 2nd ed. 1993)). For it is at that time, the "soul is the 'substantial form' of man;" i.e., "has a recognizable human shape." *Id*. *See also* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 40–41 (1993). An interesting question is whether Aquinas has accustomed himself to forms without addressing the substance to which the forms apply or at least not addressing it adequately given what was known in his day. Today, we think of the fetus as possessing 46 chromosomes but perhaps much more

Fourteenth Amendment does not prohibit simply the taking of life but rather it states "nor shall any State deprive any person of life, liberty, or property, without due process of law." The key requirement is the presence of a "person" for Fourteenth Amendment analysis. The abortion debate needs really to focus on how properly to interpret the presence of a person. And this should not be decided merely by the Court adopting the views of any one religion, or even several religions, nor just on subjective personal beliefs alone,[220] if it is to avoid a First Amendment Establishment violation.[221] What is needed is something much more objective if the belief is not to be based on religion alone.

Professor Ronald Dworkin describes two very different ideas that appear at stake when people debate such phrases as "human life begins at conception."[222] One view, probably the one held by Justice Thomas, holds "that fetuses are creatures with interests of their own right from the start, including, preeminently, an interest in remaining alive, and that therefore they have rights that all human beings have to protect these basic interests, including a right not to be killed."[223] The other view, associated with the late Justice Scalia, claims "that human life has an intrinsic value; that human

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needs to be added before we could properly say a new human being is present. If so, this raises interesting questions concerning our understanding of "potentiality" going back to Aristotle. How different scholars understand human development or even sometimes just ignore the impact that certain understandings might have on other stakeholders, including the mother, many feminist thinkers, those engaged in stem cell research, anthropologists, and even members of different religious (non-Catholic) traditions; let alone whether new research poses the question: whether any cell, by a highly developed technological process, could develop into a human being. *See* Lynn M. Morgan, *The Potentiality Principle from Aristotle to Abortion*, 54 CURRENT ANTHROPOLOGY 15 (2013).

[220] *Dobbs*, 142 S. Ct. at 2256, arguing that many of the laws passed against abortions in the late nineteenth, early twentieth centuries were "spurred by a sincere belief that abortion kills a human being."

[221] U.S. CONST. amend. I. Recent caselaw, however, suggests a tendency by the conservative members of the Court to limit just how far the Establishment Clause can limit state involvement with religion by claiming such restrictions often undermine the Free Exercise Clause. In *Trinity Lutheran Church of Columbia, Inc. v. Conner*, 137 S. Ct. 2012 (2017), a majority of the Court agreed that exclusion of the church from an otherwise neutral secular grant program to obtain scrap tire surface materials to improve children's playgrounds violated the Free Exercise Clause because it discriminated against an otherwise qualified organization strictly because of its religious status. Justices Sotomayor and Ginsburg dissented arguing that the majority's position raised a serious establishment concern by providing state funding of a religious organization in a manner that would assist the spread of its religious message. *See id.* at 2028 (Sotomayor, J., dissenting). *See also* GREENHOUSE, *supra* note 72, at 217–19, suggesting that the conservative bloc on the Court is moving away from just having Free Exercise protect religious status toward a more inclusive protection of "religious activity, uses, and conduct." *Id.* at 219 (citing Espinoza v. Mont. Dep't Revenue, 140 S. Ct. 2246 (2020), holding that Montana's state constitution's "no-aid" to religious institutions provision violated the Free Exercise of parents to use their vouchers to send their children to religious schools). In his concurring opinion, Justice Gorsuch wrote, "[m]aybe it's possible to describe what happened here as status-based discrimination. But it seems equally, and maybe more, natural to say the State's discrimination focused on what religious parents and schools *do*—teach religion." *Espinoza*, 140 S. Ct. at 2275 (Gorsuch, J., concurring). Justice Gorsuch did not seem to have a problem with the state supporting the teaching of religion.

[222] DWORKIN, *supra* note 219, at 11.

[223] *Id.*

life is sacred just in itself; and that the sacred nature of human life begins when its biological life begins, even before the creature whose life it is has movement or interests, or rights of its own."[224] Both views afford a great deal of attention to the fetus, but very little attention to the woman carrying the fetus. This is important because where the interests of the woman are seriously threatened, as would be the case when continuing the pregnancy to term will cause either loss of her life or serious physical or mental harms, is it right to discount her interest in total?[225] In a sense, the limiting of abortions post-viability, the time after which the fetus could survive outside the womb, except where the woman's life or health were threatened, was an attempt to balance the interest of the state in affording human life with intrinsic value and the woman whose life already has such value and whose interests might be seriously harmed if forced to carry the child to term. And especially where the woman might die, can we really say that the fetus' "intrinsic value" outweighs the intrinsic value of the woman? This is an example of how the right to privacy continues to play a regulatory role even when the state may present a compelling interest for its being overridden.

It seems a bit much, especially with respect to the second idea Dworkin identifies that the only person who should matter in the abortion decision is the fetus; even more does it seem unreasonable that the decision as to which life matters would be decided solely by a Court and set of state legislatures composed mostly of men.[226] If the government is to be the decider then that means that the government could decide either way depending on who the majority in the legislature would wish to protect. And this would seem very dangerous, even from the point of view of those who seek to preserve the sanctity of human life, since it essentially leaves that sanctity open to whichever candidate, the mother or the fetus, that the political will of the state legislature at the time might wish to protect. This is essentially what the *Dobbs* case has done by leaving out of the picture the Fourteenth Amendment's protection of persons.[227] Indeed, it is this very lack of certainty, on a matter so important to the woman's life and perhaps the fetus's, that is exactly why it should never be left to the shifting political whims of a legislature but to her own judgment, especially if the fetus itself

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[224] *Id.*

[225] Allison McCann & Taylor Johnston, *Where Abortion Could Be Banned Without Roe v. Wade*, N.Y. TIMES (May. 3, 2022), https://www.nytimes.com/interactive/2022/us/abortion-bans-restrictons-roe-v-wade.html (discussing how the restrictions on abortion may vary if *Roe v. Wade* is overturned among the various states).

[226] The current Supreme Court at the time *Dobbs v. Jackson Women's Health* was decided was made up of six male justices and three female. *See* Ritu Prasad, *Alabama Abortion Ban: Should Men Have a Say in the Debate?* BBC (May 18, 2019), https://www.bbc.com/news/world-us-canada-48262238.

[227] Here it is worth noting that neither Congress nor the state legislatures can do more than enforce the provisions of the Fourteenth Amendment; they cannot decree the substance of the Fourteenth Amendment's provisions. That is something the Court must do. *See* City Boerne v. Flores, 521 U.S. 507, 519 (1997) (citation omitted).

cannot credibly be found to be a person, which gets us to the first of the two ideas regarding the abortion debate that Dworkin points to.

It is important here to begin noting what is and what is not in controversy. "Scientists disagree about exactly when biological life of any animal begins, but it seems undeniable that a human embryo is an identifiable living organism at least by its conception."[228] That reality does not address the abortion question, however. Every cell in a human skin contains forty-six chromosomes and is alive.[229] Does that mean that every time someone bites their finger, they are committing homicide because if they were able and allowed to clone their skin tissue, they might be able to create a human being? No, because that is not how the law currently would view the subject. But it comes closer to the more common-sense way of thinking if contraception were to be prohibited such that any fertilized egg would have to be allowed to continue to term. The only difference would be the lack of an intentional direction behind what the fertilized egg would be doing compared to my cloning example. Put another way, is the central distinguishing feature in the above skin cell example the fact that the cells on their own would not develop into a baby but the fertilized egg, all else being equal, would? [230] That doesn't seem right either because one's nature as a thinking human being is as much a part of one's evolution as the fertilized egg's nature into developing into a baby is a part of its evolution. In other words, wouldn't adoption of such an approach just be affording a special status to evolution that occurs outside the human mind as opposed to the evolution that is the cause of one's mental expansion?[231] It is known that

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[228] DWORKIN, *supra* note 219, at 21.

[229] *Genes & Health*, BLIZARD INST., https://www.genesandhealth.org/genes-your-health/46-%E2%80%93-magical-number (last visited May 31, 2022).

[230] Robert George in *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L. J. 2475 (1997), argues against Jed Rubenfeld's claim that "[c]loning process give to nonzygotic cells the potential for development into distinct, self-integrating human beings, thus to recognize the zygote as a human being is to recognize all human cells as human beings, which is absurd." *Id.* at 2494 (citing Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 625–26 (1991)). George's response is "even assuming the possibility of cloning human beings from nonzygotic human cells, the nonzygotic cell must be activated by a process that effects substantial change and not mere development or maturation. Left to itself, apart from an activation process capable of effecting a change of substance or natures, the cell will mature and die as a human cell, not as a human being." *Id.* at 2494–95 (footnote omitted). But this presupposes that the process capable of effecting change can't be a human process; that it must be some part of nature independent of human capability. Why? As Bertrand Russell reminds us, "[o]ur nature is as much a fact of the existing world as anything, and there is no certainty that it will remain constant." BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY 87 (1959). So why assume that the processes that bring about our biological reproduction would not over time change just as much as bringing about our skills at cloning? And, if that is the case, Jed Rubenfeld is correct that the cloning process might give to cells the possibility of becoming human beings. So, it cannot be the process that is the determining factor for who is a person, at least not absent "recogniz[ing] all human cells as human beings." George, *supra*, at 2494.

[231] Robert George argues for the importance of nature because he is a Natural Law theorist, who accepts the idea that "[t]he broad tradition of natural law thinking, for example, proposes what amounts to its own principle of public reason when it asserts that questions of fundamental law and basic matters

skin cells can be cloned to become embryonic stem cells, which "can be turned into any other cell type found in the human body."[232] But while there may be very good reasons to clone stem cells, it doesn't follow that whole human beings should be cloned.[233] Why? Because as independent thinkers humans perceive themselves capable of making judgments that fertilized eggs are not capable of and that the cloned creation of human beings could give rise not only to discriminatory practices but to genetic harms arising in future generations.[234] But if that is the distinction, then it is not the life, or even how the life evolves, but our ability to make judgments that seems most central to our personhood. So where is the mark for when a being with living tissue composed of forty-six human chromosomes should be deemed a person?[235]

Beginning with the work of Professor Alan Gewirth, who in setting forth a foundation for a general theory of human rights, sought one that would not be question-begging but morally neutral in that it did not start from having to accept any particular religious or moral point of view.[236] Instead, it would be based strictly upon features of human action that all moral theories presuppose about the persons they address.[237] That is, that the persons

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of justice ought to be decided in accordance with natural law, natural right, natural rights, and/or natural justice." George, *supra* note 230, at 2482, arguing in a footnote that "[i]n Aquinas's natural law theory, something is good, right, or just 'by nature' insofar as it is reasonable. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Q. 71, art. 2, translated in JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 35–36 (1980). Here one might want to be a bit more circumspect. David A.J. Richards, in his review of Finnis' book, notes several points of difficulty:

> It is important to be clear that there is an alternative conception of the good available, one much more sensitive to argument and evidence precisely at the points that Finnis' account suspiciously ignores. This conception is familiar from Aristotle to Kant to Sidgwick to Rawls, namely, that the good is the object of rational choice and deliberation. . . . In the case of basic goods, this conception would call for investigation of the facts of the aims of persons, the circumstances of their lives, and the ways rationally to realize their ends.

David A.J. Richards, *John Finnis's Natural Law and Natural Rights*, 93 ETHICS 169, 170–71 (Oct. 1982) (book review). Additionally, the ontological basis of Aristotelean-Thomist Natural Law theory is arguably "incapable of providing a determinate justificatory criterion for moral judgments, and that some of the moral judgments it tries to justify on this basis are morally unacceptable." Alan Gewirth, *The Ontological Basis of Natural Law: A Critique and an Alternative*, 29 AM. J. JURIS. 95, 95 (1984).

[232] Michelle Castillo, *Scientists Successfully Clone Human Stem Cells via Skin Cells*, CBS NEWS (May 15, 2013), https://www.cbsnews.com/news/scientists-successfully-clone-human-stem-cells-via-skin-cells/.

[233] Satomi Angelika Murayama, *Op-Ed: The Dangers of Cloning*, FUNG INST. FOR ENG'G LEADERSHIP (May 11, 2020), https://funginstitute.berkeley.edu/news/op-ed-the-dangers-of-cloning/.

[234] *See id.*

[235] Dobbs v. Jackson's Women's Health Org., 142 S. Ct. 2228, 2269 (2022), acknowledging "the characteristics that have been offered [by number of scholars] as essential attributes of 'personhood' are sentience, self-awareness, the ability to reason, or some combination thereof" but then summarily dismissing the "open question" that this debate gives rise to.

[236] ALAN GEWIRTH, REASON AND MORALITY 25 (1978).

[237] I might point out that the Gewirthian framework can be seen as a modified Natural Law theory. Where traditional Aristotelian-Thomist Natural Law focuses on human nature as a necessary and sufficient condition of what we are to do, the Gewirthian theory focuses on human action as a

addressed are voluntary human actors who, in some sense, are free to act for purposes of their own. The same can be said for pretty much all practical precepts, including legal ones, since law imposes obligations to perform either directly, as with individuals, or indirectly, as with institutions. Gewirth describes the features that comprise human action for moral and practical purposes as follows:

> [a]mid the immense variety of such precepts, they have in common that the intention of the persons who set them forth is to guide, advise, or urge the persons to whom they are directed so that these persons will more or less reflectively fashion their behavior along the lines indicated by the precepts. Hence it is assumed that the hearers can control their behavior through their unforced choice so as to try to achieve the prescribed ends or contents, although they may also intentionally refrain from complying with the precepts. From this it follows that action, in the strict sense that is relevant to moral and other practical precepts, has two interrelated generic features: voluntariness or freedom and purposiveness or intentionality.[238]

Constitutional principles, like all legal rules and rights, fit within this standard. For whether one might be a lawmaker, prosecutor, or judge "it is still assumed even in social-role moral precepts that, within limits, action is under the control of the persons or groups addressed by the precepts—that they have knowledge of relevant circumstances and choose to act one way rather than another for purposes or reasons they accept."[239] Indeed, Gewirth states as much when he further says,

> [f]rom this it follows that action, in the strict sense that is relevant to moral and other practical precepts has two interrelated generic features: voluntariness or freedom and purposiveness or intentionality. By an action being voluntary I mean that its performance is under the agent's control in that he unforcedly chooses to act as he does, knowing the relevant proximate circumstances of his action.

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development of our human nature, making human nature a *necessary* but not sufficient condition for human action. GEWIRTH, *supra* note 236, at 118. Additionally, traditional Natural Law theory sought a universalizable position that was not necessarily egalitarian as with Aristotle's "natural slavery" and Aquinas' "inequalities of freedom and well-being in political, legal, social, and economic rights"; by contrast, Gewirth's approach "establishes that every agent, on pain or self-contradiction, must accept that he and all other prospective purposive agents have equal rights to the necessary condition of action, freedom and well-being." *Id.* at 116, 118. Finally, where traditional Natural Law sees reason as "comparing men's good to their bodily qualities, [and] to good works of art" in Aristotle or as a means to an end of privileged "natural inclinations" in Aquinas, Gewirth's approach sees reason as proceeding by "logical necessities" along a line of "steps leading to the PGC." *Id.* at 110, 113–14, 120.

[238] GEWIRTH, *supra* note 236, at 26–27.

[239] *Id.* at 27–28.

> By an action being purposive or intentional I mean that the agent acts for some end or purpose that constitutes his reason for acting; this purpose may consist in the action itself or something to be achieved by the action. Voluntariness and purposiveness hence comprise . . . the generic features of action, since they are the most general features distinctively characteristic of the whole genus of action, where "action" consists of all possible objects of moral and other practical precepts in the respects just indicated.[240]

Gewirth then goes on to show, by way of a dialectically necessary method,[241] that every agent logically must accept on pain of contradiction the moral precept that she has certain rights to freedom and well-being from the mere fact that certain objects are the proximate necessary conditions of human action.[242] And he also shows that every agent must also accept that every other agent also has these same rights.[243] It is the beginning in this argument that provides the objective basis for determining when a being with forty-six human chromosomes should be recognized as a person,

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[240] *Id.* at 27.

[241] By "dialectical" Gewirth means "the method proceeds from within the standpoint of the agent," the agent's own point of view. This distinguishes it "from an assertoric method, which is not limited to such a purview" but may reflect different points of view that not all would share. His "dialectically necessary method propounds the contents of this relativity as necessary ones, since the statements it presents reflect judgments all agents necessarily make on the basis of what is necessarily involved in their actions." *Id.* at 44.

[242] Here we begin from the value-neutral position "I do X for purpose E," which marks the claim from my own point of view that, as an agent, I perform some action for some purpose. *Id.* at 49. Since I would not perform a voluntary act that was harmful in every way, I similarly claim "E is good"; whereby "good," all I mean is a reason or pro-attitude for performing the act. *Id.* at 49–52. Still, this is enough for me to further claim: "my freedom and well-being are necessary goods," since without freedom or well-being I would not be able to perform the act. GEWIRTH, *supra* note 236 at 52–54. Thus, from my own point of view, "I have rights to freedom and well-being." *Id.* at 65. Indeed, were I to deny this latter claim, I would have to admit that others could interfere with my freedom and well-being and, thus, I may not have freedom and well-being. *Id.* at 80. But given that freedom and well-being are necessary goods to my doing X for purpose E, if I now denied from within my own point of view that I have rights to freedom and well-being, I would be contradicting myself. *Id.*

[243] What makes the principle a moral principle (and indeed a human rights principle) and not just a prudential principle, given its derivation from the agent's own interest to do an act he regards as good, is its ability, by way of universalization, to require that:

> the agent logically must acknowledge that the generic rights he claims for himself are also had by all prospective purposive agents. For at that point he admits that the sufficient reason he must adduce as justifying his own having the generic rights also justifies that these rights are had by all other persons who fulfill that sufficient reason.

Id. at 64, 146. This final derivation of his moral precept Gewirth calls the Principle of Generic Consistency (PGC). *Id.* at 135. It states: "*[a]ct in accord with the generic rights [to freedom and well-being] of your recipients as well as yourself.*" GEWIRTH, *supra* note 236, at 135 (alteration in original). For Gewirth, this principle is the supreme principle of morality that determines how all human rights are to be understood.

namely when she can act with voluntariness and purposiveness, even if only to a minimal extent.

Gewirth describes how his approach applies to help resolve the abortion question by first distinguishing prospective from potential agency. He notes specifically that "[c]hildren are potential agents, in that with normal maturation, they will attain the characteristics of control, choice, knowledge, and reflective intention that enter into the generic features of action."[244] A potential agent is not a prospective agent since she does not yet possess the abilities, along with the knowledge of relevant circumstances, to be able to make even minimal decisions for their own purposes. Still, a child, even as a potential agent, is not like an unborn fetus. For it is developing memories and experiences that will bear on its abilities to satisfy its desires; additionally, because it is not in comparable conflict with the mother; its right to proceed to develop to full agency should never be diminished.[245] In support of this development the parent can be most helpful, even if not acknowledging the child as a full agent. Hence a parent does not intrude on a child's freedom when telling the child, for example, to hold my hand while crossing the street since the child; early in its development, is not in a position to have relevant knowledge to know how to cross the street safely. "But insofar as children are potential agents, they have rights that are preparatory for their taking on the generic rights pertaining to full-fledged agency."[246] Similarly, persons with serious mental challenges, even as adults, may not be able "to exercise the kind of control over their behaviors that normal prospective agents do"; and, as such, they may "not have to the degree the right to freedom," a prospective agent has.[247] This will mean that in a proper context a guardian ad litem or health care provider may need to be appointed to protect the individual from various forms of harm. But here it is also important to note the extent to which a mentally challenged person has human potentialities, such that morality "requires both that they be protected and that efforts be made to effect whatever improvements may be possible in the direction of normal agency."[248]

In the case of abortion, morality combined with a Principle of Proportionality acknowledges that the justification for abortion varies as the fetus gets closer to term.[249] This is a moral evaluation that should be made by those most directly affected, the woman in consultation with her doctor who, more accurately than the state, is in a better position to grasp the potential harm to herself and the fetus for continuing the pregnancy. Here it needs to be understood that the fetus is not yet a prospective agent but only

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[244] *Id.* at 141.
[245] *Id.* at 142–43.
[246] *Id.* at 141.
[247] *Id.* at 141–42.
[248] *Id.* at 142.
[249] GEWIRTH, *supra* note 236, at 143.

in the process of developing the abilities necessary to become a full-fledged agent.[250] Thus, like a seventeen year old child who does not yet have the right to vote, she does have a greater claim on her school to provide a civics education in anticipation of her forthcoming right to vote, more so than a sixteen or fifteen year old child. The fetus' right to continue to term can be seen to operate similarly imposing a greater claim on the woman as it continues to term. Still, its right to continue to term should never trump the woman's life, or physical and mental equilibrium, since it is not yet a full-fledged agent and, if in conflict with the mother's health, cannot be afforded greater protection than would be afforded the mother, who is a full-fledged agent.[251] At an earlier stage in a pregnancy, less salient reasons would justify aborting a three-month fetus than a six-month fetus, given the fetus' more distant approach to having the "practical abilities and the corresponding purposes or desires."[252] But again this changes as the pregnancy evolves if the life or health of the mother falls into jeopardy. That is why something like viability or other appropriate approach makes sense, when in consultation with the physician, it provides the setting for when a pregnancy can be terminated.[253] Gewirth writes, if "[t]he conflict involves the mother's generic rights to the use of the abilities required for purpose-fulfillment are threatened by the fetus being carried to full term," as might be the case where she would suffer "death, or severe diminution of physical or mental health, or lesser but still sizable losses," then abortion would be allowed up to the time of birth.[254]

For the mother, as a purposive agent, already has the generic practical abilities and the purposes to which these are directed, and there being lost, endangered, or attacked for the sake of the fetus would involve the generic rights of someone who has them in full would be drastically subordinated to a minimal possessor of these rights.[255]

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[250] *See id.*

[251] *See id.* at 121–22.

[252] *See id.* at 143.

[253] For example,

> [s]ome European countries' laws set the time limit for abortion on request or broad social grounds between 18-24 weeks of pregnancy, whereas many set the limit around the first trimester of pregnancy. However, all these countries' laws also allow access later in pregnancy in specific circumstances, such as where a woman's health or life is at risk. The standard practice across Europe is to not impose time limits on these grounds.

CTR. FOR REPROD. RTS., EUROPEAN ABORTION LAWS: A COMPARATIVE OVERVIEW (Jul. 8, 2022), https://reproductiverights.org/wp-content/uploads/2022/10/15381_CRR_Europe_October_2022.pdf.

[254] GEWIRTH, *supra* note 236, at 143.

[255] *Id.*

IX. WHY A NARROW FOCUS ON HISTORY AND TRADITION UNDERMINES THE COURT'S LEGITIMACY AND DISAVOWS INDIVIDUAL HUMAN DIGNITY

A lot has been said in this article about the dangers to individual fundamental rights that would likely be generated by Justice Alito's approach to the meaning of "deeply rooted in this Nation's history and tradition." But before bringing this article to an end it is important to also say how human dignity is likely to be affected.

In *Lawrence v. Texas*, the Supreme Court was asked to overrule its previous holding in *Bowers v. Hardwick* that held a state may constitutionally criminalize adult, consensual, same-sex behavior in private.[256] In so doing, the Court, per Justice Kennedy, noted that the Texas statute making adult same-sex sexual relations in private a crime violated the Due Process Clause of the Fourteenth Amendment.[257] In reaching that conclusion, Kennedy wrote:

> [i]t suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[258]

What Justice Kennedy is recognizing here is the role of human dignity in discussion of fundamental constitutional/human rights.[259] Human rights refer to those rights all humans have *qua* persons whether they are legally recognized or not.[260] That role comes about because human beings are the authors of their own actions with the capacity to choose what to believe, what to do, essentially how to live their own lives.[261] It is the same worth or dignity [that Gewirth states] the agent must also attribute to all other actual or prospective agents."[262] For the worth or dignity comes about not by the choice made, but by the acknowledgement that the person is in the position to make the choice.[263] That does not mean that someone who makes an

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[256] Lawrence v. Texas, 539 U.S. 558, 564 (2003) (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

[257] *Id.* at 578.

[258] *Id.* at 567.

[259] I have not said too much about human rights in this article, but suffice it to say, that such rights as should be recognized as applying to all people simply by being human are in the background to all the fundamental rights here described. *See generally* Samar, *supra* note 73, at 129–43.

[260] *What Are Human Rights?*, OFF. U.N. HIGH COMM'R HUM. RTS., https://www.ohchr.org/en/what-are-human-rights (last visited June 26, 2022).

[261] ALAN GEWIRTH, SELF-FULFILLMENT 169 (1998). This capacity, which Gewirth connects to our ability to engage in voluntary purposive choices, is the "locus and source" by which an agent attaches worth to himself. *Id.*

[262] *Id.*

[263] *Id.*

immoral choice deserves dignity for his or her immoral choice. It means that he or she deserves acknowledgement for having made the choice, and if the choice violates human rights standards, the person should be held accountable for that choice.

Dignity arises "by distinguishing 'self-respect,' as a realistic assessment of having satisfied one's moral obligations, from 'self-esteem,' which is an affirmation of one's specific abilities to fulfill one's own desires and goals."[264] Only the former is a proper use of dignity as it points out the moral significance of human dignity. Dignity connects to human autonomy. It affirms the ownership each person has for their own choices. Consequently, dignity is not derived merely from having a right, although possession of a right might be a basis for believing the choice was reasonable. But this also suggests that where rights are not present or where human rights are taken away, a person dignity may still be shown by protests if the non-presence of a right or the choice to remove it was improper.[265] Take, for example, those who protested the Vietnam war by throwing paper money on the floor of the New York Stock Exchange to illustrate the greed present in society.[266] Obviously, the protesters did not have a right to throw false money on the floor of the Stock Exchange. Still, as this was a reasonable way to draw attention to an otherwise unjust war which would cause little to no harm to any other person, dignity attaches. What illustrations such as this show is that dignity does not require the existence of a right to be present. It does require that the actions one takes not be seriously immoral or violate human rights generally, which one hopes to be present when fundamental constitutional rights are recognized. In this sense, dignity supervenes on the presence of human rights and the individual's willingness to maintain and protect these rights both for herself and others.[267]

This example also illustrates a further problem that Justice Alito's majority opinion runs into by taking away a fundamental constitutionally protected human right, namely, the denial of human dignity to those who will be most directly affected. But it also offers hope that even as fundamental rights come under attack, the society should not be stifled to believe all is lost. Our dignity as members of a mostly free society allows us to engage in debate, and protest threats to our basic human rights. This is not a meaningless task. It does not go away just because one or even a few Court

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[264] *Id.* at 94–95.

[265] This is the dignity owed to free persons that Justice Kennedy was talking about.

[266] Lorraine Boissoneault, *How the New York Stock Exchange Gave Abbie Hoffman His Start in Guerrilla Theater*, SMITHSONIAN MAG. (Aug. 24, 2017), https://www.smithsonianmag.com/history/how-new-york-stock-exchange-gave-abbie-hoffman-his-start-guerrilla-theater-180964612/.

[267] THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 891 (Robert Audi ed., 2d ed. 1999) ("The concept of supervenience, as relation between properties, is essentially this: Properties of type A are supervenient on properties of type B if and only if two objects cannot differ with respect to their A-properties without also differing with respect to their B-properties.").

cases are lost. It resides with us so long as we are willing to carry the mantle of our own self-respect. And it affords a hope for both current and future generations, the hope that even the short-term dislodges of the rights suffered today need not be lost forever. At the end of his opinion in *Lawrence*, following where the Court has overruled its previous holding in *Bowers v. Hardwick*, Kennedy writes that "[t]he petitioners are entitled to respect for their private lives."[268] The respect he is referring to here was presumably always due even if not publicly recognized. For it is at the very core of the values for which the Constitution was created, especially following the Reconstruction Amendments, that are also set forth in the original Preamble as fundamental for government action: "to promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity."

X. CONCLUSION

If one takes Justice Alito's majority opinion and the view of the Court's conservatives as true, then some of the fundamental rights that have been recognized to be part of the Constitution, the Bill of Rights, and the Fourteenth Amendment, over the past fifty years, have not always been fully explained or well-defended. One may even accept that some of the rights being challenged had not been expressly stated in these earlier documents or in the public debates at the time of their ratification. Even if more explanation is needed, some of which has hopefully been provided in this article, one still needs to be careful to avoid throwing out basic human rights when what really should be done is just making clear the justifications upon which the rights are grounded. Appealing to past-history and tradition is certainly helpful in acknowledging rights that the Framers of the Constitution and its various Amendment were concerned with. But it is by no means the whole story of what that history and tradition teaches, or the whole story of what the Framers themselves meant for future generations to consider based on what they wrote.

The Framers would not have included abstract language or the ambiguities that appear, especially in the Bill of Rights and Fourteenth Amendment, if they meant the Constitution and its Amendments to be frozen in time. They would not have provided for a Supreme Court that early on in its history came to recognize its authority under the Constitution to say what these documents meant.[269] And most of all, they would not have succeeded in creating a system of government that would continue to remain authoritative for over six generations, if it were not for these documents being able to adapt to changing circumstances including changes in our

[268] *Id.* at 578.
[269] Marbury v. Madison, 5 U.S. 137, 177–79 (1803).

understanding of political morality, and how the various parts of the government might meet new challenges.

Yes, look at past-history and tradition; that is a correct starting point. But it is not the end point, or even the whole starting point, let alone is it the whole story of what our Constitution is about. Especially is this the case when left only to identifying rights specifically recognized when these documents were ratified. It is impossible to search for a specific formula stating precisely what the Constitution and its Amendments require, because the formula itself will need to evolve, just as the protections the Fourth Amendment provided for persons, papers, and effects needed to evolve to include listening devices, and now in the computer age, will have to evolve further to include government use of spyware. What more is required is judgment that goes beyond a formulaic expression. To limit these documents as if they were just part of a formula is far too simple an approach to understanding their meanings and would discredit their ability to respond to changed circumstances in an ever-changing world. It would diminish the brilliance we assign to the Framers who left open the exact details of how various provisions of these documents might operate to confront new challenges and new issues, and it would seriously undermine how the form of government they did create would continue to survive into the future. THIS MUST NOT HAPPEN!