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My Body, Whose Choice? A Case for a Fundamental Right to Bodily Autonomy

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A CASE FOR A FUNDAMENTAL RIGHT TO BODILY AUTONOMY

INTRODUCTION

"My body, my choice!" Upon hearing this cry, you may assume that you have stumbled upon a crowd of reproductive justice activists protesting government infringement on a person's right to choose to terminate their pregnancy. This assumption would be supported by the fact that in 2022, the US Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, which overturned the 1973 landmark case *Roe v. Wade* and the fundamental right to abortion it established.[1] *Dobbs* has left the state of reproductive rights in the United States fragmented and the future of other individual rights uncertain.[2] However, upon closer examination, you may realize that you have actually encountered a rally protesting vaccine mandates in light of the COVID-19 pandemic, because the decades old feminist rallying cry, "my body, my choice," has been usurped by those who oppose such vaccine mandates.[3] While these two movements often fall on opposite ends of the political

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022); Roe v. Wade, 410 U.S. 113, 155–56 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[2] *See* Cassandra Ballard, *'My Choice to Make':* Roe *Ruling Brings Sense of Deja Vu for Some Glenwood Springs Residents*, POSTINDEPENDENT (July 14, 2022), https://www.postindependent.com/news/my-choice-to-make-roe-ruling-brings-sense-of-deja-vu-for-some-glenwood-springs-residents/ [https://perma.cc/HU8S-WDTL]; *Interactive Map: US Abortion Policies and Access After* Roe, GUTTMACHER INST. (Oct. 16, 2022), https://states.guttmacher.org/policies/?gclid=CjwKCAjw-rOaBhA9EiwAUkLV4kzcAc9ibXC9Zr1Py1xRqvKiUjUBUlk3ZPvu3pEczsqdBuCYUdx1EBoCaX4QAvD_BwE [https://perma.cc/3MCZ-VAE5]; *Dobbs*, 142 S. Ct. at 2301, 2304 (Thomas, J., concurring).

[3] Rachel Bluth, *'My Body, My Choice': How Vaccine Foes Co-Opted the Abortion Rallying Cry*, NPR (July 4, 2022, 5:01 AM), https://www.npr.org/sections/health-shots/2022/07/04/1109367458/my-body-my-choice-vaccines [https://perma.cc/WN2H-9XMW]. Before COVID-19 vaccinations were available, the phrase was used to protest mask mandates. Mia Jankowicz, *Vaccine Skeptics and Anti-Maskers Who Invoked 'My Body, My Choice' in the Pandemic Are Now Lining Up to Support the End of* Roe v. Wade, BUS. INSIDER (May 5, 2022, 12:54 PM), https://www.businessinsider.com/anti-vaxxers-mask-skeptics-invoked-bodily-autonomy-support-overturning-roe-2022-5 [https://perma.cc/8VB8-M28F].

spectrum, their arguments are rooted in the same concept: the right to bodily autonomy.[4]

Many individual rights, including those related to abortion and vaccine requirements, have historically been decided not under a right to bodily autonomy but under a right to privacy, which was established as a fundamental constitutional right by the Supreme Court in the landmark case *Griswold v. Connecticut*.[5] Under the Due Process Clause of the Fourteenth Amendment, a right is considered "fundamental" when it has been deemed so important that infringement of the right is only permitted if it can survive the highest level of judicial scrutiny, usually called strict scrutiny.[6] Until *Dobbs,* the right to obtain an abortion had been deemed fundamental by *Roe* under the broad umbrella of privacy.[7] The breadth of the right to privacy, however, has often been subject to criticism.[8] In fact, when the Supreme Court decided *Dobbs* and overturned *Roe,* criticism of the right to privacy featured heavily in the Court's reasoning.[9] This has led many to wonder if other individual rights decided on a privacy basis, such as those relating to contraception and same-sex marriage, are now in danger.[10]

In contrast, the breadth of the right to privacy has never been held to encompass a right to decline a mandatory vaccination.[11] The primary authority on the constitutionality of vaccine mandates is *Jacobson v. Commonwealth of Massachusetts*, a 1905 case brought in the wake of a smallpox epidemic, in which the Supreme Court held that a state has the right to mandate vaccinations when necessary to ensure the

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[4] *See, e.g.*, Tina Rulli & Stephen Campbell, *Can "My Body, My Choice" Anti-Vaxxers Be Pro-Life?*, 36 BIOETHICS 6 (Apr. 5, 2022), https://onlinelibrary.wiley.com/doi/epdf/10.1111/bioe.13033 [https://perma.cc/DQ9S-JH9N].

[5] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[6] 16B Am. Jur. 2d Constitutional Law § 935; Seth F. Kreimer, *Rejecting "Uncontrolled Authority over the Body": The Decencies of Civilized Conduct, the Past and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 426 (2007) ("[T]he procedure of defining 'fundamental rights' began with the determination that due process bound the states only to observe 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'").

[7] Roe v. Wade, 410 U.S. 113, 153 (1973) ("[The] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

[8] *See infra* Section III.B.

[9] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2267 (2022) (criticizing the right to privacy for "conflat[ing] two very different meanings of the term").

[10] *See* Maggie Jo Buchanan, *In* Dobbs*, by Overturning* Roe *and Denying the Right to an Abortion, the Supreme Court Has Attacked Freedom*, CTR. AM. PROGRESS (June 24, 2022), https://www.americanprogress.org/article/in-dobbs-by-overturning-roe-and-denying-the-right-to-an-abortion-the-supreme-court-has-attacked-freedom/ [https://perma.cc/29MX-KLYW].

[11] *See infra* Section I.A.

health of the public.[12] Since *Jacobson*, courts have consistently upheld vaccine mandates under rational basis review, a deferential judicial standard that is much easier to withstand than the heightened scrutiny reserved for infringements on fundamental rights.[13]

Bodily autonomy, unlike privacy, has not been recognized as a fundamental constitutional right.[14] Despite this, references to bodily autonomy occur throughout privacy-based cases and feature heavily in the Supreme Court's reasoning for protecting many rights, such as the right to use contraception and the right to engage in same-sex sexual activity.[15] This note proposes that within the right to privacy, a strong basis for establishing a constitutional right to bodily autonomy exists. Isolating bodily autonomy from privacy as its own distinct and clearly defined fundamental right would enable courts to protect individual rights without falling victim to the weaknesses created by privacy's broad scope.

Part I of this note provides background information about the development and current state of the law surrounding privacy, bodily autonomy, abortion, and vaccine mandates. Part II discusses fundamental rights, how they are analyzed by the courts, and why they are so important for safeguarding individual rights. Part III argues that the right to privacy as currently defined is weakened by its multiple meanings and overly broad scope and identifies how the concept of bodily autonomy already exists within the right to privacy. Part IV proposes isolating bodily autonomy into its own distinct fundamental right, and highlights that there is a strong constitutional basis for doing so. Finally, Part V demonstrates how a fundamental right to bodily autonomy would safeguard individual rights by applying the appropriate judicial scrutiny reserved for infringements on fundamental rights to hypothetical abortion restrictions and vaccine mandates. Ultimately, this note seeks to demonstrate that not only is there a constitutional basis for a fundamental right to bodily autonomy, but also that such a right provides stronger protections for individual rights than does the right to privacy.

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[12] Jacobson v. Massachusetts, 197 U.S. 11, 27–28 (1905).

[13] *See, e.g.*, Norris v. Stanley, 567 F. Supp. 3d 818, 822 (W.D. Mich. 2021) ("[C]ourts have looked to *Jacobson* to infer that a rational basis standard applies to generally applicable vaccine mandates.").

[14] *See infra* Section I.A.

[15] *See infra* Section III.B; Carey v. Population Servs., Int'l, 431 U.S. 678, 693 (1977) (establishing that minors have a right to use contraception); Lawrence v. Texas, 539 U.S. 558, 564, 574 (2003) (establishing a right to same-sex sexual relations between consenting adults).

Thus, this framework is better suited to safeguard the many rights left on shaky ground in the aftermath of *Dobbs*.

I. SITUATING PRIVACY, BODILY AUTONOMY, ABORTION, AND VACCINE MANDATES IN THE LAW

Before arguing that a right to bodily autonomy can and should be established, it is necessary to provide background information on the development and current status of privacy and bodily autonomy under the law and how these concepts have impacted abortion, vaccine mandates, and other individual rights.

A. Privacy and Bodily Autonomy Under the Law

The development of the right to privacy has a history that began long before the Supreme Court decided *Griswold*. In 1890, Samuel Warren and Louis D. Brandeis published *The Right to Privacy*, a novel, seminal text in which the authors argued for privacy in the context of the development of tort law.[16] The article introduced the idea that people have "the right to be let alone."[17] In the 1900s, the Supreme Court decided a number of cases that have come to be known as predecessors to a privacy right. These cases centered on an individual's right to make decisions about their bodies and their families in particular circumstances, such as a parent's right to choose their child's school and an individual's right against forced sterilization.[18] These precedents ultimately formed the building blocks for the establishment of a fundamental right to privacy in 1965, when the Court decided *Griswold*, a landmark case that gave married couples the right to use contraception under the theory that a right to privacy is implied by various provisions in the Bill of Rights.[19] Since *Griswold*, the right to privacy has served as the

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[16] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193–94 (1890); *see also* Tamar Lewin, *The Thomas Hearings: In Search of the Source of the Right to Privacy*, N.Y. TIMES (Sept. 14, 1991), https://www.nytimes.com/1991/09/14/us/the-thomas-hearings-in-search-of-the-source-of-the-right-to-privacy.html?searchResultPosition=4 [https://perma.cc/36K7-8E79]; *see also* Dorothy Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 1 (1979) (suggesting that Brandeis and Warren "invent[ed]" the right to privacy as a legal concept).

[17] Warren & Brandeis, *supra* note 16, at 193.

[18] *See* Pierce v. Soc'y of the Sisters, 268 U.S. 510, 534–35 (1925) (affirming parents' rights to send their children to the school of their choice); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (rejecting the practice of forced sterilization); *see also* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (affirming parents' rights to make decisions about their children's education); NAACP v. Alabama, 357 U.S. 449, 462 (1958) (rejecting the requirement that certain associations need to be disclosed).

[19] Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).

basis for a number of Supreme Court cases limiting the government's ability to interfere with personal choices regarding marriage, sexual relations, and childbearing.[20]

Unlike privacy, "bodily autonomy has not been deemed a fundamental right."[21] In fact, the Supreme Court explicitly declined to establish such a right in the 1997 case *Washington v. Glucksberg*, holding that "although . . . many of the rights and liberties protected by the Due Process Clause sound in personal autonomy . . . it does not follow that any and all important, intimate, and personal decisions are so protected."[22] *Glucksberg* reflected the hesitancy of the Court to extend autonomy rights outside what some courts have referred to as "the intimacy of the individual's personal identity."[23] However, courts have often recognized that people do enjoy some bodily autonomy rights, but such rights simply do not rise to the degree of *fundamental* and, therefore, restrictions are not subject to the same level of scrutiny when challenged.[24]

B. Abortion

In 2022, individual rights suffered a major blow when the Supreme Court decided *Dobbs*, upholding a fifteen-week abortion ban in Mississippi and overturning the fundamental right to terminate a pregnancy established by *Roe* in 1973. In *Roe*, the Supreme Court held that a state cannot regulate a person's right to abort a pregnancy until at least the end of the first trimester.[25] In 1992, the right to obtain an abortion was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which upheld the central holding in *Roe*, but rejected the trimester test, instead holding unconstitutional any legislation that places an "undue burden" on a pregnant person's

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[20] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 443, 447 (1972) (extending the right to contraception to individuals); *Carey*, Int'l, 431 U.S. at 693 (minors' right to contraception), *Lawrence*, 539 U.S. at 564, 574 (right to same-sex sexual relations), Obergefell v. Hodges, 576 U.S. 644, 665 (2015) (affirming the right of same-sex couples to marry); Roe v. Wade, 410 U.S. 113, 155–56 (1973) (establishing a fundamental right to abortion); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (upholding the right to abortion established in *Roe*).

[21] *See* Norris v. Stanley, 567 F. Supp. 3d 818, 821 (W.D. Mich. 2021) (internal quotations omitted).

[22] Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (citation omitted).

[23] Hanzel v. Arter, 625 F. Supp. 1259, 1262 (S.D. Ohio 1985).

[24] *See infra* Section V.B.

[25] *Roe*, 410 U.S. at 163 ("[F]or the period of pregnancy prior to [the end of the first trimester], the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.").

ability to obtain an abortion prior to viability.[26] In *Dobbs*, however, the Court reversed these decisions, holding that abortion is not a fundamental right protected by the Constitution at the federal level, instead giving individual states the ability to impose abortion restrictions through legislation.[27] The opinion, which was leaked into circulation several weeks before it was formally published, generated controversy across the country.[28] Opponents of the decision argued that people with uteruses were being stripped of their bodily autonomy.[29] Proponents of the decision rejoiced in the preservation of what they called unborn life, and also stressed that the decision did not ban abortion, but simply gave states the power to regulate it.[30] Ironically, however, some of the same lawmakers who touted *Dobbs*' deferral to state sovereignty have since proposed federal abortion bans.[31]

C. Vaccine Mandates

Individual rights and bodily autonomy have also been implicated by the COVID-19 pandemic, which has generated significant controversy about vaccine mandates. While mandatory vaccination requirements in schools and in other

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[26] *Casey*, 505 U.S. at 877 ("[No] law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional.").

[27] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

[28] *See, e.g.,* Isaac Schorr & Brittany Bernstein, *The Media React to* Roe *Leak: Right-Wing Terrorism, Transgender Death, and the End of Interracial Marriage,* NAT'L REV. (May 9, 2024, 2:04 PM), https://www.nationalreview.com/news/the-media-react-to-roe-leak-right-wing-terrorism-transgender-death-and-the-end-of-interracial-marriage/ [https://perma.cc/NZ6R-3MUK] (explaining various left- and right-wing reactions to the *Dobbs* decision). While outside the scope of this note, the unprecedented nature of *Dobbs* cannot be ignored. The decision "marks the first time in history that the Supreme Court has taken away a fundamental right." *U.S. Supreme Court Takes Away the Constitutional Right to Abortion*, CTR REPROD. RTS. (June 24, 2022), https://reproductiverights.org/supreme-court-takes-away-right-to-abortion/ [https://perma.cc/2YH3-Q4FF]. It also not only ignored the doctrine of stare decisis, a system that generates trust in the judiciary by ensuring that Supreme Court decisions are not overturned except under exceptional circumstances, but also may have overturned the doctrine entirely. Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1846–47 (2023).

[29] *See* Nancy C. Marcus, *Yes, Alito, There Is a Right to Privacy: Why the Leaked* Dobbs *Opinion Is Doctrinally Unsound*, 13 CONLAWNOW 101, 113–14 (2022).

[30] *See* Bernadette Hassan, *Conservatives React to Dobbs Ruling*, DAILY SIGNAL (June 24, 2022), https://www.dailysignal.com/2022/06/24/conservatives-react-to-dobbs-ruling/ [https://perma.cc/RBC9-ZU7V].

[31] *See, e.g.*, Maggie Jo Buchanan, *What You Need to Know About the Bill to Ban Abortion Nationwide*, CTR. AM. PROGRESS (Sept. 16, 2022), https://www.americanprogress.org/article/what-you-need-to-know-about-the-bill-to-ban-abortion-nationwide/ [https://perma.cc/3CV8-7UKY].

limited circumstances have existed for decades,[32] an "antivax" movement began to gain traction in 2014 and was followed a few years later by outbreaks of measles, a once-eradicated disease, prompting some public officials to mandate vaccination.[33] Fear of vaccination has existed in various forms since at least the eighteenth century, but today's resurgence is often traced back to a questionable 1998 publication that purported to connect vaccines to autism.[34] The rise of misinformation about the efficacy and safety of vaccines on social media has only furthered these fears.[35] The onset of COVID-19 and the subsequent fast-tracked development of vaccines has brought significantly increased attention to vaccine mandates, and such controversies have been the subject of numerous challenges in courts.[36] While there has been a recent resurgence in litigation around this issue, vaccine mandates have been challenged in courts throughout history.[37] The primary authority on the issue is *Jacobson*, which established that states have a right to mandate vaccinations to protect the health of the public.[38] *Jacobson* was decided in the wake of a three-year epidemic of smallpox, a highly communicable disease, so concern for public safety over individual liberty played a strong role in the Court's reasoning.[39] For over a century, courts have continuously upheld vaccine requirements under the authority of *Jacobson*.[40] Despite new

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[32] *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. at11, 27–28 (1905) (upholding a vaccine mandate issued in Boston in light of a localized epidemic of smallpox).

[33] Olivia Benecke & Sarah Elizabeth DeYoung, *Anti-Vaccine Decision-Making and Measles Resurgence in the United States*, NAT'L LIBRARY MED. (July 24, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6657116/ [https://perma.cc/L68U-XH4X]; Jennifer Peltz & Verena Dobnik, *NYC Orders Mandatory Vaccines for Some amid Measles Outbreak*, ASSOCIATED PRESS (Apr. 9, 2019), https://apnews.com/article/health-york-north-america-us-news-ap-top-news-13ef6b7b83914b9b84ef8dc6e06d071b [https://perma.cc/5Z7R-VM6A].

[34] Benecke & DeYoung, *supra* note 33.

[35] *Id.*

[36] Richard Lempert, *The Vaccine Mandate Cases, Polarization, and Jurisprudential Norms*, BROOKINGS INST. (Jan. 15, 2022), https://www.brookings.edu/blog/fixgov/2022/01/15/the-vaccine-mandate-cases-polarization-and-jurisprudential-norms/ [https://perma.cc/F6RT-287V].

[37] *See infra* Section V.B.

[38] *Jacobson*, 197 U.S. at 27–28.

[39] *Id.* at 29 ("[I]n every well-ordered society . . . the rights of the individual in respect of his liberty may at times . . . be subjected to such restraint . . . as the safety of the general public may demand."); Michael R. Albert et al., *The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1901–1903*, NEW ENGL. J. MED. (Feb. 1, 2001), https://www.nejm.org/doi/full/10.1056/NEJM200102013440511 [https://perma.cc/544S-R3JJ] (noting *Jacobson*'s implication that "although the state could not pass laws requiring vaccination in order to protect an individual, it could do so to protect the public in the case of a dangerous communicable disease").

[40] *See* Richard Hughes IV, *The Supreme Court and The Future of State Vaccine Requirements*, HEALTH AFF. (July 7, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20220705.879853 [https://perma.cc/LNB6-F5ML]; *see also*

attention to this question in the lower courts, the Supreme Court has yet to revisit the constitutionality of such mandates.[41]

D. The Uncertain Future of Individual Rights

Beyond individual rights relating to abortion and vaccine mandates, it is equally important to consider the other individual rights now threatened by the decision in *Dobbs*. While Justice Alito claimed in his majority opinion that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion,"[42] the shaky ground on which Alito left the right to privacy simply cannot be reconciled with this assurance. Justice Thomas, in concurrence, even called for the Court to "reconsider . . . *Griswold*, *Lawrence*, and *Obergefell*," landmark decisions that currently protect some of the most important choices a person can make about their body, family, and relationships.[43] In light of this threat to individual rights, the need for a fundamental right to bodily autonomy is evident.

II. THE IMPORTANCE OF FUNDAMENTAL RIGHTS

Before it is possible to argue that a fundamental right to bodily autonomy should be established, it is necessary to explain the origin and importance of fundamental rights. Fundamental rights are derived from the Due Process Clause of the Fourteenth Amendment.[44] The Supreme Court determines that a right is fundamental under the Constitution when it believes the right to be "rooted in our Nation's history and tradition" and "an essential component of . . . 'ordered liberty.'"[45] Such rights are deemed important enough that any infringement is subject to the highest level of judicial scrutiny, often called strict scrutiny.[46] Strict scrutiny is most commonly described by courts

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James M. Beck, *Not Breaking News: Mandatory Vaccination Has Been Constitutional for Over a Century*, AM. BAR. ASS'N (Oct. 28, 2021), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2021/winter2022-not-breaking-news-mandatory-vaccination-has-been-constitutional-for-over-a-century/ [https://perma.cc/9GY5-TBN8].

[41] *See* Hughes, *supra* note 40.

[42] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–78 (2022).

[43] *Id.* at 2301 (Thomas, J., concurring).

[44] 16B Am. Jur. 2d Constitutional Law § 935; Kreimer, *supra* note 6, at 426 ("[T]he procedure of defining 'fundamental rights' began with the determination that due process bound the states only to observe 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'").

[45] *Dobbs*, 142 S. Ct. at 2244.

[46] BARBARA J. VAN ARSDALE ET AL., DUE PROCESS AS RELATED TO COMMON LAW AND FUNDAMENTAL RIGHTS, AM. JUR. § 935 (2d ed. 2023). Throughout history, the Supreme Court's application of strict scrutiny, or any type of scrutiny, has been inconsistent, not

as requiring a compelling government interest and a means that is either necessary or narrowly tailored to furthering that interest.[47] The *necessary* element requires that "the government action . . . addresses an actual problem, a problem that has not already been adequately dealt with, and a problem that cannot be addressed through the use of a less or least restrictive alternative."[48] The *narrowly tailored* element looks at a number of factors, including over or underinclusiveness of the legislation, the extent to which the legislation's means are tied to the ends, and the availability of less restrictive means to achieving the same ends.[49] These elements are often applied inconsistently by the courts, but they are at least thought to be deeply analyzed.[50] The *compelling government interest* element, on the other hand, is severely underanalyzed by the courts.[51] Often, the analysis of the government interest is directly tied to how closely the legislation furthers it, which conflates the prongs of the strict scrutiny test.[52]

Fundamental rights are critical because they ensure that the issues society values the most are left up to the discretion of individuals, regardless of the politics of their elected representatives. This is important because the barriers to adequate representation in this country are too great to comprehensively illustrate here. To start, not everyone who lives in this country can legally vote, such as minors and a large

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explicitly articulated, or simply not in line with previous decisions that purported to use the same level of scrutiny. *See* Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny,* 40 VT. L. REV. 285, 287 (2015) (stating that "Justices of the United States Supreme Court . . . often articulate or employ standards in vague, inconsistent, and contradictory ways"). Sometimes the Court has employed strict scrutiny without naming it at all; sometimes the Court has used variations on the word "strict," such as "exacting" and "most rigid." *Id.* at 288; *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291, 300 (1978) (using "most exacting" scrutiny); Texas v. Johnson, 491 U.S. 397, 412 (1989) (using "exacting" scrutiny in a First Amendment context).

[47] VAN ARSDALE ET AL., *supra* note 46; Spece & Yokum, *supra* note 46, at 295; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (using "strict scrutiny" defined as "serv[ing] a compelling government interest, and . . . narrowly tailored to further that interest").

[48] Spece & Yokum, *supra* note 46, at 296.

[49] *Id.* at 306.

[50] *Id.* at 295.

[51] Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 917–18 (1988) ("The validity of the process of inferring interests, the validity of the interests inferred, and the validity of the use of governmental interests as a basis to override constitutional rights have all been virtually ignored."); Spece & Yokum, *supra* note 46, at 298 ("This essential actual purpose requirement is unfortunately most often left unstated in common articulations of strict scrutiny.").

[52] Spece & Yokum, *supra* note 46, at 300 ("If compellingness is determined by considering the amount of the government's interest that is involved, then this analysis merges ends and means scrutiny.").

percentage of people with felony convictions.[53] Of those who can legally vote, many do not (or cannot). In the 2020 presidential election, which had the "highest turnout [of any] election of the twenty-first century," still only roughly two-thirds of eligible voters voted.[54] Voter turnout is significantly lower during midterm elections and state and local elections.[55] It is also well documented that practical barriers to voting disproportionately impact minority communities.[56] The electoral system used for presidential elections and widespread gerrymandering practices have also guaranteed that some votes carry more or less weight depending on where a person lives.[57] Even if everyone within an elected official's constituency could and did vote, the fact that representatives are elected by a simple majority means there is a chance that up to half of voters will disagree with whomever is elected. Fundamental rights, therefore, ensure that certain rights are not left up to the discretion of legislators.

On a broader scale, fundamental rights are not only protected from state legislation, but also from the federal government. Under the Supremacy Clause of the Constitution, state laws are constrained by federal laws.[58] As the majority in *Dobbs* reasoned, taking away a fundamental right to abortion

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[53] Minors under the age of eighteen cannot vote. *Who Can and Can't Vote*, USA.GOV (June 6, 2023), https://www.usa.gov/who-can-vote [https://perma.cc/24KL-3WN9]. All but two states place some level of restriction on the ability of incarcerated individuals or those with felony convictions to vote. *Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map [https://perma.cc/9HA7-ZT4C].

[54] Jacob Fabina & Zachary Scherer, *Voting and Registration in the Election of November 2020*, U.S. CENSUS BUREAU (Jan. 2022), https://www.census.gov/content/dam/Census/library/publications/2022/demo/p20-585.pdf [https://perma.cc/S8D4-XZ6C]; *see also* Hannah Hartig et al., *Republican Gains in 2022 Midterms Driven Mostly by Turnout Advantage*, PEW RSCH. CTR. (July 12, 2023), https://www.pewresearch.org/politics/2023/07/12/voter-turnout-2018-2022/ [https://perma.cc/4WTZ-GWBD] (finding that "two-thirds (66%) of the voting-eligible population turned out for the 2020 presidential election").

[55] *Voter Turnout*, FAIRVOTE.ORG, https://fairvote.org/resources/voter-turnout/ [https://perma.cc/4F54-7HQB].

[56] *The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. JUST. (Jan. 10, 2022), https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color [https://perma.cc/Y9EU-YYHX].

[57] *See* Mara Liasson, *A Growing Number of Critics Raise Alarms About the Electoral College*, NPR (June 10, 2021), https://www.npr.org/2021/06/10/1002594108/a-growing-number-of-critics-raise-alarms-about-the-electoral-college [https://perma.cc/AXJ8-PCG9]; Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. JUST. (June 9, 2023), https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained) [https://perma.cc/LVS5-6GDX].

[58] U.S. CONST. art. VI, cl. 2; KEVIN J. HICKEY & WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10787, CONGRESSIONAL AUTHORITY TO REGULATE ABORTION 1–2 (July 8, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10787 [https://perma.cc/3PNN-W7KT].

simply gives the power to regulate abortion to the states.[59] Since then, however, federal abortion bans have been proposed, which would strip state legislators of this power, ensuring that even fewer of the already too small proportion of individuals in a state are adequately represented.[60] At times, it seems that the Supreme Court itself does not fully internalize this distinction. In *Dobbs*, the Court declared, in what can only be described as a fit of irony, that the *Roe* Court "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for *the people*."[61] By "the people," however, the Court was not actually referring to individual people, but to their elected officials, who, as discussed previously, cannot adequately represent their entire electorate and its diverse opinions. Fundamental rights, then, are so important that neither the state nor the federal government can supersede the choices of individuals except under the strictest scrutiny.

A fundamental right to bodily autonomy would preserve individuals' rights to make decisions that pertain to their bodies and lives without government infringement, unless that infringement is necessary or narrowly tailored toward furthering a compelling government interest. As discussed, most of these individual rights are currently protected under a fundamental right to privacy. But as *Dobbs* illustrates, the right to privacy is weak and has left the future of individual rights in jeopardy.

III. DECONSTRUCTING THE RIGHT TO PRIVACY

To contextualize the argument that a fundamental right to bodily autonomy should exist, it is critical to discuss the weaknesses of the right to privacy and how it is currently defined—or rather, ill-defined.

A. Establishment and Applications of the Right to Privacy

The Supreme Court officially recognized privacy as a fundamental right guaranteed by the Constitution in *Griswold*.[62] In his majority opinion, Justice Douglas stated that a right to privacy is implied from the "penumbra" of rights guaranteed by various provisions within the First, Third, Fourth, Fifth, and

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

[60] Buchanan, *supra* note 31 ("As a federal ban, Graham's proposal would override state regulation of abortion. This means that the proposed ban would allow states to restrict abortion more stringently—but bar states from ensuring abortion remains legal.").

[61] *Dobbs*, 142 S. Ct. at 2265 (emphasis added).

[62] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

Ninth Amendments.[63] According to Douglas, the various provisions explicitly stated within these amendments, such as the First Amendment's right to association and the Third Amendment's right to refuse to quarter soldiers in one's home, create implied "zones of privacy" into which the government should not intrude.[64] The marriage bed, and the use of contraception therein, fell into one of these protected "zones" and was therefore not within the government's right to control.[65]

Since *Griswold*, the right to privacy has served as the basis for many Supreme Court cases establishing individual rights. The right to use contraception was extended from married couples to individuals in *Eisenstadt v. Baird*, and later to minors in *Carey v. Population Services International*.[66] In *Roe*, the Court cited *Griswold* in reasoning that the right to terminate a pregnancy fell under the umbrella of fundamental rights protected by the right to privacy as an extension of the fundamental rights that had already been established: the right to make decisions about personal matters like contraception, family relationships, and whether to have children.[67] Later, in *Casey*, the Court once again cited privacy in upholding the central premise of *Roe*.[68]

The right to privacy has also been used to further the rights of LGBTQ+ individuals. In *Lawrence v. Texas*, the Court held that intimate sexual relations, including same-sex intercourse, fell within the zone of privacy established by *Griswold* and invalidated a statute criminalizing sodomy.[69] The right to privacy has indirectly resulted in the establishment of significant additional rights, such as the right to same-sex marriage established in *Obergefell v. Hodges*.[70] While privacy played only a peripheral role in the Court's reasoning in *Obergefell*, the precedent set by the validation of same-sex relationships as a privacy right in *Lawrence* clearly paved the

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[63] *Id.* at 484; *see infra* Section IV.A.

[64] *Griswold*, 381 U.S. at 484.

[65] *Id.* at 485–86.

[66] Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (individuals' rights to contraception); Carey v. Population Servs., Int'l, 431 U.S. 678, 693 (1977) (minors' rights to contraception).

[67] Roe v. Wade, 410 U.S. 113, 152–53 (1973); *see also Eisenstadt*, 405 U.S. at 447 (1972) (individuals' rights to contraception); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (affirming marriage as a fundamental right); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (rejecting forced sterilization).

[68] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (rejecting the trimester-based theory in *Roe* and establishing instead that legislation cannot place an "undue burden" on a person's ability to obtain an abortion).

[69] Lawrence v. Texas, 539 U.S. 558, 564–65 (2003).

[70] Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015).

way for the Equal Protection argument that won out in *Obergefell*.[71] While many of these cases and the rights therein are based on the right to privacy, it is impossible to claim that they do not also implicate issues of bodily autonomy.[72] This implication forms the basis for much of the criticism surrounding the right to privacy.

B. The Conflation of Knowledge-Privacy and Autonomy-Privacy

The right to privacy is no stranger to criticism. Even those who staunchly advocate for such a right have argued that privacy is ill-defined.[73] Various scholars have referred to the definition of privacy as "elusive,"[74] "an unusually slippery concept,"[75] and "lack[ing] clear contours and meaning."[76] Others have described privacy to be "entangled in competing and contradictory dimensions [and] engorged with various and distinct meanings."[77] While legal scholar Ronald Krotoszynski suggests "embracing the polysemous nature of privacy," he also notes that "the potentially infinite breadth of the concept of privacy can endanger the successful protection of the interests it seeks to safeguard . . . . [and] imprecision in the definition of a fundamental human right can and will make its enforcement significantly more difficult."[78] Krotoszynski's point underscores the necessity of isolating the distinct concepts that exist within the broader right to privacy and why these concepts must be applied separately to ensure that they continue to protect individual rights. While legal scholars have identified many different concepts contained within the right to privacy,[79] these concepts generally fall under two main categories: privacy as it pertains to knowledge and privacy as it pertains to autonomy.

The former category aligns the right to privacy as a legal notion with its nonlegal counterpart. Outside the law, privacy is

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[71] *See id.* at 664–65.

[72] *See infra* Section IV.A.

[73] James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1153 (2004) ("[H]onest advocates of privacy protections are forced to admit that the concept of privacy is embarrassingly difficult to define.").

[74] Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 371 (2003).

[75] Whitman, *supra* note 73, at 1153.

[76] Ronald J. Krotoszynski, Jr., *A Prolegomenon to Any Future Restatement of Privacy*, 79 BROOK. L. REV. 505, 507 (2014).

[77] Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001).

[78] Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 887 (2013).

[79] *See, e.g.*, Post, *supra* note 77, at 2087 (proposing to "isolate and review three different and in some respects incompatible concepts of privacy").

almost exclusively defined in terms of secrecy, exclusion, and nondisclosure.[80] Various definitions include "the quality or state of being apart from company or observation,"[81] "the state of being apart from other people or concealed from their view,"[82] and "someone's right to keep their personal matters and relationships secret."[83] This version of privacy is what legal scholar Robert C. Post would consider "privacy [connected] to the creation of knowledge,"[84] and hereinafter is referred to as knowledge-privacy. It is also the form of privacy that Warren and Brandeis conceived in *The Right to Privacy*, ultimately arguing for tort liability for those who publish information about someone without their consent.[85] It is the form of privacy most closely related to vernacular conceptions of privacy: the idea that people have the right to allow or disallow others to see or know certain things about them.

The latter category, however, demonstrates that the right to privacy also contains the concept of personal autonomy or integrity, which addresses not what others can learn or observe about a person, but what a person themself is or is not permitted or compelled to do.[86] Post would likely align this with his formulations of privacy in relation to dignity and freedom,[87] hereinafter referred to as autonomy-privacy. Krotoszynski acknowledged this aspect of privacy, noting that "[p]rivacy can refer to an autonomy interest; that is to say, the right to do or refrain from doing," and pointed to the decision to constitutionalize abortion in *Roe* as an example of the application of this form of privacy.[88] One need not be a legal scholar to understand how this differs from knowledge-privacy, as vernacular conceptions of privacy rarely extend to questions

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[80] Krotoszynski, *supra* note 78, at 882 ("[P]rivacy in nonlegal contexts usually denotes seclusion or nondisclosure.").

[81] *Privacy,* MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/privacy [https://perma.cc/8K6E-34ST].

[82] *Privacy,* DICTIONARY.COM, https://www.dictionary.com/browse/privacy [https://perma.cc/E8BM-TRXY].

[83] *Privacy,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/privacy [https://perma.cc/XNR4-VUZ9].

[84] Post, *supra* note 77, at 2087.

[85] Warren & Brandeis, *supra* note 16, at 197; Krotoszynski, *supra* note 78, at 882 ("[P]rivacy logically can and does refer to an interest in not disclosing personal information; the historical roots of the right of privacy in the United States relate to this aspect of the concept. Warren and Brandeis . . . argued that the common law of torts should protect an interest in nondisclosure of certain true but embarrassing personal information.").

[86] Krotoszynski, *supra* note 78, at 882 ("Privacy can refer to an autonomy interest; that is to say, the right to do or refrain from doing something.").

[87] *See* Post, *supra* note 77.

[88] Krotoszynski, *supra* note 78, at 882.

about what an authority can or cannot require a person to *do*. Generally, privacy outside the law only implicates what an authority can or cannot require a person to share or reveal.

It is strange, then, that under the law, autonomy-privacy would be conflated with knowledge-privacy, given that the latter much more closely mirrors common definitions.[89] However, this combined meaning has existed since the formal establishment of the right to privacy in *Griswold*.[90] In inferring a right to privacy from numerous provisions of the Bill of Rights, Justice Douglas led with the First Amendment, citing *NAACP v. State of Alabama* to point out that the Court had previously held that requiring "[d]isclosure of membership lists of a constitutionally valid association" was an impermissible violation of the First Amendment's guarantee of a right to association.[91] The specific mention of *disclosure* aligns this right with knowledge-privacy. Douglas then cites the Third Amendment, which prohibits the quartering of soldiers in private homes without the owner's consent, as another "facet of that privacy."[92] It would be difficult to argue that the Third Amendment pertains to knowledge-privacy without first acknowledging its overarching interest in autonomy: the owner of the house has the autonomy to choose not to board a soldier.

The legacy of a right to privacy rooted in both knowledge-privacy and autonomy-privacy is also present in the cases that followed *Griswold.* While the word "autonomy" is not used in *Griswold*, mentions of autonomy are peppered throughout right-to-privacy-based cases. In *Carey*, the Court reasoned that "the constitutional protection of *individual autonomy* in matters of childbearing" is not limited to married couples and adult individuals, but applies also to minors.[93] In *Casey*, the Court declared that "matters . . . involving the most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment."[94] In *Lawrence*, the Court quoted the same reasoning from *Casey* to declare that people in same-sex relationships may enjoy the same *autonomy* in their choices regarding intimate relationships as do those in

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[89] *Id.* ("[The autonomy interest] arguably is a rather odd construction of the word, given that privacy in nonlegal contexts usually denotes seclusion or nondisclosure, rather than more generalized autonomy interests.").

[90] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[91] *Id.* at 483 (citing NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

[92] *Id.* at 484.

[93] Carey v. Population Servs, Int'l, 431 U.S. 678, 687 (1977) (emphasis added).

[94] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (emphasis added).

opposite-sex relationships.[95] It is clear from these references to autonomy that, rather than clarify the multifaceted right to privacy established in *Griswold*, subsequent cases only embraced its broad scope.

The fact that distinct notions of autonomy and knowledge have been combined under a singular right to privacy has weakened the right when subjected to judicial review. In discrediting the arguments for abortion rights in *Roe*, the *Dobbs* majority cited this very problem: "*Roe* conflated the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference."[96] This illustrates exactly what Krotoszynski feared: that the "infinite breadth" of privacy "endanger[s] the successful protection of the interests it seeks to safeguard."[97] While it is, of course, possible to argue that the logic in *Dobbs* is flawed, since *Roe* did not pretend to found the right to abortion under, for example, a person's right to exclude others from the *knowledge* of their abortion, it is difficult to argue that the right to privacy itself does not conflate these two concepts exactly as described. Clearly, the Supreme Court did not have a problem taking away a fundamental right like abortion on the grounds that the right under which it was established is too broad and multifaceted. Therefore, it remains a very real threat that the other rights founded under the right to privacy are also at risk of being overruled, as highlighted by Justice Thomas's concurrence.[98] Had *Roe* been decided under a right to autonomy alone, the *Dobbs* Court would not have had the opportunity to use its criticism of the right to privacy generally as a discrediting factor.[99]

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[95] Lawrence v. Texas, 539 U.S. 558, 574 (2003).

[96] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2237 (2022).

[97] Krotoszynski, *supra* note 78, at 887.

[98] *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring); *see supra* Section I.D.

[99] While the argument presented here highlights the necessity of autonomy-privacy and the need for its ultimate isolation as a distinct right, knowledge-privacy continues to be a critical right as well. In the context of abortion, for example, concerns about data collected on messaging apps and menstrual cycle tracking apps have led many to worry that this data could be used as evidence that someone obtained an abortion that is now illegal in their state. Rina Torchinsky, *How Period Tracking Apps and Data Privacy Fit into a Post-*Roe v. Wade *Climate*, NPR (June 24, 2022, 3:06 PM), https://www.npr.org/2022/05/10/1097482967/roe-v-wade-supreme-court-abortion-period-apps [https://perma.cc/UC59-9ZPP] ("The personal health data stored in these [period tracking] apps . . . can show when their period stops and starts and when a pregnancy stops and starts . . . this data—whether subpoenaed or sold to a third party—could be used to suggest that someone has had or is considering an abortion."). Information shared via Facebook's messaging app has already been used for this purpose. Shortly after the *Dobbs* decision, a woman in Nebraska was prosecuted for helping her daughter obtain an illegal abortion, evidence of which was collected from Facebook messages after Facebook complied with a warrant for the information. Martin

C. *A Right to Privacy Implies a Need for Privacy*

At the most basic level, the importance of isolating knowledge-privacy from autonomy-privacy is quite easy to understand. What a person is or is not permitted to *do* is entirely different from what a person is or is not required to permit others to *know*. However, the multifaceted nature of the right to privacy also leads to a conflation of something that is a person's *right* to keep private with something that society believes *should* stay private. This problem is apparent in the context of same-sex intimate relations. *Lawrence v. Texas* relied substantially on the right to privacy to establish what is more accurately characterized as an autonomy right; that is, the right to have consensual sexual relations without government interference.[100] In his majority opinion, Justice Kennedy reasoned that "[t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[101] In other words, by legalizing the petitioners' *private* sexual activity, Kennedy elevated their *public* existence. Same-sex couples do not exist only in the solitude of their bedrooms, and before *Lawrence*, their ability to make their relationships visible to the public was hindered by the knowledge that their private lives were against the law.[102] The *Lawrence* decision "[swept] away doctrinal as well as symbolic barriers" in the fight against discrimination against same-sex couples.[103]

Even though *Lawrence* was a victory in the fight for the rights of same-sex couples, the fact that it necessitated the use of privacy to establish an autonomy right demonstrates another way privacy is problematic. Legal scholar Jeffrey Rosen, for example, illustrated this problem just a few years before *Lawrence* was decided, arguing, "we should preserve private spaces for those activities about which there are legitimately

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Kaste, *Nebraska Cops Used Facebook Messages to Investigate an Alleged Illegal Abortion*, NPR (Aug. 12, 2022, 2:49 PM), https://www.npr.org/2022/08/12/1117092169/nebraska-cops-used-facebook-messages-to-investigate-an-alleged-illegal-abortion [https://perma.cc/ZSJ9-QBWN]. Even if the establishment of knowledge-privacy as a right is not the ultimate proposal here, this argument does not endeavor to reject knowledge-privacy as a critical right, only to separate it from analyses under bodily autonomy.

[100] *Lawrence*, 539 U.S. at 564–65.

[101] *Id.* at 578.

[102] *See* Jon W. Davidson, *From Sex to Marriage: How* Lawrence v. Texas *Set the Stage for the Cases Against DOMA and Prop 8*, LAMBDA LEGAL BLOG (Mar. 25, 2013), https://www.lambdalegal.org/blog/from-sex-to-marriage-davidson#:~:text=Before%20Lawrence%2C%20not%20only%20were,a%20devastating%20precedent%3A%20Bowers%20v [https://perma.cc/ZR5M-GLGM].

[103] *Id.*

varying views, activities that no one in a civilized society should be forced to submit to public scrutiny."[104] Rosen was referring to sexual activity in general, and the multitude of opinions held by a scrutinizing public to whom no person should be forced to justify their choices.[105] It may be that society generally agrees that sexual activity itself should remain in private spaces. However, when something like same-sex sexual activity is liberated from illegality on the basis of a right to privacy, Rosen's argument demonstrates that there is an inherent implication that same-sex activity should be reserved to private spaces. Under Rosen's theory, because there are "legitimately varying views" about same-sex couples, their activities should be relegated to "private spaces."[106] A *closet* analogy is almost too accurate to spell out here. Had *Lawrence* been decided under a right to autonomy, private sexual liberation could have occurred without the implication that same-sex couples need to keep their relationships away from the eyes of the public.

In contrast to *Lawrence*, *Obergefell v. Hodges* took same-sex relations out of the private sphere and into the public mainstream by legalizing same-sex marriage.[107] Justice Kennedy's opinion mentions privacy only once, in a larger discussion of autonomy:

> the right to personal choice regarding marriage is inherent in the concept of individual autonomy . . . . it would be contradictory "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."[108]

Kennedy's point illustrates how illogical it is to legalize a private relationship while continuing to reject the public declaration of such a relationship: marriage. Rather than decide the case under the right to privacy, then, Kennedy focused substantially on Equal Protection, finding that a same-sex marriage ban impermissibly infringed on the rights of same-sex couples by treating them differently than opposite-sex couples.[109] Kennedy also highlighted the stigma against same-sex couples and the way restrictions on their right to marry affected their dignity and sense of self-worth.[110] This illustrates the problem

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[104] JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 24 (2000).

[105] *Id.*

[106] *Id.*

[107] Obergefell v. Hodges, 576 U.S. 644, 665 (2015).

[108] *Id.* at 665–66 (quoting Zablocki v. Redhail, 434 U.S. 374, 386 (1978)).

[109] *Id.* at 675.

[110] *Id.* at 660.

with Rosen's argument and its implication that controversial activity should be kept to the private sphere—such relegation only upholds stigmas and contributes to the affront to dignity and self-worth that those treated differently under the law already experience. The public validation of same-sex relationships brought forth by the *Obergefell* decision has had broad effects, and not just on those who finally obtained the right to marry. Public opinion about same-sex marriage has improved drastically since it was legalized and taken out from under the umbrella of privacy.[111]

Clearly, the right to privacy has many weaknesses in its current form: it conflates two materially different concepts to the detriment of its protections, and its societal implications only serve to uphold stigmas by relegating certain individual rights to the private sphere. A right to bodily autonomy would not only create stronger protections, but it would do so without perpetuating negative ideas about individual choices.

IV. A CONSTITUTIONAL BASIS FOR BODILY AUTONOMY AS A FUNDAMENTAL RIGHT

Because the right to privacy, as it currently stands, contains multiple distinct meanings and is weakened by its broad reach, autonomy-privacy should be isolated as a new constitutional fundamental right to bodily autonomy. While the Constitution does not explicitly mention an autonomy right, such a right, like privacy, can be inferred from the Constitution's enumerated rights. Because the proposed fundamental right to bodily autonomy is derived from the privacy right in *Griswold*, the constitutional basis for this right is already well-established. A right to bodily autonomy would also withstand the rigorous scrutiny that it would receive were it to be analyzed by the Supreme Court, which would question whether the right was "rooted in our Nation's history and tradition," as well as determine if the right is "an essential component of . . . ordered liberty."[112] Bodily autonomy survives on all fronts.

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[111] Courtney Vinopal, *LGBTQ Activists on What Progress Looks Like 5 Years After Same-Sex Marriage Ruling*, PBS NEWSHOUR (June 29, 2020, 6:36 PM), https://www.pbs.org/newshour/nation/lgbtq-activists-on-what-progress-looks-like-5-years-after-same-sex-marriage-ruling [https://perma.cc/3Y5C-83MX].

[112] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022).

A. Griswold and the Bill of Rights

Griswold found the basis for a right to privacy in the "penumbra" of rights established by numerous provisions of the Bill of Rights; namely, the First, Third, Fourth, Fifth, and Ninth Amendments.[113] Because knowledge-privacy and autonomy-privacy are both key components of the broad right to privacy established in *Griswold*, a constitutional basis for an autonomy right alone already exists. As mentioned, the Third Amendment's implication of a right to privacy reflects an autonomy right: the right to choose not to quarter a soldier in your home.[114] However, it is not the only amendment cited in *Griswold* that contributes to an autonomy right.

In his majority opinion, Justice Douglas cited *NAACP v. State of Alabama* and its protection of the First Amendment's freedom of association and the privacy guaranteed therein.[115] Douglas inferred from this the protection against the requirement that certain associations be disclosed,[116] but this protection is clearly rooted in autonomy-privacy. After all, before you can be protected from having to disclose your associations, you must first be permitted to associate. Douglas stated this outright in his reasoning: "we have protected forms of 'association' that are not political . . . but pertain to the social, legal, and economic benefit of the members."[117] This demonstrates that, often, before there can be knowledge-privacy, there must be autonomy-privacy, even if cases like *Griswold* treat them as one in the same.

Douglas moved on to the Fourth Amendment, which protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[118] The breadth of this amendment easily covers both knowledge-privacy and autonomy-privacy. From the text alone, protection against a *search* of one's papers and effects pertains to the right of a person to limit the government's ability to gain knowledge about them. In fact, the usual standard for determining the constitutionality of a Fourth Amendment search is whether a person has a "reasonable expectation of privacy" in the location authorities wish to search.[119] Protection

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[113] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
[114] *See supra* Section III.B; U.S. CONST. amend. III.
[115] *Griswold*, 381 U.S. at 483.
[116] *Id.*
[117] *Id.*
[118] U.S. CONST. amend. IV.
[119] Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

against *seizure*, specifically seizure of one's *person*, has obvious autonomy implications.[120] Additionally, knowledge-privacy is held to a different standard in Fourth Amendment applications because the Fourth Amendment does not protect against government collection of information that parties have willingly shared publicly.[121] In contrast, individuals do not relinquish the same right to autonomy over their person by stepping into a public place.

Douglas then cited the Fifth Amendment and its protection against self-incrimination, which is more aligned with knowledge-privacy, as it prevents the government from compelling people to share certain knowledge.[122] However, Douglas grouped it with the Fourth Amendment, stating that the two amendments together provide protection against "governmental invasions 'of the sanctity of a man's home and the privacies of life.'"[123] Even if the Fifth Amendment's protection of knowledge-privacy as it relates to unwilling admission of crimes does not require first that a person have an autonomy-based right to commit those crimes, it demonstrates the need to isolate an autonomy right from knowledge-privacy, as it would be illogical to argue that Fifth Amendment rights against self-incrimination are based in an autonomy right to commit crimes.

Finally, Douglas cited the Ninth Amendment, which clarifies that just because certain rights are not enumerated in the Constitution does not mean that those rights do not exist.[124] Douglas's discussion of the Ninth Amendment is brief, but Justice Goldberg elaborated on its importance in his concurrence, stressing that "the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."[125] While this does not specifically state an autonomy right, it does imply that if the other rights enumerated in the Bill of Rights do not preclude and instead support a right to autonomy, the Constitution should not be interpreted to deny such a right.

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[120] Christopher Slobogin, *A Defense of Privacy as the Central Value Protected by the Fourth Amendment's Prohibition on Unreasonable Searches*, 48 TEX. TECH L. REV. 143, 156 (2015).

[121] Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 2 (2009) ("[G]overnment officials are entitled to access information that individuals publicly reveal. [T]he Fourth Amendment . . . provide[s] no protection for information voluntarily revealed to third parties.").

[122] U.S. CONST. amend. V.

[123] Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

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

[125] *Griswold*, 381 U.S. at 490 (Goldberg, J., concurring).

Griswold demonstrates that autonomy rights not only contributed to the development of the right to privacy, but that they are absolutely essential to it. Because of this, Douglas's reasoning in *Griswold* created a firm constitutional basis for the recognition of bodily autonomy as a fundamental right.

B. History and Tradition

Establishing a constitutional basis is only the first step in determining whether a right is fundamental. Another part of the Supreme Court's process involves analyzing whether the right is "rooted in the Nation's history and traditions."[126] While progressive views of this analysis tend to indicate that it should not be dispositive,[127] even a conservative analysis cannot deny that elements of bodily autonomy are certainly "rooted in the Nation's history and traditions." Common law staunchly enforces protections against unwanted bodily intrusions.[128] Even the Supreme Court, despite declining to declare bodily autonomy as a fundamental right, has acknowledged the strong common law protections it enjoys.[129]

The development of tort law creates a strong argument for the existence of bodily autonomy within our history and tradition. Torts are, by definition, wrongs that result in harm, and the body of tort law was created to impose liability on those who commit such wrongs.[130] In *The Right to Privacy*, Warren and Brandeis point out that the development of tort law began with the simple and limited idea that people enjoyed the right not to be physically injured by others, and from this concept, the tort of battery was born.[131] Tort law, then, evolved as society began recognizing a broader sphere of protected rights around the person.[132] Protection against actual physical injury expanded to protection against fear of physical injury, and eventually, tort

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[126] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022).

[127] *See* Obergefell v. Hodges, 576 U.S. 644, 645 (2015) ("History and tradition guide and discipline the inquiry but do not set its outer boundaries.").

[128] Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILL. L. REV. 1059, 1061 (2014) ("The common law right not to have our bodies touched or invaded without our consent is so well established that most of us take its existence for granted.").

[129] *See, e.g.*, Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("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 own person, free from all restraint or interference of others.").

[130] *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[131] Warren & Brandeis, *supra* note 16, at 193 ("[I]n very early times, the law gave a remedy only for physical interference with life and property . . . . Then the 'right to life' served only to protect the subject from battery in its various forms.").

[132] *Id.* at 194–95.

law broadened to protect against injuries that were not physical, such as emotional or reputational harms.[133] Given this history, it is impossible to claim that protection against unwanted invasions of the body is not "rooted in the Nation's history and tradition."[134] Just like how many of the amendments cited by Douglas in *Griswold* imply a right to knowledge-privacy that necessarily stems from autonomy-privacy—like the right not to quarter soldiers in one's home—the historical evolution of tort law demonstrates how the concept of privacy could not have developed without bodily autonomy at its core.

C. Ordered Liberty

In determining whether a right is fundamental, the Supreme Court also asks "whether it is an essential component of . . . 'ordered liberty.'"[135] According to the Court, "[o]rdered liberty sets limits and defines the boundary between competing interests."[136] In other words, ordered liberty acknowledges that individual freedoms are necessarily "limited by the need for order in society."[137] While arguments for a bodily autonomy right are popularly associated with the pro-choice movement, opposition to such a right will be quick to point out that bodily autonomy implicates many other personal activities besides abortion, thus calling into question the competing interests that the government may seek to regulate. In *Dobbs*, the Supreme Court argued that these implications indicate that autonomy rights cannot be reconciled with ordered liberty: "[a]ttempts to justify abortion through appeals to a broader right to autonomy . . . could license fundamental rights to illicit drug use, prostitution, and the like."[138] These statements may be true, but they are unpersuasive in opposing bodily autonomy overall as part of ordered liberty.

There are strong and well-reasoned movements that suggest that activities like sex work and drug use should, in fact, be legal.[139] There is evidence to indicate that the criminalization

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[133] *Id.* at 194.

[134] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022).

[135] *Id.*

[136] *Id.* at 2257.

[137] *Ordered Liberty*, MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/legal/ordered%20liberty#:~:text=noun,clause%20of%20the%20Fourteenth%20Amendment. [https://perma.cc/XE5H-VFHN].

[138] *Dobbs*, 142 S. Ct. at 2258.

[139] *See, e.g.*, SANDRA NORMAN-EADY, 94-R-1089, CONN. GEN. ASSEMBLY OFF. LEGIS. RSCH., *Legalization of Illicit Drugs* (Dec. 22, 1994), https://cga.ct.gov/PS94/rpt%5Colr%5Chtm/94-R-1089.htm [https://perma.cc/2DV2-U6DR] ("Proponents of drug legalization argue that prohibition in general and the 'War on Drugs' that began in

of such activities does not actually reduce their incidence and criminal penalties, like incarceration, do not address the reasons that people engage in drug use and sex work.[140] Under a fundamental right to bodily autonomy, legislatures may be required to legalize these activities. However, legislatures would retain countless other avenues to address these issues, such as regulating the corporations responsible for the opioid crisis or creating social programs that relieve poverty, one of the main reasons people engage in sex work.[141] Moreover, legislatures would retain the right to criminalize *forced* sex work, or sex trafficking,[142] on the basis that this practice infringes on the bodily autonomy of the person forced into sex work, without interfering with those who choose to engage in sex work voluntarily.[143] Therefore, a fundamental right to bodily autonomy would not only protect individuals from government infringement, but would also force legislatures to address the actual causes of the problems they are trying to solve.

V. APPLYING A FUNDAMENTAL RIGHT TO BODILY AUTONOMY IN THE COURTS

The establishment of a fundamental right to bodily autonomy would have significant implications for many

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the 1980's in particular have created a black market for drugs, overloaded the criminal justice system, failed to reduce the supply of drugs, and victimized children."); *Why Sex Work Should Be Decriminalized*, HUM. RTS. WATCH (Aug. 7, 2019), https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized [https://perma.cc/UH7X-UDXU] ("Criminalizing adult, voluntary, and consensual sex . . . . is incompatible with the human right to personal autonomy and privacy.").

[140] NORMAN-EADY, *supra* note 139 ("[P]rohibition fails because . . . addicts are impervious to the criminal justice system's threat of punishment."); *see also* NAT'L INST. JUST., PROSTITUTION: PATHWAYS, PROBLEMS AND PREVENTION (Sept. 29, 2009), https://nij.ojp.gov/topics/articles/prostitution-pathways-problems-and-prevention [https://perma.cc/3LJ7-8QXV] ("Many [prostitutes] are recruited into prostitution by force, fraud or coercion. Some women need money to support themselves and their children . . . . Without a means to support themselves and their children, they may think staying on the streets is less risky than leaving prostitution.").

[141] NAT'L INST. JUST., *supra* note 140.

[142] *What is Human Trafficking?*, U.S. DEPT. JUST. (June 26, 2023), https://www.justice.gov/humantrafficking/what-is-human-trafficking [https://perma.cc/FAK9-75JZ].

[143] Justice Alito's concern that "broader autonomy rights" could "license . . . prostitution," *Dobbs*, 142 S. Ct. at 2258, clearly indicates that he views all sex work as a societal problem to be solved, whereas the arguments in this section purport to address how criminalization fails to solve the narrower problem of involuntary sex work, ranging from sex trafficking to coercion by circumstances like poverty. However, modern decriminalization movements emphasize how criminalization harms sex workers, arguing that "a government should not be telling consenting adults who they can have sexual relations with and on what terms" and illustrating how sex workers face increased abuse and violence by civilians and law enforcement officers alike under criminalization. *Why Sex Work Should Be Decriminalized*, *supra* note 139.

contentious issues that have recently come to the forefront. Restrictive abortion laws and vaccine mandates are just two examples of legislation that could be challenged under such a right;[144] however, these issues are particularly controversial to the extent that they implicate the bodily autonomy rights of others. In fact, an argument often raised opposing the right to abortion under bodily autonomy is the fact that "[o]ur desires to do as we wish with our bodies . . . must be limited by the needs and rights of others, including those who live inside our own bodies."[145] A similar argument is often echoed in support of vaccine mandates, as the decision not to vaccinate not only increases an individual's chances of getting sick, but also increases the likelihood of spreading the sickness to others.[146] The fact that individual rights concerning both abortion and vaccine mandates can be seen as infringing on the rights of others serves as a reminder that no right is absolute, not even a fundamental right. It is simply subject to strict scrutiny when infringed upon by the legislature.[147] With this in mind, this section explores possible outcomes for future cases relating to abortion and vaccine mandates, two polarizing issues that have strong bodily autonomy implications, were they to be analyzed under a fundamental right to bodily autonomy.

A. Abortion Restrictions

Many state and federal abortion bans have been proposed or enacted since *Dobbs*, providing ample material for a strict scrutiny analysis under a hypothetical fundamental right to bodily autonomy. In a number of states, so called "trigger bans" already existed on the books, ready to be enforced as soon as *Roe* was overturned.[148] One such law called the LIFE Act, enacted in

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[144] The scope of this note is limited to bodily autonomy as it pertains to abortion and vaccine mandates, as well as, to a lesser extent, the potential for a right to bodily autonomy to safeguard the future of established rights, such as the rights to use contraception and engage in same-sex sexual relations. However, it would be an oversight not to mention the significant protections a fundamental right to bodily autonomy would provide for other rights that have recently been under attack, such as the right of transgender individuals to obtain gender affirming care.

[145] Tish Harrison Warren, Dobbs*,* Roe *and the Myth of 'Bodily Autonomy*,' N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/dobbs-roe-autonomy.html [https://perma.cc/J4RQ-UK9H].

[146] *See* Beck, *supra* note 40 ("Vaccine resistance need not be tolerated when it allows disease to spread and imperil others.").

[147] *See supra* Part II.

[148] Sarah McCammon, *Two Months After the* Dobbs *Ruling, New Abortion Bans Are Taking Hold*, NPR (Aug. 23, 2022, 2:42 PM), https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold [https://perma.cc/Z2FX-TF36].

Georgia in 2019, restricts abortion after a fetal heartbeat can be detected, which usually occurs around six weeks.[149] In August of 2022, Indiana became the first state to pass post-*Dobbs* abortion legislation with a law that criminalizes abortion after twenty weeks.[150] In September of 2022, Senator Lindsey Graham proposed a bill that would ban abortion on the federal level after fifteen weeks.[151] Were any of these laws to be challenged under a fundamental right to bodily autonomy, the courts would decide whether the government interest is compelling and whether banning abortion is necessary or narrowly tailored to achieve that interest.[152]

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[149] Living Infants Fairness and Equality Act, H.B. 481, Act 234, 144th Gen. Assemb., Reg. Sess. (Ga. 2019) https://www.legis.ga.gov/api/legislation/document/20192020/187013 [https://perma.cc/PW8A-DKVC]; Sarah Mervosh, *Georgia Is Latest State to Pass Fetal Heartbeat Bill as Part of Growing Trend*, N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/georgia-fetal-heartbeat-abortion-law.html [https://perma.cc/4E94-L5RH]. The LIFE Act was challenged in the courts, but ultimately upheld by the Georgia Supreme Court, and remains in force at the time of publication. David W. Chen, *Georgia Supreme Court Allows State's Six-Week Abortion Ban to Remain in Effect*, N.Y. TIMES (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/us/georgia-abortion-ban-supreme-court.html (Last visited Feb. 20, 2024).

[150] 2022 Indiana Senate Bill No. 1, 122nd Gen. Assemb., 1st Spec. Sess., (Ind. 2022), https://iga.in.gov/pdf-documents/122/2022ss1/senate/bills/SB0001/SB0001.06.ENRH.pdf [https://perma.cc/5YTU-9CEM]. In September 2022, Indiana's highest court blocked enforcement of the bill "while it considers whether it violates the state constitution." Maya Yang, *Indiana Supreme Court Blocks State from Enforcing Abortion Ban*, GUARDIAN (Oct. 12, 2022), https://www.theguardian.com/us-news/2022/oct/12/indiana-supreme-court-state-abortion-ban [https://perma.cc/ZW72-JPQR]. In December 2022, another judge blocked the bill while the state reviewed religious freedom challenges to the law. Daniel Trotta, *Judge Blocks Indiana Abortion Ban on Religious Freedom Grounds*, REUTERS (Dec. 2, 2022, 10:43 PM), https://www.reuters.com/legal/judge-blocks-indiana-abortion-ban-religious-freedom-grounds-2022-12-03/ [https://perma.cc/5ZEH-J3HU]. In June 2023, the Indiana Supreme Court ruled that the ban can take effect. *Abortion Access in Indiana*, ACLU IND., https://www.aclu-in.org/en/abortion-access-indiana [https://perma.cc/6MK9-PK6A]. At the time of publication, the ban is on hold awaiting rehearing. *Id.*

[151] Amy B. Wang & Caroline Kitchener, *Graham Introduces Bill to Ban Abortions Nationwide After 15 Weeks*, WASH. POST (Sept. 13, 2022, 11:19 AM), https://www.washingtonpost.com/politics/2022/09/13/abortion-graham-republicans-nationwide-ban/ [https://perma.cc/HUY7-XZ66]. At the time of publication, there have been no updates on this proposed ban, possibly due to lack of support from other senators in Graham's own party. Burgess Everett et al., *Graham's Abortion Ban Stuns Senate GOP*, POLITICO (Sept. 13, 2022, 1:41 PM), https://www.politico.com/news/2022/09/13/grahams-abortion-ban-senate-gop-00056423 [https://perma.cc/8QQ8-TG53].

[152] Because of *Dobbs*, future abortion legislation is likely to happen at the state level. However, were Senator Graham's proposed abortion ban to be enacted and challenged, the Supreme Court justices who voted to overturn *Roe* would have a difficult time reconciling upholding a federal abortion ban with their ruling. The majority in *Dobbs* emphasized that abortion legislation belongs in the hands of the states, not the federal government. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022). In order to uphold a federal abortion ban under a fundamental right to bodily autonomy, the Court would have to both hold this legislation to a strict scrutiny standard and reconcile a federal ban with their previous determination that states have the right to legislate on this issue. Moreover, a federal abortion ban would also need to fall under one of the powers specifically granted to Congress by the Constitution, as opposed to a state ban, which is subject to no such restriction. *See* Randy E. Barnett & Heather

1. Compelling Government Interest

The government interests that these laws purport to further vary, but most come down to an interest in preserving what their proponents refer to as unborn life. The stated interest in Senator Graham's proposed federal abortion ban is "in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain."[153] The LIFE Act states that Georgia has an interest in "providing full legal recognition to an unborn child."[154] Were the nation to recognize a fundamental right to bodily autonomy, these laws would be challenged on the grounds that they violate the pregnant parent's right to bodily autonomy, because a fetus is dependent on its parent's body to sustain it, essentially forcing that parent to relinquish their bodily autonomy unless abortion is an available option.[155] Under the current judicial standard for abortion cases, the interest in fetal life is legitimate.[156] Under strict scrutiny, the interest in fetal life would need to be compelling.

Because the compelling government interest prong is so underanalyzed, the answer to whether the government's interest in fetal life is considered compelling is difficult to predict and almost impossible to discuss without implicating questions of narrow tailoring. However, it is possible to present the

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Gerken, *Article I, Sec. 8: Federalism and the Overall Scope of Federal Power*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-i/section/8712 [https://perma.cc/8XLJ-4NWG] ("The national government was conceived as one of limited and enumerated powers. The powers of states were simply *everything left over* after that enumeration.").

[153] Protecting Pain-Capable Unborn Children from Late-Term Abortions Act, 117th Cong. § 2 (2022), https://www.lgraham.senate.gov/public/_cache/files/3065785d-86b8-4d36-986a-72aa1c8f100c/protecting-pain-capable-unborn-children-from-late-term-abortions-act-.pdf [https://perma.cc/FQJ4-D3MT].

[154] Living Infants Fairness and Equality Act, H.B. 481, Act 234, 144th Gen. Assemb., Reg. Sess. (Ga. 2019), https://www.legis.ga.gov/api/legislation/document/20192020/187013 [https://perma.cc/PW8A-DKVC].

[155] Language surrounding pregnancy and abortion is highly politicized, and it is difficult to find neutral terms. For the sake of simplicity, this note will use the term "fetus" and "fetal life" to refer to the entity developing during pregnancy at any stage, even though "embryo" is the scientifically proper term prior to seven weeks gestation, and even though this note does not purport to identify when "life" begins. *See* Elizabeth Jensen, *Reviewing NPR's Language for Covering Abortion*, NPR (May 29, 2019), https://www.npr.org/sections/publiceditor/2019/05/29/728069483/reviewing-nprs-language-for-covering-abortion [https://perma.cc/ND3C-NDG3]. "Parent," "pregnant parent," or "birthing parent" will be used to refer to a person who is pregnant or capable of pregnancy in acknowledgement of the fact that people other than women, such as trans men and nonbinary individuals, can be capable of pregnancy and may not identify with the gendered terms "mother" or "woman." Cited material, however, may still use gendered and politicized language.

[156] *See Dobbs*, 142 S. Ct. at 2283–84; *see also* SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320, 1326 (11th Cir. 2022).

supporting and opposing arguments the Court would likely review in its analysis. Proponents of the abortion bans would likely point to some of the criticism that *Roe* faced for determining that the government's interest in protecting fetal life only became compelling at viability without defining or rationalizing the viability line.[157] Their argument is bolstered by the fact that *Casey* reaffirmed this criticism.[158] For the LIFE Act, proponents would argue that once a fetus has a heartbeat, there is a compelling interest in preserving fetal life. For the federal ban, the argument would be that at fifteen weeks, a fetus is capable of feeling pain, and therefore the government should have an interest in preventing the abortion procedure which, the bill claims, involves "the use of surgical instruments to crush and tear an unborn child apart."[159] Under a fundamental right to bodily autonomy, proponents would likely argue that the bodily autonomy of the fetus should be taken into account just as strongly as that of the pregnant parent.

Opponents of the abortion bans would present a myriad of counterarguments. One such argument is that, according to medical experts, a fetus cannot have a heartbeat at six weeks because a six-week-old fetus does not have a heart, but rather emits electrical impulses.[160] Another argument would be that the fifteen-week abortion ban is just as arbitrary, if not more so, than the viability line. One need only look to a similar abortion ban proposed by Senator Graham in 2018, which purported to ban abortion after twenty weeks on the same grounds of fetal pain.[161] Opponents might also question why, if the bodily autonomy of a fetus is to be treated as equal to that of the pregnant parent, there is no consideration for the fact that pregnancy and childbirth can often cause significant pain, illness, and even death to the parent.[162] The conclusion here may

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[157] Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1327 (2013).

[158] *Id.* at 1328.

[159] Protecting Pain-Capable Unborn Children from Late-Term Abortions Act, S. 4840 117th Cong. § 2 (2022), https://www.lgraham.senate.gov/public/_cache/files/3065785d-86b8-4d36-986a-72aa1c8f100c/protecting-pain-capable-unborn-children-from-late-term-abortions-act-.pdf [https://perma.cc/FQJ4-D3MT].

[160] Kaitlin Sullivan, *'Heartbeat Bills': Is There a Fetal Heartbeat at Six Weeks of Pregnancy?*, NBC NEWS (Apr. 17, 2022, 4:30 AM), https://www.nbcnews.com/health/womens-health/heartbeat-bills-called-fetal-heartbeat-six-weeks-pregnancy-rcna24435 [https://perma.cc/NTY7-8NNJ].

[161] Pain-Capable Unborn Child Protection Act, S. 2311, 115th Cong. § 2 (2018), https://www.congress.gov/bill/115th-congress/senate-bill/2311/text [https://perma.cc/BDR3-4S2Z].

[162] *What Are Some Common Complications of Pregnancy?*, NAT'L INSTS. HEALTH (Apr. 20, 2021), https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/complications [https://perma.cc/3BGK-AWLD].

be that it is impossible to reconcile the competing bodily autonomy interests of the pregnant parent and fetus without making value judgments about the relative worth of either life. In the absence of the willingness to do that, the Court would likely turn to other arguments.

One such argument is that abortion bans essentially impart more bodily autonomy rights on a fetus prior to birth than that same fetus would possess immediately after birth, and possibly more than that child would then obtain upon reaching adulthood if able to become pregnant.[163] This illustrates why bodily autonomy creates stronger protections for abortion than the right to privacy, because as soon as a court endeavors to balance the bodily autonomy of the fetus with the bodily autonomy of its pregnant parent, the compelling government interest argument falls apart. This is because it is well understood that minors are presumed to be unable to consent to medical treatment, as demonstrated by the many state laws that dictate the limited circumstances under which a minor *can* consent to medical treatment.[164] While ethical standards indicate that "[p]arents have a duty to act in the best interests of their children . . . and not to inflict harm,"[165] pregnancy, as opposed to raising a child, is a rare circumstance under which a parent is providing direct, life-sustaining care to their child through their own body. Once a fetus is born, a parent cannot be compelled to do that. Parents are not required, for example, to donate their organs to their children to save their lives.[166] Some scholars have argued that it is impossible to reconcile these arguments: if you believe that a parent should not have the right to terminate their pregnancy, they argue, you must also believe that parents should be

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[163] *Whose Right to Life? Women's Rights and Prenatal Protections Under Human Rights and Comparative Law*, CTR. REPROD. RIGHTS (July 28, 2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf [https://perma.cc/DHD9-5T7E] ("[R]ecogniz[ing] prenatal legal personhood . . . bestow[s] rights on a zygote, embryo, or fetus that would be equal or superior to the rights of women.").

[164] *See generally* NAT'L DIST. ATTY'S ASS'N, MINOR CONSENT TO MEDICAL TREATMENT LAWS (Jan. 2013), https://ndaa.org/wp-content/uploads/Minor-Consent-to-Medical-Treatment-2.pdf [https://perma.cc/4QQG-A8SL] (cataloguing state laws).

[165] Geoffrey Miller, *The Limits of Parental Authority to Accept or Refuse Medical Treatment*, AM. ACAD. NEUROLOGY (2011), aan.com/globals/axon/assets/8857.PDF [https://perma.cc/7SMR-58JB].

[166] *See* Parker Crutchfield & Emily Carroll, *Abortion Restrictions and Compulsory Organ Donation*, MSU BIOETHICS (Sept. 23, 2021), https://msubioethics.com/2021/09/23/abortion-restrictions-compulsory-organ-donation-crutchfield-carroll/ [https://perma.cc/K5P7-A3UE].

compelled to donate their organs to their children.[167] This serves to illustrate that under an abortion ban, fetuses possess more bodily autonomy than they will at any other time in their life, especially if, once grown, they are able to become pregnant. Therefore, abortion bans are never consistent with upholding the bodily autonomy rights of a pregnant parent, and a government therefore has no compelling interest in such laws.

2. Narrow Tailoring

Assuming, for the sake of argument, that the Court finds the government interest in preserving fetal life compelling, it would then address the narrowly tailored prong of the strict scrutiny analysis. One major consideration in this part of the analysis is the extent to which the legislation's means are tied to the ends. Opponents of abortion bans would argue that banning abortion does not actually reduce rates of abortion.[168] Abortion rates vary minimally between countries where abortion is highly restricted and those where abortion is widely available.[169] Abortion bans do, however, increase the rate of *unsafe* abortion, which can lead to serious and sometimes fatal medical complications.[170] Despite this reality, many antiabortion supporters allege that abortion itself is medically risky; in fact, Senator Graham's proposed abortion ban purports that the medical risks associated with abortion are among the reasons for

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[167] *See, e.g.*, Emily Carroll, *The Duty to Protect, Abortion, and Organ Donation*, 31 CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 333 (2022) (finding an irreconcilable conflict between banning abortion and not enforcing compulsory organ donation from parents).

[168] Michael Nedelman, *Abortion Restrictions Don't Lower Rates, Report Says*, CNN (Mar. 21, 2018), https://www.cnn.com/2018/03/21/health/abortion-restriction-laws/index.html [https://perma.cc/W4VT-TNC8]; *Unintended Pregnancy and Abortion Worldwide*, GUTTMACHER INST. (Mar. 2022), https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide [https://perma.cc/URT5-ZJHZ].

[169] Nedelman, *supra* note 168; *Unintended Pregnancy and Abortion Worldwide*, *supra* note 168.

[170] Nedelman, *supra* note 168. While the viability of this argument does not need to touch on the differential impact of abortion bans and their resulting harm across different populations, it would be a grievous oversight not to acknowledge the disproportionate impact of abortion bans on marginalized groups, such as people of color, trans men, people with disabilities, and low-income individuals. Liza Fuentes, *Inequity in US Abortion Rights and Access: The End of Roe Is Deepening Existing Divides*, GUTTMACHER INST. (Jan. 17, 2023), https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides [https://perma.cc/RR8H-YL5D]. In particular, Latinas and Black women are disproportionately likely to be uninsured, earn low wages, experience contraceptive failure, and be subject to discriminatory medical practices. *Id.* Post-*Dobbs*, these realities will only exacerbate the already disproportionate barriers preventing these populations from obtaining abortion care. *Id.*

the ban.[171] However, this is directly in opposition to the data suggesting that abortion bans only increase these risks.

Another consideration in the narrowly tailored test is whether there are reasonable alternatives to the legislation that can address the same compelling interest in a way that is less burdensome on a fundamental right. If the Court is convinced that abortion bans do not decrease abortion rates, then opponents of the bans may also present evidence that the same government interest could be furthered by other means that do not burden bodily autonomy. For example, abortion rates decline when there are fewer unwanted pregnancies.[172] Some factors that have been shown to lower rates of unwanted pregnancies are increased use of contraception—in particular, long-term contraception methods like implants and intrauterine devices[173]—more affordable contraception due to legislation like the Affordable Care Act,[174] and sex education that teaches about birth control methods aside from abstinence.[175] Additionally, data show that a significant percentage of pregnant people who seek abortion do so because they do not have the financial means to raise a child.[176] Legislation aimed at providing financial assistance to new mothers, then, could turn some unwanted pregnancies into wanted ones. Clearly, legislatures have a variety of options other than total bans to consider that would actually be narrowly tailored to reducing abortion rates. Overall, it is clear that under a fundamental right to bodily autonomy, abortion bans do not pass strict scrutiny.

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[171] Protecting Pain-Capable Unborn Children from Late-Term Abortions Act, S. 4840, 117th Cong. § 2 (2022), https://www.lgraham.senate.gov/public/_cache/files/3065785d-86b8-4d36-986a-72aa1c8f100c/protecting-pain-capable-unborn-children-from-late-term-abortions-act-.pdf [https://perma.cc/FQJ4-D3MT].

[172] *See* Diana Greene Foster, *Dramatic Decreases in US Abortion Rates: Public Health Achievement or Failure?*, AM J. PUB. HEALTH (Dec. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5678419/ [https://perma.cc/GZL6-4RZ5].

[173] *Id.*

[174] Alia E. Dastagir, *Fewer Women Are Having Abortions. Why?*, USA TODAY (June 17, 2019, 7:17 AM), https://www.usatoday.com/story/news/nation/2019/06/13/abortion-law-fewer-women-having-abortions-why/1424236001/ [https://perma.cc/YA65-X3VW] ("The Affordable Care Act's federal contraceptive coverage guarantee . . . . made it possible . . . for women to choose the method of contraception that best suited them, versus what they could afford.").

[175] MARSHALL BRIGHT, *Study Finds That Comprehensive Sex Education Reduces Teen Pregnancy*, ACLU (Mar. 28, 2008), https://www.aclu.org/news/reproductive-freedom/study-finds-comprehensive-sex-education-reduces-teen-pregnancy [https://perma.cc/XX4A-NJTT].

[176] M Antonia Briggs et al., *Understanding Why Women Seek Abortions in the US*, BCM WOMEN'S HEALTH (July 5, 2013), https://bmcwomenshealth.biomedcentral.com/articles/10.1186/1472-6874-13-29 [https://perma.cc/K2LB-3SAP] (citing two research studies in 1987 and 2004 in which 69 percent and 73 percent of abortion patients surveyed respectively agreed with the statement "I can't afford a baby now").

B. Vaccine Mandates

Were the constitutionality of vaccine mandates to be challenged in the Supreme Court on the grounds that vaccine mandates interfere with a fundamental right to bodily autonomy, the Court would have to use strict scrutiny to decide the case. This would be a substantial change from the way vaccine mandate cases have been decided thus far. *Jacobson* gave states broad authority to issue vaccine mandates when necessary to ensure public health.[177] While *Jacobson* did not articulate its standard of review, courts that have looked to *Jacobson* to address recent vaccine mandate cases have generally found that the Court used rational basis review, a deferential standard that only requires that the legislation be rationally related to a government interest.[178]

In adhering to *Jacobson*, courts have declined to extend the right to privacy to cover the right to decline a mandatory vaccination, both before and during the COVID-19 pandemic. In 1985, a district court in *Hanzel v. Arter* pointed out that the right to privacy recognized by the Supreme Court is limited to privacy in the sphere of "bodily or mental intimacy."[179] According to *Hanzel*, "[v]accination, in this view, may interfere with bodily autonomy, but fails to offend the intimacy of the individual's personal identity."[180] Because the interest failed to qualify as a fundamental right, the court used rational basis review and declined to find that a vaccine mandate for Ohio public schools was unconstitutional.[181] In 2002, a district court in *Boone v. Boozman* characterized refusal of a vaccine mandate as refusal of medical treatment, which, while protected under a general privacy interest, is not a fundamental right and therefore subject to rational basis review.[182] This reasoning has been echoed in many COVID-19 era cases as well. In *Klaassen v. Trustees of Indiana University*, a district court determined that "privacy rights largely have been confined to 'to sexual and reproductive rights,' . . . . [w]hereas infringements on other rights or liberties . . . must meet what courts call rational basis

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[177] Jacobson v. Massachusetts, 197 U.S. 11, 27–28 (1905).

[178] Norris v. Stanley, 567 F. Supp. 3d 818, 822 (W.D. Mich. 2021) ("Over the last year and a half, courts have looked to *Jacobson* to infer that a rational basis standard applies to generally applicable vaccine mandates.").

[179] Hanzel v. Arter, 625 F. Supp. 1259, 1262 (S.D. Ohio 1985).

[180] *Id.*

[181] *Id.*

[182] Boone v. Boozman, 217 F. Supp. 2d 938, 956–57 (E.D. Ark. 2002).

review."[183] Similarly, in *Norris v. Stanley*, the district court found no infringement of a fundamental right, and therefore applied rational basis review to deny an employee's motion against their employer's vaccine mandate.[184]

The Supreme Court has yet to reconsider whether vaccine mandates are generally constitutional. In early 2022, the Court heard two cases related to COVID-19 vaccine mandates, *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration* (*OSHA*) and *Biden v. Missouri*—neither case addressed the constitutionality of vaccine mandates broadly, but rather only under certain circumstances.[185] In *OSHA*, the Court invalidated OSHA's vaccine mandate on the grounds that it was an overreach of OSHA's specific congressionally granted power, not on the grounds that such mandates are generally unconstitutional.[186] In *Biden*, the Court granted the government's applications to stay temporary injunctions against a requirement that employees at healthcare facilities that receive Medicaid and Medicare funding must be vaccinated against COVID-19.[187] The Court then agreed that "ensur[ing] that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety" was a legitimate goal, and the Secretary of Health and Human Services was within his authority to enact requirements like a vaccine mandate in order to further that goal.[188] Neither case referenced *Jacobson*.[189]

It is clear from these cases that while the right to privacy generally protects a person's bodily autonomy to refuse medical treatment, it does not specifically extend to refusal of vaccine mandates. Were bodily autonomy to be adopted as a new

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[183] Klaassen v. Trs. of Ind. Univ., 549 F. Supp. 3d 836, 860–61 (N.D. Ind. 2021), *vacated and remanded*, 24 F.4th 638 (7th Cir. 2022). The plaintiffs in *Klaassen* appealed to the Seventh Circuit Court of Appeals, which vacated and remanded the case on the grounds of mootness, because all but one of the plaintiffs qualified for a religious exemption, and the remaining plaintiff withdrew from the university. *Klaassen*, 24 F.4th at 640. The Seventh Circuit did not address the lower court's constitutionality analysis. *Id.*

[184] Norris v. Stanley, 567 F. Supp. 3d 818, 821 (W.D. Mich. 2021) ("'If a . . . fundamental right is involved, [the court] must apply strict scrutiny, but where no . . . fundamental right is implicated, [the court] must apply rational basis review.' . . . Because this Court finds that no fundamental right is implicated . . . the Court must apply a rational basis standard.") (quoting Midkiff v. Adams Cty. Reg'l Water Dist., 409 F.3d 758, 770 (6th Cir. 2005)).

[185] *See generally* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 142 S. Ct. 661 (2022); Biden v. Missouri, 142 S. Ct. 647 (2022).

[186] *OSHA*, 142 S. Ct. at 665.

[187] *Biden*, 142 S. Ct. at 654–55.

[188] *Id.* at 650, 652.

[189] *Id.* at 650–55; *OSHA*, 142 S. Ct. at 662–67 (neither case referencing *Jacobson*).

fundamental right, vaccine mandates challenged as violations of that right would be subject to strict scrutiny instead, requiring a compelling government interest and narrow tailoring.

1. Compelling Government Interest

Since *Jacobson*, vaccine mandates have largely been issued with the purpose of promoting public health and preventing the spread of disease.[190] It would be difficult to argue that promoting public health and preventing the spread of disease are not compelling government interests.[191] This interest was foundational to *Jacobson* and the vaccine mandate cases that have followed.[192] Furthermore, this interest was unquestioned in *Biden* and even *OSHA*.[193] Promoting the health and welfare of the people is one of the main purposes of government, particularly under the broad police powers possessed by the states.[194]

Legal scholars Ben Horowitz and Lucien J. Dhooge agree that preventing the spread of disease is a compelling government interest, but only under limited circumstances.[195] Dhooge states that a vaccine mandate would survive the compelling interest prong of strict scrutiny as long as it is "designed to stem the spread of a highly-transmissible disease presenting a significant risk of death or serious illness in the midst of a once in a century pandemic."[196] Horowitz, similarly, argues that this interest is only compelling during an epidemic constituting "[a] public health emergency, which involves a

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[190] *See* Jacobson v. Massachusetts, 197 U.S. 11, 27–28 (1905); *Biden*, 142 S. Ct. at 652.

[191] People v. Adams, 597 N.E.2d 574, 580–81 (Ill. 1992) ("There are few, if any, interests more essential to a stable society than the health and safety of its members.").

[192] *See Jacobson*, 197 U.S. at 27–28 (1905); Norris v. Stanley, 567 F. Supp. 3d 818, 821–22 (W.D. Mich. 2021).

[193] *See Biden*, 142 S. Ct. at 652; *OSHA*, 142 S. Ct. at 665.

[194] *The Roles of State and Federal Governments*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/roles-state-and-federal-governments [https://perma.cc/UBB8-59S7]. Because the federal government is one of limited power, any federal vaccine mandate would first be subject to the question of whether the mandate was within the federal government's limited powers. *See* Barnett & Gerken, *supra* note 152. In *OSHA*, for example, the Court invalidated a mandate because it was out of the realm of power granted to the specific issuing authority. *OSHA*, 142 S. Ct. at 665. Because states have broad power, a state vaccine mandate would not first be subject to such analysis.

[195] *See* Lucien J. Dhooge, *Pushing the Needle: Vaccination Mandates in the Age of Covid*, 59 SAN DIEGO L. REV. 481, 520 (2022); Ben Horowitz, *A Shot in the Arm: What a Modern Approach to* Jacobson v. Massachusetts *Means for Mandatory Vaccinations During a Public Health Emergency*, 60 AM. U. L. REV. 1715, 1718 (2011).

[196] Dhooge, *supra* note 195.

substantial threat to the entire population."[197] This analysis demonstrates one of the inexactitudes of the strict scrutiny analysis discussed in Part II; namely, that the compelling interest and narrowly tailored prongs of strict scrutiny are often conflated.[198] Here, Dhooge and Horowitz do not argue that protecting public health is not a compelling government interest, but rather that an emergency-level epidemic may be the only occasion under which the interest is compelling *enough* to justify the infringement of a fundamental right.[199] Horowitz then argues that the legislation can only be narrowly tailored if the government avoided broad discretion in determining that a public health emergency existed, thereby conflating the government interest with the narrow tailoring prong.[200]

2. Narrow Tailoring

Under an analysis of a fundamental right to bodily autonomy, Dhooge and Horowitz's arguments are persuasive, and the Court may agree that a vaccine mandate would only withstand strict scrutiny during a pandemic. However, even if the protection of public health and welfare generally is considered a compelling government interest, there is still room for the Court to go either way on the issue of narrow tailoring and the question of whether there are reasonable, less restrictive alternatives. To prevent an infringement on bodily autonomy, one could argue that there is a question of whether the government should *require* vaccines, or whether legislative power should be channeled instead toward *encouraging* people to get vaccines. Dr. Jody Lynee Madeira, for example, has suggested that vaccinations and other COVID-19 precautions could be successfully encouraged through practices and policies centered on empathy.[201] The Center for Disease Control (CDC) has pointed out that widespread misinformation about vaccines has contributed to fear of vaccines and lack of confidence in their effectiveness and safety, and strategies aimed at combating misinformation can go a long way toward increasing the public's confidence in vaccines.[202]

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[197] Horowitz, *supra* note 195, at 1731; Dhooge, *supra* note 195.

[198] *See supra* Part II.

[199] Horowitz, *supra* note 195, at 1734.

[200] *Id.* at 1738.

[201] Dr. Jody Lynee Madeira, *Worth a Shot: Encouraging Vaccine Uptake Through "Empathy*," 24 VAND. J. ENT. & TECH. L. 363, 364 (2022).

[202] *How to Address COVID-19 Vaccine Misinformation*, CTRS. DISEASE CONTROL & PREVENTION (Nov. 3, 2021), https://www.cdc.gov/vaccines/covid-19/health-departments/addressing-vaccine-misinformation.html [https://perma.cc/N9EW-R9RL].

This argument echoes the earlier analysis of ordered liberty and the implications of a bodily autonomy right on the legality of activities like sex work and drug use.[203] While a fundamental right to bodily autonomy may require the government to refrain from mandating infringements on bodily autonomy like vaccinations, nothing about this would prevent the government from using its power to encourage compliance by addressing the underlying reasons people do not want to get vaccinated. Just like how the government could use its power to lower the rates of abortion by reducing rates of unwanted pregnancies, or combat drug use and sex work by targeting the societal issues that result in these practices, legislation targeting the spread of misinformation, for example, could quell the type of fear that the CDC has highlighted as a major factor in vaccine hesitancy. Campaigns aimed at increasing transparency about the dangers of certain illnesses could prevent the phenomenon that occurred during the rise of antivaccine sentiment surrounding measles; namely, that because vaccines have prevented most people from seeing firsthand the horrors of the diseases vaccines prevent, people underestimate their severity.[204] Ultimately, however, there is always a possibility that the question of narrow tailoring will result in a realization that there are no viable alternatives, especially if a disease is novel and there are no available treatments. As Dhooge and Horowitz suggest, under pandemic circumstances, courts would likely uphold vaccine mandates, even under the strictest scrutiny.[205]

CONCLUSION

While advocates for abortion access and opponents of vaccine mandates may never be able to reconcile their conflicting interests, both would clearly benefit from the establishment of a fundamental right to bodily autonomy. These hypothetical analyses show that in both cases, a bodily autonomy right would elevate individual interests to a new level of importance, aligned with our nation's most revered liberty interests and unrestricted except under the strictest scrutiny. In implementing such a right, legislatures may be forced to address issues like abortion and vaccination with legislation significantly more narrowly

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[203] *See supra* Section IV.C.

[204] Raneem Rayes, *America's Measles Crisis Amid the Anti-Vaccine Movement*, PUB. HEALTH ADVOC. (Fall 2019), https://pha.berkeley.edu/2019/12/01/americas-measles-crisis-amid-the-anti-vaccine-movement/ [https://perma.cc/KJ8G-7MY7].

[205] *See supra* Section V.B.

tailored to combating the factors that actually contribute to the problems at hand.

Controversial issues of our day, like the Court's decision in *Dobbs* and the onset of the COVID-19 pandemic, have deep implications for our individual rights and bodily autonomy. Because the right to privacy under which so many of our individual rights are based is ill-defined and overbroad, courts—and individuals—could benefit from a new standard by which to analyze the constitutionality of restrictions on individual rights. A fundamental right to bodily autonomy, based on the provisions of the Constitution, protected by the history and traditions of this country, and inherent to the concept of ordered liberty, would require the courts to utilize a stronger and more concrete standard by which to protect individuals from unwanted infringement on their bodies and their choices.

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