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In Dobbs v. Jackson Women's Health Organization, the United States Supreme Court held that the federal constitution allows states to interfere with, or even deny, the right of women to choose whether to carry a pregnancy to term.[1] *This essay argues that state constitutional guarantees of the right to privacy protect that right. It further argues that advocates in states that do not have a constitutional right to privacy should utilize direct democracy provisions, where available, to add a right to privacy to their constitutions.*

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1. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215,142 S.Ct. 2228 ("…the authority to regulate abortion must be returned to the people and their elected representatives.")

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I. INTRODUCTION: THE FEDERAL RIGHT TO PRIVACY, EMANATING FROM THE "PENUMBRAS"

Long ago when I was a law student, a memorable constitutional law class discussion considered the right to privacy as it was applied in *Griswold v. Connecticut*.[2] Reading Justice Douglas's opinion as I was preparing for class, I was surprised to learn that a state thought it was appropriate to bar married adults from using contraceptives. I was astounded that Connecticut would make it illegal for anyone to even counsel adults about using them.[3]

I was fascinated and pleased to learn there existed a constitutional right to privacy that protected the right of married couples to buy contraceptives, to use them, and to receive advice about using them.[4] Justice Douglas, waxing poetic, wrote in the majority opinion that this right to privacy does not allow the government to invade "the sacred precincts of marital bedrooms."[5]

I especially enjoyed Douglas's explanation that the right to privacy is inherent in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution.[6] The idea that those constitutional provisions have "penumbras" – I had to look the word up[7] – was simply exhilarating! As Justice Douglas explained:

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2. Griswold v. Connecticut, 381 U.S. 479 (1965).
3. *Id.*at 480.
4. *Id.* at 485-86.
5. *Id.*at 485.
6. *Id*. at 484.
7. "Penumbra" is literally defined as "a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light." *Penumbra*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1996).

> specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. (Citation omitted). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'[8]

It was exhilarating to imagine the right to privacy emanating from those Amendments! However, my constitutional law professor was not impressed. While he agreed the Connecticut statute was unreasonable, the class discussion made it clear that he thought the Douglas opinion relied upon a weak reed.[9]

II. THE FEDERAL RIGHT TO PRIVACY PROTECTS A WOMAN'S RIGHT TO CHOOSE

My professor's disdain for Douglas's reliance upon the penumbral origins of the right to privacy recognized in *Griswold* was not shared by the Supreme Court. Indeed, in *Roe v. Wade*[10] the majority went to some length to demonstrate that the constitutional right to privacy was well established and venerable:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the

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

9. He suggested that the constitutional right to privacy had been invented by an activist Supreme Court Justice.

10. 410 U.S. 113 (1973).

> Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1872-1873, 20 L.Ed.2d 889 (1968), Katz v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), see Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485, 85 S.Ct., at 1681-1682; in the Ninth Amendment, id., at 486, 85 S.Ct. at 1682 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).[11]

That led the majority in *Roe* to conclude the constitutional right to privacy protects a woman's right to choose:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[12]

III. THE FEDERAL RIGHT TO PRIVACY PROVES TO BE VENERABLE, YET VULNERABLE

The reasoning of the *Griswold* and *Roe* opinions was and is sound. Clearly privacy was important to the authors of the Bill of Rights, an essential element of the "freedom" they sought to enshrine.[13] Yet, the first sentence of the *Roe* opinion's description of the federal privacy right identifies the opening that allowed the majority in *Dobbs* to blithely ignore the right to privacy in overruling *Roe*.[14] That opening lies in the fact that nowhere in the Constitution is there an explicit

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11. *Id.* at 152-53.

12. *Id.*

13. *Griswold*, 381 U.S. at 486 ("We deal with a right to privacy older than the Bill of Rights – older than our political parties, older than our school system.")

14. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *See also* Roe v. Wade, 410 U.S. 113, 152 (1973).

declaration of the right to privacy. The majority reasoning in *Dobbs* shows that the reach, and indeed the vitality, of the federal right to privacy is now under threat due to that opening. While Justice Alito's majority opinion declares "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion,"[15] query whether any faith should be put in that assertion.[16] It is clear a court bent on eliminating as many personal freedoms as possible could use the *Dobbs* reasoning to severely limit, if not eliminate, many of the freedoms currently protected by the federal right to privacy.[17]

Justice Thomas made that threat explicit, stating in his concurring opinion, "in future cases we should: . . . reconsider all of its substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents."[18]

The key concept is "substantive due process," the idea that the Constitution protects rights that are neither purely procedural, like the right to fair trial procedures, nor explicitly mentioned in the Constitution, like freedom of the press. Justice Thomas is arguing that such "unenumerated" rights are basically made up: not just the right to abortion protected by *Roe*, but also the protection of birth control by *Griswold v. Connecticut*, the protection of same-sex sexual relations by *Lawrence v. Texas*, and the protection of same-sex marriage by *Obergefell v. Hodges.*[19]

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15. *Dobbs*, 142 S. Ct. at 2239.

16. Alex Rogers, *Mike Braun clarifies his assertion that states should decide legality of interracial marriages*, CNN (Mar. 23, 2022, 1:27 PM), https://www.cnn.com/2022/03/23/politics/mike-braun-interracial-marriage-comments/index.html (Indeed, shortly after the *Dobbs* decision was announced, Senator Mike Braun of Indiana, when asked by a reporter whether he thought the issue of interracial marriage, which was legalized in *Loving v. Virginia,* 388 U.S. 1 (1967), should be left to the individual states, Braun replied: "Yes, I think that's something that if you're not wanting the Supreme Court to weigh in on issues like that, you're not going to be able to have your cake and eat it too." Braun also said the right to sexual privacy and legalized contraception recognized in the *Griswold* decision should also be left to the states).

17. The majority noted that abortion was once widely outlawed in the United States to justify overruling *Roe*. *Dobbs*, 142 S. Ct. at 2241. 213 L.Ed.2d 545

18. *Id.* at 2301.

19. Zack Beauchamp, *Could Clarence Thomas's Dobbs concurrence signal a future attack on LGBTQ rights?*, VOX (June 24, 2022, 2:36pm),

IV. THE EXPLICIT PROTECTION OF PRIVACY IN STATE CONSTITUTIONS CAN PROVIDE MORE CONCRETE PROTECTION FOR RIGHTS THAT ARE "UNENUMERATED" IN THE FEDERAL CONSTITUTION

For advocates fighting to protect the right to make these personal choices free of governmental interference, a promising line of attack lies in resorting to existing state constitutional protections of the right to privacy, or in creating state constitutional provisions that make explicit the right to privacy. The history of California's constitutional right to privacy is instructive and a cause for hope.

In 1972, voters of the state of California overwhelmingly agreed to enshrine the right to privacy in the state Constitution. Article I section 1 of the California Constitution had long provided that "[a]ll people [sic] . . . are free and independent and have inalienable rights. Among those rights were enjoying and defending life and liberty, acquiring and protecting property, pursuing and obtaining safety, and happiness."[20]

Proposition 11, a legislatively referred constitutional ballot measure, was short, simple, and elegant. It accomplished two things. First, the proposition replaced the sexist reference to "men" with the word "people."[21] Second, and most important here, is that the proposition added the right to privacy to the list of inalienable rights.[22] The ballot argument supporting Proposition 11 articulated what the right to privacy would be, and what it would protect. The argument's soaring declaration was that "the right to privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose."[23]

The California Supreme Court was called upon to interpret the meaning and application of that explicit constitutional right to privacy with respect to limits on a

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https://www.vox.com/2022/6/24/23181723/roe-v-wade-dobbs-clarence-thomas-concurrence.

20. CAL. CONST. art. I § 1.

21. Voter Information Guide for 1972, General Election, 26 (1972), https://repository.uclawsf.edu/ca_ballot_props/774/.

[22] Id.

23. *Id.* at 27.

woman's right to choose. The California Legislature, emulating Congress, passed the 1978, 1979 and 1980 Budget Acts with language prohibiting the expenditure of Medi-Cal funds for elective abortions.[24] In *Committee to Defend Reproductive Rights v. Meyers*, the Court voided those prohibitions, concluding "under article 1, section 1 of the California Constitution all women in this state rich and poor alike possess a fundamental constitutional right to choose whether or not to bear a child."[25] The court then compared California's right of privacy to the federal right, observing that "the federal right of privacy . . . is more limited than the corresponding right in the California Constitution."[26]

A further illustration of the protection that can be created by an explicit right to privacy occurred in the case of *Hill v. National Collegiate Athletic Association (NCAA).*[27] In that case, Jennifer Hill and others challenged the NCAA rules establishing mandatory drug testing of college athletes.[28] The trial court enjoined the program, finding it violated the California right to privacy.[29] The NCAA appealed this ruling arguing, among other things, that the California constitutional right to privacy did not apply because it is not a governmental agency.[30]

The California Supreme Court rejected that argument, relying once again upon the legislative history of the constitutional right to privacy.[31] When California courts interpret voter approved legislation, the legislative history consists of the ballot arguments supporting and opposing approval of the measure.[32]

For instance, in the *Hill* case, the legislative history proved conclusive. The Supreme Court read closely the ballot arguments for and against Proposition 11. A passage quoted by the Court in favor of the proposition is typical: "At present

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24. Stats.1978, ch. 359, s 2, item 248, pp. 823-825; Stats.1979, ch. 259, s 2, item 261.5, pp. —— - ——; Stats.1980, ch. 510, s 2, item 287.5, pp. —— - ——.

25. Comm. to Defend Reproductive Rights v. Meyers, 29 Cal. 3d 252, 262 (1981).

26. *Id.*

27. *See* Hill v. Nat'l Collegiate Athletic Ass'n., 7 Cal. 4th 1 (1994).

28. *Id.* at 9.

29. *Id.* at 13-15.

30. *Id.* at 16.

31. *Id.*

32. *Id.*

there are no effective restraints on the information activities of government *and business.* This amendment creates a legal and enforceable right of privacy for every Californian."[33] The Supreme Court also quoted the ballot argument against the amendment, which stated that the receipt of personal information is essential to effectuate the *private* party relationships and transactions referred to by proponents of the measure.[34] Based on this legislative history the Supreme Court concluded the constitutional right to privacy applies to private parties, stating the amendment to Article I section 1 "creates a right of action against private as well as government entities."[35]

The creation of the California right to privacy, and the cases interpreting that protection, demonstrate that resorting to state constitutions with explicit guarantees of the right to privacy can provide protection for reproductive rights, as well as LGBTQ rights. At present at least nine other state constitutions explicitly protect an individual's right to privacy,[36] and the state Supreme Courts of Arkansas, Georgia and Kentucky have held their constitutions implicitly protect the right to privacy.[37] Advocates in those states should utilize the language of their constitutional provisions to extend protection to the right to make personal choices free of governmental interference.[38]

For advocates in states where the constitution does not contain an explicit right to privacy, there may be a ray of hope if their state has a mechanism for direct democracy akin to California's initiative process. Voters in California approved Proposition 11 by a wide margin – 63% yes, 37% no.[39] While I

33. *Hill,* 7 Cal. 4th at 17.

34. *Id.*

35. *Id.* at 20.

36. ALASKA CONST., art. 1, §22; ARIZ. CONST., art. 2 § 8; FLA. CONST., art. I, § 23; HAW. CONST., art. I, § 6; ILL. CONST., art. 1, § 6; MONT. CONST., art. II § 10; LA. CONST., art. I, § 5; S.C. CONST., art. I § 10; WASH. CONST., art. I § 7.

37. Jegley v. Picado*,* 349 Ark. 600, 80 S.W.3d 332 (2002); Powell v. State, 270 Ga. 327, 510 S.E.2d 18 (1998); Com. v. Wasson, 842 S.W.2d 487 (Ky. 1992), overruled in part by Calloway Cnty. Sheriff's Dep't v. Woodall, 607 S.W.3d 557 (Ky. 2020).

38. Already there have been successes in utilizing this line of attack.

39. *California Proposition 11, Constitutional Right to Privacy Amendment* BALLOTPEDIA (1972), https://ballotpedia.org/California_Proposition_11,_Constitutional_Right_to_Privacy_Amendment_(1972).

have not located a survey focused squarely on the right to be left alone, surveys of American attitudes about the importance of privacy in general show that an overwhelming majority of Americans, 83%, desire the adoption of laws protecting data privacy.[40] That support is bipartisan – in 2020 86% of Democrats and 82% of Republicans surveyed said that privacy legislation should be a top priority of Congress.[41] These figures suggest that ballot proposals to incorporate an explicit right to privacy in state constitutions would enjoy wide support among Democratic and Republican voters alike.

The *Dobbs* decision was a rude wake up call. The prospect that the current Supreme Court majority will further erode the protections provided by the federal right to privacy is frightening and all too real. Advocates should look now to their state constitutions to protect rights that may be excluded from protection under the federal right to privacy. Advocates in states that have an explicit right to privacy should begin crafting litigation to invoke this right. Advocates in states that do not have an explicit right to privacy, but who have access to some form of direct democracy, should draft ballot propositions to add an explicit constitutional right to privacy that would protect reproductive freedom and LGBTQ rights. These actions would protect those who will be left vulnerable should the Supreme Court decide to further restrict the federal right to privacy.

V. CONCLUSION

Justice Thomas, and at least one member of the United States Senate, announced they would go further than Dobbs and allow states to interfere with the right to decide whether to get pregnant (*Griswold*), to decide who one loves (*Lawrence v. Texas*) or who one marries (Obergefell). This willingness to expand the ability of government to interfere with and even prohibit decisions by consenting adults is based on an ahistorical understanding of the right to privacy:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness…. They

40. Sam Sabin, *States Are Moving on Privacy Bills. Over 4 in 5 Voters Want Congress to Prioritize Protection of Online Data*, MORNING CONSULT (April 27, 2021), https://pro.morningconsult.com/instant-intel/state-privacy-congress-priority-poll.

41. *Id.*

> sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.[42]

State constitutions with an explicit declaration of the right to privacy provide a bulwark that protects their citizens' beliefs, thoughts, emotions and sensations, and their ability to make decisions about intensely private aspects of their lives. Lawyers in states with an explicit constitutional right to privacy should seek to ensure that it is interpreted to prohibit interference with the personal decisions of adults. In states whose constitutions lack an explicit right to privacy but have direct democracy provisions, lawyers, politicians, and activists concerned about personal autonomy and dignity should seek to amend their constitutions to add this right that is "…valued by civilized men [and people]."

42. Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).