NATIONAL WOMEN'S LAW CENTER

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Nothing is Safe: Threats to Other Fundamental Rights in the Wake of *Roe v. Wade* Being Overturned

Roe v. Wade did far more than establish the right to abortion; it solidified and expanded the constitutional "right to privacy," which has also been described as the right to autonomy or to be let alone. This right to privacy is part of the right to liberty protected by the Fifth and Fourteenth Amendments, which state that no person shall be deprived of "life, liberty or property, without due process of law."[1] These rights are in jeopardy now that *Roe* has been overturned.

The Constitution's protection of liberty and privacy underlies the Supreme Court's recognition of fundamental rights related to contraception and procreation, marriage, family relations, child rearing, and intimacy.[2] Although the Supreme Court's recognition of the right to privacy predates *Roe*, *Roe* was an important affirmation of and foundation for a broad array of privacy and liberty rights.[3] While not exclusively dependent on *Roe*, *Roe* influenced privacy and liberty principles in each of these areas—principles that are now in jeopardy because the Supreme Court overturned *Roe* in *Dobbs v. Jackson Women's Health Organization*.

The Right to Contraception and the Right to Procreate

Roe reaffirmed prior decisions protecting individuals' rights to contraception and to decide whether to bear a child.[4] Subsequent cases upholding the right to contraception, in turn, rely on *Roe*. For example, a 1977 Supreme Court case overturned a law that restricted distribution of nonprescription contraceptives to adults and prohibited the sales or distribution of contraceptives to individuals under 16. The case explicitly relied on *Roe* for its central holding that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[5]

The Right to Marry

Loving v. Virginia acknowledged the constitutional right to marry, and *Roe* affirmed that it is among the fundamental liberties protected by the right to privacy.[6] Subsequent cases protecting the right to marry have relied on *Roe*. For example, a 1978 Supreme Court decision upheld the right of single parents obligated to pay child support to marry without first obtaining the permission of a judge,[7] and based this

conclusion in part on *Roe*.[8] This same fundamental liberty right was reaffirmed as recently as 2015 by the Supreme Court in a case that guaranteed same-sex couples the right to marry.[9]

The Right to Maintain Family Relationships

The right that underlies *Roe* also protects family relationships.[10] For example, the Supreme Court relied on *Roe* to hold that the state cannot interfere in the realm of family life by preventing close relatives from living together.[11] As the Supreme Court put it, a zoning regulation that banned a grandmother from living with her grandson, "slic[ed] deeply into the family itself . . . by select[ing] certain categories of relatives who may live together and declar[ing] that others may not."[12] The Supreme Court went on to say that courts used *Roe* to "consistently acknowledge[] a 'private realm of family life which the state cannot enter.'"[13]

The Right to Make Decisions About How to Rear One's Children

Parents' right to raise their children according to their preferences is also protected by the same fundamental constitutional right. The Supreme Court has relied on *Roe* as important support for the proposition that "[a] person's decision whether to bear a child and a parent's decision concerning the manner in which his child is to be educated may fairly be characterized as exercises of familial rights and responsibilities" and thus protected by the Constitution.[14] While these rights related to parental decision-making were recognized before *Roe*,[15] *Roe* relied on and strengthened the underlying principle—that parenting is best when free from unwarranted government intrusion.[16]

The Right to Intimacy

Another right profoundly influenced by *Roe* is the right to form intimate relationships and the related right for adults to engage in consensual sexual relations in private. This right was first recognized in a 2003 Supreme Court decision striking down laws that criminalized same-sex intimate activity.[17] The case proclaimed that "*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person," such as autonomy in decision-making about intimate relationships.[18]

The Right to Personal Control of Medical Treatment

The right affirmed in *Roe* also includes the right to make other kinds of medical decisions. For example, the Supreme Court in 1990, influenced by *Roe* and the liberty interest doctrine, extended the right to the ability to appoint a healthcare proxy and refuse unwanted medical treatment.[19] The Supreme Court later confirmed that *Roe* recognized the importance of receiving medical intervention.[20]

The Court's legally unjustifiable decision to overturn *Roe v. Wade* puts these rights in jeopardy. The analytical framework used by the majority in *Dobbs* lays out a roadmap for revisiting and taking away these other fundamental rights. And Justice Thomas states this goal clearly.[21] He calls for the Court to overrule the caselaw that established these rights, specifically mentioning cases guaranteeing the right to birth control, intimate relationships, and marriage equality.[22]

But these rights have recognized our fundamental dignity and freedom, and allowed us to thrive. As the dissent in *Dobbs* made clear, "[t]he Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives."[23] Losing more of these fundamental rights would create even more devastation across the country, further undo the gains we have made over the past 50 years, and destroy our constitution and democracy.

FOOTNOTES

1 U.S. Const., amend. V; *Id*. at amend. XIV, § 1.

2 *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003); George Blum et al., *Right to Privacy*, 16B Am. Jur. 2d Constitutional Law § 652 (2012).

3 While not originally understood as arising primarily from the Due Process Clause, the right to privacy has been recognized since at least 1891, when the Supreme Court proclaimed "[n]o right is held more sacred . . . than the right of individual to the possession and control of his own person, free from all restraint or interference of others." *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891); see *Roe v. Wade*, 410 U.S. 113, 153 (1973) (citing *Botsford* as recognizing right to privacy rooted in the Constitution).

4 *Roe*, 410 U.S. at 153. The right to obtain contraception was first established by *Griswold v. Connecticut*, a 1965 case striking down a law banning the distribution of contraceptives to married persons. 381 U.S. 479 (1965). In *Eisenstadt v. Baird*, decided a year before *Roe*, the Supreme Court extended this right to unmarried persons, stating "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. 438, 453 (1972). *Eisenstadt* thus recognized the right to contraception extended beyond the use of birth control; it also encompassed freedom to make fundamental decisions involving procreation.

5 *Carey v. Population Services, Int'l*, 431 U.S. 678, 687 (1977).

6 *Roe*, 410 U.S. at 152. The foundational case on the right to marry is *Loving v. Virginia*, a 1967 decision that struck down anti-miscegenation laws and permitted interracial unions, which did so on both right to privacy and equal protection grounds. 388 U.S. 1 (1967).

7 *Zablocki v. Redhail*, 434 U.S. 374, 375, 386-87 (1978). The challenged law not only required single parents obligated to pay child support to obtain a court order before marrying, it also provided that such permission would not be granted unless the parent proved both that he or she was current on the child support payments and that the children were not likely to become public charges.

8 *Id*. at 386 (citing *Roe* for the proposition that "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.") Given this history, *Roe* is also relevant to the current term's Supreme Court cases on marriage equality. For example, in the case challenging California's ban on same-sex marriage, the plaintiffs argue that the right to marry is one of the most fundamental entitlements accorded any individual and utilize *Roe* to support this position. Brief of Respondents in Opposition to a Writ of Certiorari at 31, *Hollingsworth v. Perry*, No. 12-144, 2012 WL 3134429 (Dec. 7, 2012).

9 *Obergefell v. Hodges*, 576 U.S. (2015) "The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs."

10 This right is said to derive from decisions dealing with procreation and parental rights. Some cases, such as, *Moore v. City of E. Cleveland, Ohio*, directly cite *Roe* to establish family rights. See 431 U.S. 494, 498-99 (1977).

11 *Id.*

12 *Id.*

13 *Id*. at 499. The Supreme Court went on to say that the family was not immune from state regulation, but that *Roe* required these regulations to be "carefully examined."

14 *Runyon v. McCrary*, 427 U.S. 160, 178 (1976).

15 For example, *Meyer v. Nebraska*, a 1923 decision, held that a prohibition of foreign language classes prior to the Eighth Grade was an unconstitutional interference of parental rights. 262 U.S. 390 (1923).

16 See *Roe*, 410 U.S. at 153.

17 *Lawrence*, 539 U.S. at 558.

18 *Id*. at 565.

19 *Cruzan v. Director, Mo. Dept.of Health*, 497 U.S. 261, 287–289 (1990) (O'Connor, J., concurring).

20 *Washington v. Glucksberg*, 521 U.S. 702, (1997) (Souter, J., concurring) (relying on *Roe* to argue that dying patients should receive as much pain relief medicine as necessary, even if it advances time of death).

21 *Dobbs v. Jackson Women's Health*, No. 19–1392, slip op. at 5 (2022).

22 *Dobbs v. Jackson Women's Health*, No. 19–1392, slip op. at 2–3 (Thomas, J., concurring) (2022).

23 *Dobbs v. Jackson Women's Health*, No. 19–1392, slip op. at 4–5, 20 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (2022).