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The Supreme Court's Next Target Is Marriage Equality. It Won't Be the Last.

Trust the liberal justices: *Dobbs* puts many other rights in grave and immediate jeopardy.

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June 24, 2022

The Supreme Court's decision on Friday overruling *Roe v. Wade* is a devastating blow to individual autonomy and women's equality, a horrific assault on liberty that will [inflict unspeakable suffering and death](#) in the states that are already criminalizing abortion. That decision, [Dobbs v. Jackson Women's Health Organization](#), marks the culmination of a decadeslong battle against reproductive freedom.

But it also constitutes the start of another crusade—an all-out assault on the many other rights that are “all part of the same constitutional fabric,” as the liberal justices put it in dissent. With *Dobbs*, the majority has torn down the entire doctrine protecting gay rights, marriage, and contraception, among other personal liberties. These rights are now in grave and immediate jeopardy.

In case there was any doubt about this fact, Justice Clarence Thomas spelled it out in his concurring opinion calling on the Supreme Court to overrule *Griswold v. Connecticut* (protecting birth control), *Lawrence v. Texas* (protecting same-sex intimacy), and *Obergefell v. Hodges* (protecting same-sex marriage). Thomas helpfully spelled out the doctrinal implications of *Dobbs*: Beginning today, every progressive constitutional victory rooted in individual liberty is up for grabs.

The basic threat is easy to grasp. For more than a century, a debate has raged over how courts should define the “liberty” guaranteed by the 14th Amendment. Some say it protects unenumerated rights, but only those deemed “fundamental” in 1868 when the amendment was ratified. Others say it also safeguards modern rights which are “so fundamental that the state must accord them its respect.” The court relied on this second conception of liberty in *Griswold*, *Lawrence*, and *Obergefell*, as well as other cases like *Skinner v. Oklahoma* (barring involuntary sterilization) and *Loving v. Virginia* (safeguarding interracial marriage).

In *Dobbs*, though, Justice Sam Alito flatly rejected this vision of ever-evolving liberty: For the court to recognize unenumerated rights, he wrote, they must be “deeply rooted in the nation's

history and traditions” with a high level of specificity. Many states, he asserted, criminalized abortion around 1868, so reproductive freedom cannot possibly be a component of constitutional liberty. (There are, in fact, [many errors](#) and [misunderstandings](#) in his historical analysis, but the justice doesn’t care.) In *Roe*, Alito concluded, the Supreme Court created a right that does not exist, deciding a question “that the Constitution unequivocally leaves for the people.”

The flaw in this reasoning—aside from its historical dilettantism and cruel disregard for the lives it will destroy—is that it flatly contradicts precedent. In *Obergefell*, the court explained: “The nature of injustice is that we may not always see it in our own times.” Thus, the Framers “entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.” The Constitution must be read to protect “intimate and personal decision[s]” that are “central to personal dignity and autonomy.” In short, an “emerging awareness” of individual freedom may gain constitutional stature—even when it was not on the minds of the men who wrote the 14th Amendment.

Alito overruled this doctrine in *Dobbs*. If constitutional liberty really guaranteed “a broader right to autonomy,” he wrote, it could also “license fundamental rights to illicit drug use, prostitution, and the like.” These are really “policy arguments” on which the court has no “authority to weigh.” So unless a right has “deep roots” in “the specific practices of states at the time of the adoption of the Fourteenth Amendment,” it is totally unprotected.

With this conclusion, Alito all but declared that decisions like *Obergefell* and *Lawrence v. Texas* (striking down sodomy bans) are next on the chopping block. Yet the justice tried to obscure this fact with empty rhetoric. Abortion, unlike every other purported right, “destroys” the “life of an unborn human being,” the justice wrote. So “nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”

The dissenters—Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, writing jointly—rebuked Alito’s faux assurances with a mix of fury and fear. “Should the audience for these too-much-repeated protestations be duly satisfied?” they asked. “We think not. ... Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.”

The majority’s “sole reason for overturning *Roe* and *Casey*,” after all, was because “the law offered no protection to the woman’s choice in the 19th century.” And “here is the rub”:

The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner v. Oklahoma* not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong. ... And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even “undermine”—any number of other constitutional rights.

Don't believe it, the dissenters warned, when Alito insists the court can "neatly extract the right to choose from the constitutional edifice without affecting any associated rights." That lie is akin to "someone telling you that the Jenga tower simply will not collapse." And even if Alito were telling the truth, law has a way of "actually following where logic leads, rather than tolerating hard-to-explain lines." The dissenters "cannot understand how anyone can be confident that today's opinion will be the last of its kind."

For good measure, the liberal justices also pointed out that Alito recently [joined Thomas' opinion](#) "lamenting that *Obergefell* deprived states of the ability" to "resolve" same-sex marriage "through legislation." Moreover, "those two justices hardly seemed content to let the matter rest: The court, they said, had 'created a problem that only it can fix.' "

We know at least two-fifths of the *Dobbs* majority wants to overrule *Obergefell*. We also know that Thomas wants to overrule every single decision that rests on constitutional "liberty," because he does not believe that guarantee encompasses any "substantive rights." The only remaining question is whether these justices can attract three more votes. In his mealy-mouthed concurrence, Kavanaugh pinky-promised that overruling *Roe* "does not mean the overruling of those precedents" inextricably linked to *Roe*. Then again, Kavanaugh also [apparently told](#) Sen. Susan Collins that he would not overrule *Roe*, and look how that turned out. His assurances of restraint, dubious from the start, now ring hollower than ever.

The conservative legal movement scored its single greatest victory on Friday when the Supreme Court rewarded its relentless assault on a precedent that most Americans thought was settled. That movement will now devote its energy to toppling other precedents that, at this moment, many consider to be sacrosanct, or at least settled. Any statements to the contrary by the court's far-right bloc are not to be believed. Less than four years ago, Kavanaugh [told](#) the nation, under oath, that he believed *Roe* was "settled," then proceeded to unsettle it at the earliest opportunity. No constitutional right favored by progressives is safe from this Supreme Court's wrecking ball.