Abortion: A constitutional right?

The controversy around the Right to Abortion and its relation to the Constitutional Right to Privacy in American Constitutional Law

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I. Introduction

This writing will discuss the topic of abortion and its relation with the constitutional right to Privacy, as well as the extent to which the latter must be limited by the Government. The thesis that is going to be argued is concurrent with the latest ruling of the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization (2022)* which overturned the controversial decision *Roe v. Wade (1973)*. It will be argued that abortion has no constitutional ground as it shall not be protected under the constitutional right to privacy, or to "be let alone". It will also be argued in favor of the most extensive/ least restrictive version of the right to be let alone.

II. The Right to Privacy

A. Origins

In Justice Brandeis' words, "The makers of our Constitution ... conferred, as against the government, the right to be let alone —the most comprehensive of rights and the right most valued by civilized men”.[1]

Although the term "privacy" wasn't explicitly mentioned in the Constitution a single time, the framers regarded certain facets of privacy or self-determination as key components of liberty. Today, American constitutional law is firmly rooted in the protection of certain privacy interests. Foundations for this right can be found in the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the Constitution, as announced by Justice Douglas in his majority opinion in Griswold v. Connecticut, 1965.[2] In other words, the Constitution's express provisions implied others that were just as significant but were not listed.

B. Definition and Limitations

Different concepts underpin privacy. The right "to be let alone" defines it best for most. Thus, people should be free to make choices about their lives without illegitimate or unnecessary interference from outside parties, the Government being at the top of the list. However, some argue that if taken too far, privacy would make it difficult on law enforcement agencies to maintain public order and tranquility. They further add that citizens are never truly "let alone" to act independently in society. While it is understandable to raise such concern, the thesis of this paper supports the idea that individuals must be granted the least restricted privacy right. Some ill-intentioned individuals might indeed misuse the high level of privacy granted to them by engaging in illicit activities far from the eyes of law enforcement, it is nevertheless not a sufficient reason to justify limiting the privacy of all the law-abiding citizens only to be able to limit the misuse of this right by a handful of wrongdoers. However, it is not illegitimate to limit the right to privacy in the following two cases: first, in case of a compelling state interest that can’t be defended through any other means. A normal interest, or probable cause, is insufficient in this case and stays outweighed by the constitutional right to privacy. The second case in which the right to privacy ought to be legitimately limited is when it conflicts with the freedom of expression of other individuals, or the freedom of the press, both recognized by the First Amendment. In this case, courts ought to balance these competing rights and rule on case-by-case bases, trying to find the middle ground as the traditional judicial

[1] Brandeis and Warren, The Right to Privacy, 1890.
[2] Griswold v. Connecticut, 1965

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methodology requires. There is no doubt that informational privacy must be protected, however, and that the disclosure of personal information with no societal value or interest whatsoever, and that is at the same time morally or materially prejudicial for the person directly involved, has to be regarded as unwelcomed by the courts. And when the person herself acts incautiously and fails to meet her due diligence and cautiousness by giving an opening for her right to be violated by other individuals. Each person must bear total responsibility for her negligence and for her failure to behave reasonably. For if her privacy is broken in such cases, it is the person's — and only her — responsibility, and public resources should not be used to answer the consequences of her incautiousness.

III. How Abortion came to be included with Privacy

The Supreme Court has mostly done a good job protecting and reaffirming the right to Privacy. More than a century ago, the Court had already declared in Botsford that "*No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his person, free from all restraint or interference of others, unless by clear and unquestionable authority of law*".[3]

The Court has been more consistent than not in its views on privacy throughout time. For more than half a century after Botsford, Justice Clark wrote that without the suppression of illegally acquired evidence, "*the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty*."[4]

When it comes to the extent to which the constitutional Right to Privacy goes, there is no doubt that among the most important freedoms included under the umbrella of privacy is the freedom to marry whom we want, which is, in the words of Chief Justice Warren, "*one of the vital personal rights essential to the orderly pursuit of a happy life by free men*."[5]

But privacy has also been instrumentalized by the Court to grant protection to more controversial individual acts. This is exactly what happened one year after *Loving v. Virginia* when the Court struck down a state law proscribing private possession of obscene material.[6] Obscene and pornographic material have been traditionally protected by the Court through the First Amendment in addition to the right to privacy. It is a fascinating topic to delve into, but unfortunately not within the scope of our topic.
Therefore, when it comes to Privacy, there is no doubt that it is among the unwritten fundamental rights that Justice Douglas refers to in *Griswold v. Connecticut, 1965.* As said in the aforementioned decision, the bedroom of a married couple is undoubtedly at the core of this right. But this right also clearly extends to the bedroom of unmarried couples, as the Court recognized when it granted this right to sexual privacy to all individuals no matter their marital status: *"The marital couple is not an independent entity with a mind of its own, but an association of two individuals each with separate intellectual and emotional make-up. If the right to privacy means anything, it is the right of an individual, married, or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget children."*[7]

The right to Privacy also extends to other aspects of individual conduct that are unrelated to sexual activity and the choice to have children or not, but delving into them would

[3] Union Pacific R. Co v. Botsford, 1891
[4] Mapp v. Ohio, 1961.
[5] Loving v. Virginia, 1967.
[6] Stanley v. Georgia, 1968
[7] Eisenstadt v. Baird,1972.

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not be relevant to our specific concerns for this study. Thereby, when it comes to the right to privacy, the Court's opinion in Griswold and Eisenstadt seems to offer the most extensive/least restrictive interpretation of said right, and thus should be supported for this reason. And it is not unreasonable to firmly hold that a "probable cause" or a "reasonable" interest of the state is insufficient to justify the infringement on an individual's right to be let alone. Only a compelling state interest, such as an unequivocal threat to national security and so forth, ought to justify the use of social order, that is, governmental action, in a way that restricts the right to privacy.

To sum up, the argument about the right to privacy, let's say that it is to be protected as much as other constitutional rights and that the only limitations acceptable to this right are in case of unequivocal and clear compelling interest for the state, and whenever there is another constitutional right at stake, requiring from the Court to seek the middle ground between them.

In Roe, it was decided that the Right to Privacy also extended to include Abortion. And this argument became the basis for the constitutionality of abortion for the next 50 years — until 2022. While there is no issue in extending the right to privacy as much as reasonably possible, and as long as it does not infringe on the area of acts protected under another fundamental right, the point that this essay is arguing for is that abortion, and the right for an individual to decide freely what they ought to do with their bodies, considering that it is, in fact, a matter of privacy, is still clearly outweighed by the most essential of rights, the most important of rights, the right which, if not protected, would render ALL individual rights void and meaningless. Namely, the right to live. Even though other conflicting interests ought to argue for a pro-life position, alone the right to live is enough to firmly oppose abortion. The state of Texas used this same argument to justify its prohibition of abortion in Roe.[8] Before touching on this issue, let's talk somewhat about the evolution of the right to abortion that was declared by the Court in 1973, and the limits that the Court allowed on this right throughout these last decades.

IV. The Evolution of the Right to Abortion

The right to abortion has been a major political and societal conflict in America since the famous decision Roe v. Wade of 1973, if not before. It is a never-ending battle between the right and the left, the liberals, and the conservatives, in America as well as the rest of the world. The proponents of the Right to Abortion are known as the "pro-choice" folks, while the opponents of this right are referred to as "pro-life". A funny and absurd denomination, as if the pro-choice is anti-life, and the pro-life is anti-choice. But still, I am going to comply with the absurdity of these terms and make use of them for the sake of simplicity.

In Roe v. Wade, Abortion was recognized as a component of the constitutionally protected right to privacy in Justice Blackmun's majority opinion. *"Whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or… in the Ninth Amendment's reservation of rights to the people, it is broad enough to encompass a woman's decision whether or not to terminate her pregnancy".*[9]

However, the right to abortion was never absolute. In the same opinion, the Court further declares the limits of the right to which it just had given birth: "*A state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be absolute… These interests are separate and*

[8] Roe v. Wade, 1973.
[9] Roe v. Wade, 1973.

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distinct. Each grows in substantiality as the woman approaches the term and, at a point during pregnancy, each becomes compelling".[10] Other limitations came along after Roe and that was motivated by the will to tame the agitated reaction of pro-life proponents. Maher v. Roe upheld Connecticut's policy of granting Medicaid support for therapeutic abortions but not for elective ones. Against the state's argument that it could constitutionally discourage abortions in this manner given its justified interest in promoting childbirth, opponents argued that paying for childbirth but not for elective abortions impacted the exercise of a constitutional right, financially forcing poor women to carry a pregnancy to its conclusion.[11] As if she didn't have any way to avoid this pregnancy in the first place and that she was not aware that she can't afford to get an abortion if she got irresponsible enough to get pregnant with a child she did not want to have. The Court expanded the Maher rationale to Congress very quickly after that.[12]

Furthermore, the Hyde Amendment went beyond Connecticut's prohibition and forbade the use of federal Medicaid funds for even some medically necessary abortions. Only abortions required to preserve the mother's life and those where the pregnancy is the result of rape or incest were considered legal. A majority of five Justices concluded that a state was not compelled to cover Medicaid abortions for which there was no federal reimbursement under the Hyde Amendment. The Hyde Amendment itself was not unconstitutional either: the majority concluded that it resulted in no government restrictions on abortion. Nearly all states' abortion regulations were brought into doubt by Roe.

In 1973, 21 states had highly stringent rules that only allowed abortions necessary to save the woman's life, akin to the Texas statute that Roe outlawed. Additionally, 25 states permitted some types of therapeutic abortions where the mother's health would be substantially compromised by pursuing the pregnancy, when the fetus would likely be born with a serious and irreparable mental or physical disability, or when the pregnancy was the result of incest or rape. As was mentioned earlier, the Court also nationalized the abortion debate by concluding that there is protection for abortion in the Constitution. Abortion regulations wouldn't be determined by competing interests in a state's legislation anymore.

After 1973, much of the conflict between supporters of Roe and opponents of it turned to Congress, presidential elections, and the courts. Some Supreme Court nominees even had their fate depending on their stance on the matter.

The Right to Abortion has thus been protected throughout the past decades under the umbrella of Privacy. In sum, the issue raised by abortion can be summarized as a disagreement about priorities: on one hand, the pro-life activists never deny the woman's right to physical integrity, and her freedom to decide what to do with her own body, but they think that this interest is outweighed by many others, namely, the state's interest in promoting childbirth, the state's interest in protecting the woman's health, and its interest in protecting the unborn child's life. On the other hand, pro-choice activists think that the woman's choice is still more preponderant. Although most of them do not even consider the third interest among those enumerated above as valid, to stay within the limits of common sense and avoid being considered radicals: it is unreasonable to consider the right to physical freedom as more important as the right to live. Therefore, most free-choice activists do not accept the state's interest in protecting the child's life as an argument in the first place as they base their position on the belief that the fetus is still not a "life" until a certain number of weeks after conception. The scientific community is not unanimous on the issue.

Have I believed that the fetus did not constitute "life", I would now be arguing in support of the pro-choice position. For the two other aforementioned State interests seem to be outweighed by a woman's free choice. Meaning that the state's interest in protecting the

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[10] Idem.

[11] Maher v. Roe, 1977.

[12] Harris v. McRae, 1980.

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woman's health, and the state's interest in promoting childbirth, are not compelling enough to infringe on a woman's right to abortion. Especially that the clinical practice of abortion nowadays has become, on average, safer than accouchement. The only interest that is compelling enough to legitimize the state's interference in a woman's free will when it comes to pregnancy is to preserve the innocent child's right to live. Thus, it is only logical for this essay to support the recent controversial decision *Dobbs v. Jackson Women's Health Organization 2022*, however without agreeing with its rationale. The Court's reasoning in this decision is weaker than it should've been when deciding such a sensitive matter.

It seems like the Court considered abortion as a matter unrelated to privacy in the first place — even though this was not explicitly said. For the fact of considering abortion unconstitutional because it is not "deeply rooted in this nation's history and tradition" — as the Court did— means that it is not protected by the right of privacy, since the latter is "deeply rooted in the nation's history and tradition". It would've been more logical for the Court to consider abortion as a matter of privacy, but one to which the constitutional protection does not extend because of its conflict, among other interests, with the state's compelling interest in protecting the right to life.

Other reasons backing this paper’s pro-life position, and which are not at all reasons to be neglected, are all the means and resources that exist in our modern age that allow us to avoid an unwelcome pregnancy. We — as a society — have ALL the resources to avoid this problem in the first place! And it is unacceptable to make an innocent unborn baby bear the consequences of the irresponsible acts of his adult parents. The resources and means are diversified and accessible to all social classes (for most of them):

1. Birth control is a constitutionally protected practice, and the options satisfy all preferences (male or female preservatives, pills, and so forth).
2. If one's financial situation doesn't grant them the luxury of this choice, they can avoid ejaculation on the inside (the arguments require such explicit formulation).
3. If they are people who can't contain themselves from the pleasure of inside ejaculation, — which is an absurd and invalid argument, but let’s address it anyway — today women can know their days of ovulation, and thus agree on having sexual intercourse with their partner only outside these 2—5 days!

These are some of the many reasonable and accessible options to avoid getting pregnant. Not to talk about the possibility of limiting the sexual encounter to oral/ "foreplay" if they are not sure about having a child, or to avoid sexual activity until marriage, that is until a person is sure about whom they want their children's other parent to be. The last two options aside (for not everyone is willing to put limits on his or her sexual activity to avoid the risks of pregnancy), the ones mentioned before them are enough to support the “pro-life” position and limit the cases in which abortion would be allowed.

It is unfair to make an innocent soul pay for the irresponsibility of the parents when they had all these means to avoid putting themselves in this situation. People should take responsibility for their choices in life and not act recklessly knowing they can throw the responsibility somewhere else. Allowing abortion in cases where the couple was irresponsible encourages such irresponsible behaviors. This rationale leads us to one case in which abortion should be constitutionally protected: when the woman's life is at stake. In this case, the right to abortion is backed by the right to live, and thus outweighs the other side of the balance. If the irresponsible behavior was the basis of the position taken in this paper, another exception would’ve also been argued for, that is the case in which the pregnancy is the result of rape. But it is inconsistent with the basis of our argument, namely, the right to live, to argue for such an exception as well. The fact that the pregnancy results from rape does not make the unborn child less innocent or deserving of protection. This position is hard to stand by, for the woman did

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not have a say in the awful event that would've led to her pregnancy, and according to this position she would have to bear the child of her rapist. It is horrible to imagine, but it seems to be the right position to hold, and the least cruel one, for the unborn child does not have to bear the filthy criminal behavior of his biological father.

V. Conclusion

To sum it up, the right to privacy is with no doubt a fundamental right in which the state shall not interfere without compelling unequivocal interest. This right extends to the furthest degree as long as it does not unreasonably limit other fundamental rights of other individuals. However, as declared by the Court in 2022, this right does not extend its constitutional protection to include the right to abortion. Although the Court's rationale in Dobbs is not immune against all pro-choice arguments, and although the basis for a pro-choice position is within the limits of reason as long as they do not consider the fetus, until a certain level of development, as a living being, this belief is not scientifically backed. Thus, it would be wiser to adopt a more careful position and to consider the fetus as a living being deserving of constitutional protection unless further scientific advances in the matter could prove otherwise. Especially that all means are available to avoid such conflicts of interest.

And finally, the rationale exposed in this paper concerning both the right to privacy and that to abortion invite two exceptions for the former and one for the latter: The only two acceptable exceptions for the right to privacy should be, as said above: a state's unequivocal compelling interest, and the balance with other fundamental rights. The exception in which abortion should be allowed is when the mother's life is endangered by the pregnancy because it is the only case in which resorting to abortion would be supported by heavier interests than those of not resorting to it. As for other cases, the state should have enough justification to limit a woman's right to get an abortion.

Therefore, to avoid giving opening to the Government to restrict individual freedom, there should be constant and resounding advocacy for birth control and contraception, a constant effort to raise awareness about the matter at hand and to encourage people deciding to engage in sexual intercourse, to do so responsibly, and to remind them that if they act recklessly, they will have to assume full responsibility of their reckless conduct in the name of one's right to have their chance in this life.

We have no excuse to escape the consequences of our acts anymore. All the resources are at our service, all the information is freely accessible. We have no excuse. The cost of one's irresponsible acts shall not be paid by an innocent third party, the state shall not encourage the irresponsible behavior of its citizens, and the right to abortion ought not to be constitutionally protected.

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VI. Bibliography

A. Court Decisions and Jurisprudence

- 1891, U.S. Supreme Court, *Union Pacific R. Co v. Botsford*.
- 1961, U.S. Supreme Court, *Mapp v. Ohio.*
- 1965, U.S. Supreme Court, *Griswold v. Connecticut.*
- 1967, U.S. Supreme Court, *Loving v. Virginia.*
- 1969, U.S. Supreme Court, *Stanley v. Georgia*.
- 1972, U.S. Supreme Court, *Eisenstadt v. Baird.*
- 1973, U.S. Supreme Court, *Roe v. Wade*.
- 1977, U.S. Supreme Court, *Maher v. Roe.*
- 2022, U.S. Supreme Court, *Dobbs v. Jackson Women's Health Organization.*

B. Scholarship

- Warren, Samuel, and Louis Brandeis, 1890, The Right to Privacy, Harvard Law Review.

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