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## Alito Versus Roe v. Wade: Dobbs As A Means of Circumvention, Avoidance, Attenuation and Betrayal of the Constitution

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# ALITO VERSUS *ROE V. WADE*: *DOBBS* AS A MEANS OF CIRCUMVENTION, AVOIDANCE, ATTENUATION AND BETRAYAL OF THE CONSTITUTION

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## I. INTRODUCTION

There can be no argument that Justice Alito is a learned justice of great knowledge and reason, and has a superb grasp of the law. As such, despite any opposition to or disagreement with his legal opinions, he is deserving of respect for his intellectual prowess, in general and as it relates to the Constitution. Notwithstanding all the aforementioned, wrong is wrong.

Justice Alito remains as human as any of us, given to holding opinions and

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philosophies taught to him from adolescence, cultivated through those that have influenced him most to this day, and refined to hardening through the natural and all-too-human trait of a confirmatory effort toward one's held beliefs. As such, despite the skillful manner in which Justice Alito has assembled law and reason to craft his *Dobbs* decision to overrule *Roe v. Wade*<sup>1</sup> and its progeny (in particular *Planned Parenthood v. Casey*<sup>2</sup>), it is clearly geared toward confirming his preferred outcome.

The wrongness of Justice Alito's reasoning and opinion comes not from his interpretation of the Constitution (though one could argue that it substantially comprises so much of the same flaws as those he cites in *Roe*), but from how he intentionally does not interpret it at all—not for purposes of *Dobbs v. Jackson Women's Health Organization*,<sup>3</sup> let alone *Roe* or *Casey*.<sup>4</sup> His ambition and goal was (and has been throughout his career) seemingly and fundamentally to do away with the precedence of *Roe* as the foundation of the right to abortion services<sup>5</sup>—to invalidate it (as he's done in *Dobbs*) as having constitutional origins, and disproving as inapposite all referenced authority therein.<sup>6</sup> Perhaps he has successfully achieved both goals in his decision, yet his analysis and conclusion offered only address one aspect of *Roe* (i.e., its constitutional and precedential basis)<sup>7</sup> and leaves without any discussion, consideration, or even recognition the existence of the equally important facet—what rights do mothers have, after fertilization, to control their bodies and chose not to remain gravid?

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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, 154 (1973).

2. *Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992).

3. *Dobbs*, 142 S. Ct. at 2228.

4. *See generally Roe*, 410 U.S. at 154; *Dobbs*, 142 S. Ct. at 2242; *Casey*, 505 U.S. at 833.

5. *See* Memorandum from Samuel A. Alito to U.S. Solic. Gen. 8 (May 30, 1985), [https://www.archives.gov/files/news/samuel-alito/accession-060-89-216/T\\_hornburgh-v-ACOG-1985-box20-memoAlitotoSolicitorGeneral-May30.pdf](https://www.archives.gov/files/news/samuel-alito/accession-060-89-216/T_hornburgh-v-ACOG-1985-box20-memoAlitotoSolicitorGeneral-May30.pdf) (writing “[N]o one seriously believes that the court is about to overrule *Roe v. Wade*, 410 U.S. 113 (1973). But the court's decision to review these cases nevertheless may be a positive sign . . . What can be made of this opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects?”); *see also* Memorandum from Mark Sullivan, Assoc. Dir. Presidential Personnel, to Mark Levin, Assoc. Deputy Att'y Gen. Dep't of Just. 13 (Dec. 12, 1985), <https://www.archives.gov/files/news/samuel-alito/accession-060-97-761/Acc060-97-761-box1-Alito.pdf> (stating “I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court . . . that the Constitution does not protect a right to an abortion.”).

6. *See generally Roe*, 410 U.S. at 154; *Dobbs*, 142 S. Ct. at 2228;

7. *See Dobbs*, 142 S. Ct. 2228; *Roe*, 410 U.S. at 154.

## II. CHARTING JUSTICE ALITO’S “SCHEME” OF ABNEGATION

Both *Roe* and to *Casey* determined that a right to abortion existed in the “penumbra” of the Constitution.<sup>8</sup> Under this rubric, *Roe* determined the right to abortion services was an unenumerated yet protected right of privacy, while *Casey* found that a right to elect not to remain gravid existed as a right of personal “liberty” under the Fourteenth Amendment.<sup>9</sup> In Justice Alito’s decision, however (the greater part of which is more an academic rebuttal to *Roe* and *Casey*), he explains to us that the bases for the right to abortion services, to stop a pregnancy once it occurs, as discerned by these Courts has always been wrongheaded, and he uses this prime opportunity in his tenure on the Court (where he now controls a majority of like-thinkers) to set things right—as he sees it. As will be discussed, how he does it, however, is more argument than analysis, and an effort to disregard the true central issue before him so that he may preference his personal biases.

### A. Justice Alito’s Dismantling of *Roe* and *Casey*

To understand how he arrives at his goal, we must understand how he constructs the basis for it. Justice Alito begins his process by discrediting *Roe*’s historiographical foundation.<sup>10</sup> Then, he goes about disproving the privacy right established in *Roe* by discrediting as inapposite the precedential support by which the *Roe* Court established it, arguing a lack of any referenceable connection to abortion in the cited authority.<sup>11</sup> In fact, he uses *Casey* to further this end by noting how even *Casey* discarded privacy as a basis for the right to abortion services, favoring instead the Fourteenth Amendment’s expression of “liberty” as the right’s true source.<sup>12</sup>

Turning next to *Casey*’s invalidation, under Justice Alito’s analysis, abortion cannot be a liberty protected by the Fourteenth Amendment because “liberty” as a generalized term (which he observes has a different meaning from person-to-person) is not what the Fourteenth Amendment protects.<sup>13</sup> Rather, he explains, the Fourteenth Amendment’s purpose is to establish a

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8. See *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (defining “penumbra” as being an unenumerated right that “is necessary in making the express guarantees [of the Constitution] fully meaningful”).

9. See *Roe*, 410 U.S. at 154; *Casey*, 505 U.S. at 846.

10. *Dobbs*, 142 S. Ct. at 2240–41 (citing to *Roe*, 410 U.S. at 113).

11. *Id.* at 2242 (stating that the Constitution makes no reference to abortion and therefore is not implicitly protected by any constitutional provision).

12. *Id.* at 2245.

13. *Id.* at 2257.

“scheme of *ordered* liberty,”<sup>14</sup> which is a very different construct under the Constitution than what is understood of “liberty” generally.<sup>15</sup>

Justice Alito instructs us that “liberty” allows one to think and say as they please because such is “central to personal dignity and autonomy.”<sup>16</sup> “Ordered liberty,” however, does not allow one to *do* as they please—it sets limits.<sup>17</sup> As such, he shows with precedent that for an unenumerated “liberty” right to exist under the Constitution, there must be a “scheme” that is “objectively, deeply rooted in this Nation’s history and traditions,”<sup>18</sup> and that scheme must be one the Court is capable of charting.<sup>19</sup>

As he offers cited examples throughout his decision to support his argument on this point, Justice Alito fails to show us whether “ordered liberty” has been traditionally employed throughout our Nation’s history and traditions to interfere with a right central to the discussion of this Article and underpinning the right to access abortion services and to make use of abortion services—a right of an individual to exercise total control over their own person, free from government interference (which this Article will term “self-sovereignty”).

### B. Justice Alito’s Sleight of Hand and Misdirection

“History and tradition” is where Justice Alito makes his primary attack on *Roe*, formulating a historiography to contrast that offered in the *Roe* decision.<sup>20</sup> With it, he argues that the right to abortion services has never been a part of our Nation’s history or traditions—not before the Fourteenth Amendment, not at the time of its enactment, and not at any time thereafter—until *Roe*.<sup>21</sup>

Plenty of critiques of Justice Alito’s historiography have already occurred, and continue, by those far more expert.<sup>22</sup> Ultimately, however, whatever

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14. *Id.* at 2246–47 (emphasis added) (citing *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019)).

15. *Dobbs*, 142 S. Ct. at 2248.

16. *Id.* at 2257.

17. *Id.*

18. *Id.* at 2247 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

19. *Dobbs*, 142 S. Ct. at 2248 (“[G]uided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term “liberty.”)

20. *See Dobbs*, 142 S. Ct. at 2249–51.

21. *See id.* at 2249–53.

22. *See, e.g.,* Lawrence Hurley, *Alito’s Abortion History Lesson in Dispute*, REUTERS (May 6, 2022), <https://www.reuters.com/legal/government/us-supreme-court-justice->

history Justice Alito chooses, just as whatever history *Roe* employed, is irrelevant. There was nothing like the Constitution or the Bill of Rights until they were drafted and adopted; slavery of a kind used in America was acceptable until the Fourteenth Amendment; and segregation of the type employed in America was long held permissible by the Court after the Fourteenth Amendment's enactment, until *Brown v. Board of Education*.<sup>23</sup>

Justice Alito's historiography is more a distraction than it is an analysis. His reasoning, his review of history and his use of precedent (mostly to support the basis for his analysis rather than for his conclusion) avoidantly draws focus entirely away from the true constitutional issue before him: a woman's personal sovereign right of control over her person as a whole (which would include a right not to remain gravid after fertilization of her egg), i.e., "self-sovereignty."<sup>24</sup>

Before exploring the concept of the right of "self-sovereignty" and how it is enshrined in the Bill of Rights (and ultimately reaches the right to abortion

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alitos-abortion-history-lesson-dispute-2022-05-06/; Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022), <https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174>; Robert Spitzer, *Originalism, History, and Religiosity are the Faults of Alito's Reasoning in Dobbs*, HIST. NEWS NETWORK (May 29, 2022), <https://historynewsnetwork.org/article/183250>; Jennifer Schuessler, *The Fight over Abortion History*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/arts/roe-v-wade-abortion-history.html> (discussing Alito's historiography, his sources and those scholars and historians who have offered discussion of the flaws in his recitations); Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC MAG. (Aug. 24, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> (commenting generally on the amateur historian efforts of judges to justify their decisions: "The decisive objection to the quest for original meaning, even when the quest is conducted in good faith, is that judicial historiography rarely dispels ambiguity. Judges are not competent historians. Even real historiography is frequently indeterminate, as real historians acknowledge. To put to a judge a question that he cannot answer is to evoke 'motivated thinking,' the form of cognitive delusion that consists of credulously accepting the evidence that supports a preconception and of peremptorily rejecting the evidence that contradicts it."). See generally Evan D. Bernick, *Vindicating Cassandra: A Comment on Dobbs v. Jackson Women's Health Organization*, 2021 CATO SUP. CT. REV. 227 (July 2022).

23. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (declaring segregation deprives people of equal protection of the laws guaranteed by the Fourteenth Amendment).

24. See *Dobbs*, 142 S. Ct. at 2258 (reasoning that "[t]he attempts to justify abortion through appeals to a broader right to autonomy . . . prove too much [because] [t]hose criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like," but failing to address at all what is a woman's right to control her own person, and what limits should be set to that right).

services), it must be briefly explored exactly how it is Justice Alito skillfully snakes around this central issue in his analysis. One method he employs is the application of “Textualism.” This a legal theory under which laws are interpreted based on their plain language meaning as written, and as it was understood at the time of their ratification.<sup>25</sup> For example, Justice Thomas made use of this legal theory during the *Dobbs* oral argument, proposing “[i]f we were talking about the Second Amendment, I know exactly what we’re talking about. If we’re talking about the Fourteenth Amendment, I know what we’re talking about because it’s written.”<sup>26</sup> His point is that, unless the Bill of Rights refers to abortion in some fashion as an articulated or implied right, it cannot be a right under the Constitution. It is a perspective keenly employed by Justice Alito to deconstruct the grounds supporting *Roe* and *Casey*.<sup>27</sup>

While Justice Alito (and others) may be facially correct that the professed right to abortion services is not even intimated in the text of the Constitution, textualism may actually work against him. If used faithfully, without biased motive and ambition to achieve a preferred outcome, textualism supports the understanding that what is fundamentally protected by the Bill of Rights is “individual freedom from personal tyranny or any form of external control or interference,”<sup>28</sup>—i.e., to “self-sovereignty”. If “self-sovereignty” is indeed the foundational right protected by the Bill of Rights (as will be shown later, herein), then it cannot be disregarded that “self-sovereignty”

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25. See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 36 (2012).

26. Transcript of Oral Argument at 86, *Dobbs v. Jackson Women’s Health Org.*, 124 S. Ct. 2228 (2022) (No. 19-1392) [Hereinafter “Transcripts”].

27. See *Dobbs*, 142 S. Ct. at 2237, 2246–47, 2266 (“[I]n 1973, this Court decided *Roe v. Wade*, 410 U. S. 113. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one.”; “[*Roe*] held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned.”; “[R]espondents [] argue that it ‘does not matter that some States prohibited abortion at the time *Roe* was decided or when the Fourteenth Amendment was adopted.’ Brief for Respondents 21. But that argument flies in the face of the standard we have applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment.” (internal brackets removed)).

28. Mark A. Stoler, *The Original Intent of the Constitution, Myths of American History*, YOUTUBE (Mar. 19, 2021), [https://www.youtube.com/watch?v=CCT1S9\\_07us](https://www.youtube.com/watch?v=CCT1S9_07us); see also JOHN LOCKE, *Two Treatises of Government* 7–9 (1689) (describing the false principal that mankind is born without self-sovereignty). See generally *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965); *Dobbs*, 142 S. Ct. 2228, 2242; *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

imbues upon a woman a right to control her physical body; and if that right therefore exists, then a woman has the right to control whether or not to remain gravid after fertilization, which leads then to her right to “de-gravidate” if she so chooses—her right to abortion services.

Not to rely solely on Textualism to move around an exploration of the foundations of a right to abortion services, Justice Alito incorporates a historiography, in part to rebut the one offered by the *Roe* Court, but primarily to remove the abortion right from consideration under the Constitution. His offer of our “Nation’s history and tradition,”<sup>29</sup> is to show how abortion was not a consideration when the Framers ratified the Bill of Rights and when the Fourteenth Amendment was later introduced; to evince how abortion was abhorred in our Nation and generally prohibited. There can be debate on this issue, as to whether or not abortion was indeed disfavored or banned by practice or in law,<sup>30</sup> but even if it is accepted that Alito’s premise is correct, a chartable right to abortion services is ultimately irrelevant. If history and tradition were the bedrock upon which all rights must be based, then past practices of “separate but equal” institutionalized by *Plessy v. Ferguson*<sup>31</sup> would never have been overcome in *Brown v Board of Education*.<sup>32</sup>

Reference to *Plessy* and *Brown* are interesting examples offered by Justice Alito and should be explored under his presented rubric of “history and tradition.” He presented *Plessy* as a comparative example to the *Roe* Court’s constitutional finding,<sup>33</sup> reasoning that *Roe*’s error was similar (if not the same) as *Plessy*’s necessitating an overruling (regardless of *stare decisis*<sup>34</sup>). However, *Plessy* in view of *Brown* may operate to undermine Justice Alito’s conclusions concerning the role history and tradition has in constitutional interpretation and rights recognition thereunder.

*Plessy v. Ferguson*<sup>35</sup> institutionalized a long and disgraceful practice of segregating people of African descent under a legal concept of “separate but equal.” It would not be misstated to say that such a discriminatory policy, (finding its origins with the original sin of slavery) was very much a part of our Nation’s history and tradition at the time of its decision. The Court

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29. See *Dobbs*, 142 S. Ct. at 2237.

30. See sources cited, *supra* note 22.

31. 163 U.S. 537 (1896).

32. 347 U.S. 483 (overruling *Plessy*, 163 U.S. 537).

33. See *Dobbs*, 142 S. Ct. at 2265 (offering how *Plessy* “betrayed our commitment to equality”) (internal quotes and citation omitted).

34. See *Dobbs*, 142 S. Ct. at 2261–78.

35. See *Dobbs*, 142 S. Ct. at 2237 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).



eventually overturned *Plessy*'s long precedent (and the history and tradition on which it was based) in *Brown v. Board of Education*,<sup>36</sup> not just because, as Justice Alito echoes it, the *Plessy* decision "betrayed our commitment to equality under the law,"<sup>37</sup> but because the attitudes and sentiments of dominant Caucasian society finally reached a point at which it prevailingly recognized that this particular tradition in our history of segregating out other human beings and to tolerate them as some sort of lesser or different species is contrary to our notions of equality as enshrined in the Constitution. Therefore, contrary to Justice Alito's interpretation, "history and tradition" would not be firm ground upon which to establish ordered liberty. In fact, he shows us that "history and tradition" can lead us down a wrong constitutional path and when it does, it must be set aside for the more just and constitutional outcome. Thus, he establishes, with his *Plessy* example, that "history and tradition" is only a guide, not a rule (and an imperfect one at that).

What we learn is that "history and tradition" operates as Justice Alito's mechanism to move around the abortion question and that which may underpin it.

### III. "SELF-SOVEREIGNTY"—THE FOUNDATIONAL RIGHT FROM WHICH ALL OTHERS ARISE

Here, now, the concept of "self-sovereignty" must be understood as it is established under the Constitution, and from it we will see how Justice Alito avoids it entirely through a self-serving application of "history and tradition."

Simply put, "self-sovereignty" is one's absolute right to define one's self in their mind, and then to actualize that definition—i.e., the right of self-determination, to control one's destiny in life, to decide and define for one's self who they will be, how they will be seen and acknowledged, what they will do and when and where they will do it to make real in society and the world the manifestation of their definition and determination of self.

#### A. *The Original Self-Sovereignist*

"Self-sovereignty" has its origins with John Locke. He does not use this distinct label, but his description in his treatises of every person's right of

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36. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

37. See *Dobbs*, 142 S. Ct. at 2266 (citing *Plessy*, 163 U.S. at 562 (Harlan, J. dissenting)).

“life, health, liberty and possessions”<sup>38</sup> perfectly encapsulates it in general terms. His explanation of “liberty” in particular is apropos, which he defines as the natural right “not to be subject to the inconstant, uncertain, unknown, arbitrary will of another []: as freedom of nature is, to be under no other restraint but the law of nature.”<sup>39</sup> In fact, “[t]his freedom from absolute, arbitrary power,” he continues, “is so necessary to, and closely joined with a [person]’s preservation, that [they] cannot part with it, but by what forfeits [their] preservation and life together: for a [person], not having the power of [their] own life, cannot, by compact, or [their] own consent, enslave [themselves] to any one, nor put [themselves] under the absolute, arbitrary power of another, to take away [their] life, when [they] please[]. No body can give more power than [one] has [them]self; and [one] that cannot take away [their] own life, cannot give another power over it.”<sup>40</sup>

His clear meaning is that one has power only over the self, absolutely, and that no exterior authority may interfere or suppress that power (except where one’s exercise of such power infringes upon another’s such right, as will be discussed in Part D, below). It is a basic theory that was put into practice by the Framers of the Constitution as they intently “wove Lockean notions of natural rights with concrete protections against specific abuses” when they substantially based the Bill of Rights upon Virginia’s Declaration of Rights as previously constructed by Lockean proponent, George Mason.<sup>41</sup>

### *B. A Chartable Constitutional Course Through the Bill of Rights*

Much like “privacy,” however, “self-sovereignty” is not a term used

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38. LOCKE, *supra* note 28, at 107 (“Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.”).

39. *Id.* at 114.

40. *Id.* at 181.

41. See A.E. Dick Howard, *Bill of Right*, HISTORY (Oct. 27, 2009), <https://www.history.com/topics/united-states-constitution/bill-of-rights> (“Once independence had been declared in 1776, the American states turned immediately to the writing of state constitutions and state bills of rights. In Williamsburg, George Mason was the principal architect of Virginia’s Declaration of Rights. That document, which wove Lockean notions of natural rights with concrete protections against specific abuses, was the model for bills of rights in other states and, ultimately, for the federal Bill of Rights.”); Leonard C. Helderman, *The Virginia Bill of Rights*, 3 WASH. & LEE L. REV. 225, 235–36 (1941) (stating “As the [Virginia] Declaration [of Rights] emerged . . . we may paraphrase its basic principles as follows: equal freedom of man in a state of nature . . . these principles, of course, were not original to George Mason. They came . . . particularly from John Locke. Sections 1-3 state the fundamental propositions of the natural rights school of political philosophy, more eloquently and concisely expressed by [Thomas] Jefferson in the Declaration of Independence.”).

anywhere in the text of the Constitution. Yet, if one (properly) uses Textualism, not just on a particular amendment, but on the Bill of Rights as a whole, then, just like “privacy,” the right of “self-sovereignty” is clearly found within the plain language, spread across the Bill of Rights, as a “scheme of ordered liberty,” that is “deeply rooted in our Nation’s history and tradition.”<sup>42</sup>

The four corners of the Bill of Rights as enacted in 1791 must be reviewed as a whole, rather than amendment-to-amendment (contrary to Justice Thomas’ preference, quoted above<sup>43</sup>), because the intention of any law is not limited to just the numbered statute and what it says there, it must be interpreted from its wording within the context of the entire related body of laws—the common scheme expressed. Disputes on the intent of a law will often rely on the meaning of only a few words.<sup>44</sup> In all such cases, however, the Courts will interpret those words by turning to the rest of the provisions, the Act as a whole, to establish context and meaning within the full statutory framework.<sup>45</sup> As Justice Scalia has described it, “[s]tatutory construction . . . is a holistic endeavor,” where ambiguity in isolation “is often clarified by the remainder of the statutory scheme . . .”<sup>46</sup> In other words, the “meaning of a statute is to be looked for, not in any single section [or amendment], but in all the parts together and in their relation to the end in view,”<sup>47</sup> under a form of judicial analysis referred to by Justice Scalia as the “whole-text canon.”<sup>48</sup> It should therefore be appropriate to apply the “whole-text cannon” to the

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42. See generally *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2236 (2022) (stating the Court will examine in *Dobbs* whether the right to obtain an abortion is rooted in the Nation’s history and tradition).

43. See Transcripts, *supra* note 26, at 86.

44. See *Yates v. United States*, 574 U.S. 528, 535 (2015) (plurality opinion).

45. *Yates*, 574 U.S. at 528; see also *NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 938–39 (2017); *FCC v. AT&T Inc.*, 562 U.S. 397, 407–08 (2011) (interpreting “personal privacy” in light of its use in a distinct but similar exemption within the same statute); *Holder v. Hall*, 512 U.S. 874, 883–84 (1994) (comparing the functioning of two sections within the Voting Rights Act of 1965 that “differ in structure, purpose, and application.”).

46. *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

47. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J. dissenting); see also *Richards v United States*, 369 U.S. 1, 11 (1962) (“a section of a statute should not be read in isolation from the context of the whole Act . . .”).

48. SCALIA & GARNER, *supra* note 25, at 167 (“A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts”). When construing the United States Constitution in *McCulloch*. Chief Justice John Marshall rightly called for “a fair construction of the whole instrument.” *McCulloch v. Maryland*, 17 US 316, 406 (1819) (Marshall, C.J.); see also 293 U.S. 388, 439 (1935) (Cardozo J., dissenting).

## Bill of Rights.

In so doing, a theme becomes apparent, one where personal rights (like liberty) are not generally granted (as it is normally described), but where rights within a broader theme are recognized as having immunity (within reason) from government intrusion or suppression. For instance, the First Amendment<sup>49</sup> restrains the government from making laws that prevent people from choosing and practicing their faith, from expressing their thoughts and beliefs freely, and from assembling with others for peaceful discourse on the same and other issues of concern. The Second Amendment<sup>50</sup> restrains the government from taking away the right of the individual to own arms. The Third<sup>51</sup> and Fourth<sup>52</sup> Amendments, which are seen as interlocking in nature,<sup>53</sup> prevent the government from intruding upon the privacy of one's home (by forcing the housing of soldiers in peacetime without consent) as well as the privacy of their physical person (such as jacket pockets).<sup>54</sup> The Eighth Amendment<sup>55</sup> restrains the government from imposing on a person any punishment that is "cruel and unusual."<sup>56</sup> Then,

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49. U.S. CONST. amend. I ("Congress shall make no law . . .").

50. U.S. CONST. amend. II (the right "to keep and bear Arms, shall not be infringed.").

51. U.S. CONST. amend. III ("[n]o soldier shall . . .").

52. U.S. CONST. amend. IV ("the right of the people . . . against unreasonable searches and seizures, shall not be violated . . ." by the government absent reasonable cause and a warrant.).

53. *See generally* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).

54. *See* Terry v. Ohio, 392 U.S. 1, 17 (1968) (finding that "the Fourteenth Amendment protects people, not places . . . wherever an individual may harbor a reasonable expectation of privacy." (internal quotations omitted)) (citing Katz v. United States, 778 F.2d 963 (1985), cert. denied 476 U.S. 1159 (1986)).

55. U.S. CONST. amend. VIII (no "cruel and unusual punishments inflicted" by the government).

56. *See, e.g.,* Graham v. Florida, 560 U.S. 49 (2010) (holding life imprisonment for non-homicide juvenile offenders is cruel and unusual); Miller v. Alabama, 567 U.S. 460 (2012) (holding sentencing schemes that mandate life imprisonment without parole for juvenile homicide offenders violates the Eighth Amendment); Hope v. Peler, 536 U.S. 730 (2002) (holding any action taken that exceeds what is necessary to restore order, like handcuffing a prisoner to a hitching post for seven hours to be taunted and denying him bathroom breaks, violated the Eighth Amendment); Hudson v. McMillian, 503 U.S. 1 (1992) (malicious and sadistic punishment without significant physical injury); Estelle v. Gamble, 429 U.S. 97 (1976) (indifference to a prisoner's serious illness or injury); Brown v. Plata, 131 S. Ct. 1910 (2011) (prison overcrowding). The Eighth Amendment also restrains the government from imposing "excessive bail" or "fines", requiring a reasonableness standard when imposing such penalty. This is further evidence that the

of course, there is the Ninth Amendment,<sup>57</sup> which implicitly restrains the government from imposing laws that constrain a right simply because it is not represented by words in the Constitution (i.e., just because the Constitution does not state it does not mean the right will not fall generally under its protection). Even the Fourteenth Amendment<sup>58</sup> restrains the government from taking any action to restrain liberty absent due process.

In contrast, the language of the Fifth, Sixth, Seventh and the Tenth Amendments are very different. The Fifth Amendment<sup>59</sup> grants to a person a right to procedure when accused of a crime (to a process for being accused, finality after trial without fear of re-litigation) and the right not to be forced to be a witness against oneself. The Sixth Amendment<sup>60</sup> grants one the right to a speedy trial, to know their accuser, to a trial by jury, to full access to evidence including witnesses for aiding a defense, and the right to be represented by a lawyer. The Seventh Amendment<sup>61</sup> grants the right to “the peculiar and essential feature[] of trial by jury at common law” for civil matters (which existed prior to the Constitution).<sup>62</sup> Finally, the Tenth Amendment<sup>63</sup> grants all powers to the States then to persons (respectively) which have not been expressly reserved to the federal government or otherwise proscribed by the Constitution. The language of these four Amendments, expressing grants of rights of the individual to procedure or powers of the State, appears to starkly contrast the language of the others which describe restraints on government power over the individual.<sup>64</sup>

Thus, if Textualism is applied in a faithful manner, a pattern of meaning

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Framers formulated the Bill of Rights as an enumeration of restraints upon the government from unreasonably interfering with a person’s liberty.

57. U.S. CONST. amend. IX.

58. U.S. CONST. amend. XIV.

59. U.S. CONST. amend. V (a right to indictment before being tried and a right against self-incrimination).

60. U.S. CONST. amend. VI (right of counsel in criminal matters).

61. U.S. CONST. amend. VII (right to a trial by jury).

62. *See* *Am. Publ’g Co. v. Fisher*, 166 U.S. 464, 468 (1897); *see also Colgrove v. Battin*, 413 U.S. 149, (1973) (“[T]he purpose of the Seventh Amendment was ‘to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution.’”) (citing to *Dimick v. Schiedt*, 293 U.S. 487, 490 (1935)).

63. U.S. CONST. amend. X.

64. It can be interpreted that the Fifth and Sixth Amendments are furthering the intent to restrain the government from imposing upon the general liberty of an individual to the extent that they impose procedural requirements for governmental action which would result in restraint upon capriciousness. Nonetheless, the result is the grant of right to procedure which may be exercised or waived as much as it must be followed. *See* U.S. CONST. amends. V, VI.

is easily discerned. The Fifth, Sixth, Seventh and Tenth Amendments are the ones enumerating rights being granted, while the First, Second, Third, Fourth, Seventh and Ninth Amendments enumerate something different—they are restraints on the government, operating as a shield to prevent it from infringing, abridging or suppressing pre-existing rights inherent to all people. This “shield interpretation” seems a more faithful application of Textualism. And if we further apply the “whole-text cannon” to these so-called “enumerated restraints”, what becomes clear is that the Bill of Rights was not intended to just protect the particularized rights expressed in each of the relevant amendments. Its purpose was to prevent unreasonable intrusion upon an overarching right of “self-sovereignty” defined by the constellation of rights they reference. After all, does not the catalog of rights within the enumerated restraints of the Bill of Rights (the right of thought, speech, to worship as one pleases, to have the tools to defend one’s self, family and home with the assurance that the same will not be unreasonably intruded upon by the government, to expect measured justice for misdeeds and freedom from abuse in its name, and to expect all ancillary rights related to all of the foregoing list)<sup>65</sup> imply a broader scheme such as “self-sovereignty?”

This thesis of “self-sovereignty” is not unique to this Article. There have been examples in the past of the Court’s articulation of its existence under the Constitution (though without having concisely referred to its doctrine as “self-sovereignty”). Justice Horace Gray, for instance, gave a succinct description of it thusly in *Union Pacific Railway Company v. Botsford*:

No right is held more sacred, or is more carefully guarded [ ] than the right of every individual to possession and control of [their] own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . . The right to one’s person may be said to be a right of complete immunity: to be let alone.<sup>66</sup>

Justice Benjamin Cardozo echoed this by declaring in *Schloendorff v. Society of New York Hospital*, that “[e]very human being of adult years and sound mind has a right to determine what shall be done with [their] own body . . .”<sup>67</sup>. This was echoed once again by Justice Mosk when he wrote in *Cobbs v. Grant* that “a person of adult years and in

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65. U.S. CONST. amend. I–IV, VII and IX.

66. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (internal citation omitted).

67. *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (overruled on other grounds by *Bing v. Thunig*, 2 N.E.2d 656 (N.Y. 1957)).

sound mind has [a] right, in the exercise of control over [their] own body . . . ”<sup>68</sup>

“[T]he right of every individual to possession and control of [their] own person”<sup>69</sup> and “a right to determine what shall be done with [their] own body”<sup>70</sup> as innately recognized by the above Justices, basic concepts of “self-sovereignty.” It operates as a core right expressed by the plain language of the Bill of Rights, and it is one clearly intended by the Framers who formulated and enacted it.<sup>71</sup> It must now be a doctrine recognized and acknowledged by those such as Justice Alito who would profess themselves to be Textual Originalists.

### C. *Hidden in Plain Sight*

It is proposed here the “Doctrine of Self-Sovereignty” (as it will be called) has not emerged because it has been mislabeled as “privacy.” As a legal concept, “privacy” refers to a person’s “right to be let alone” by the government, so that they may have for themselves and “communicate to others” their “thoughts, sentiment, and emotions.”<sup>72</sup> When thought turns to action, the legal concept of “privacy” appears to become more muddled. For example, speech, whether spoken or written and whether conceived in the mind or shared with others,<sup>73</sup> is constitutionally protected. However, when speech is directed toward inciting or producing imminent lawless action that is likely to and does result therefrom, the cloak of constitutional protection is removed.<sup>74</sup> Here is where “self-sovereignty” distinguishes itself. It is one step more than mere “privacy,” it is an action or conduct that is self-facing in furtherance of the private thought, sentiment, and emotion; to manifest self-determination and self-definition in the world. To put it more

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68. *Cobbs v. Grant*, 502 P.2d 1, 10 (1972) (referring to the right to receive or decline medical treatment).

69. *Botsford*, 141 U.S. at 251.

70. *Schloendorff*, 105 N.E. at 93.

71. See Howard, *supra* note 41; Helderman, *supra* note 41, at 236.

72. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198, 205 (1890).

73. See *Martin v. Struthers*, 319 U. S. 141, 143 (1943).

74. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also *Giboney v. Empire Storage & Ice Co.* 336 U.S. 490, 502, 598 (1949) (The Court rejected the contention that “the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” The court added that “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”).

succinctly, it is one thing to discuss and understand concepts, it is another to perform them to invoke their real-world consequences.

Take, for instance, *Griswold v. Connecticut*, which struck down as unconstitutional a Connecticut law that made it a crime to use contraception and to assist, abet or counsel for its use.<sup>75</sup> The appellant in that case, a doctor, was convicted of the latter crime of assisting, abetting and counseling a married couple in their use of contraception.<sup>76</sup> The Court found that the law “operate[d] directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”<sup>77</sup> In the Court’s opinion, the notion that the State could govern the intimate “precincts of marital bedrooms” was repugnant to the privacy right protected by the Constitution.<sup>78</sup> “Privacy” is a clear aspect of the foregoing, yet, there was more than thought, sentiment or emotion at the center of the controversy. It was not illegal to speak about contraception. Though “counseling” was a primary part of the case (in that a doctor was criminally convicted for speaking with married persons on how to make use of contraception to prevent pregnancy), the intent behind the law was directed toward preventing the tangible action of married persons making educated use of contraception for the purpose of preventing pregnancy. Without a doubt, privacy within the confines of the marital bedroom was a primary issue, but entangled with it and central to the prohibition found to be unconstitutional was the self-facing, tangible action and its consequence. Thus, “privacy” alone was not central to the matter before the court, it was merely a component of a binary issue (privacy and self-facing action) encompassed by “self-sovereignty.”

The Court tends time and again to apply (or misapply) “privacy” as the central deciding factor of constitutionality where it exists as half of a binary matter of privacy/self-facing action which this Article refers to as “self-sovereignty.” *To wit*: cases such as those involving the right to refuse life-prolonging medical services,<sup>79</sup> the right to marry whomever one loves

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75. *Griswold*, 381 U.S. at 485.

76. *Id.* at 480.

77. *Id.* at 482.

78. *Id.* at 485 (“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”).

79. *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 262 (1990) (establishing the right to refuse medical services) (“A competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment”).



regardless of race, nationality or gender,<sup>80</sup> the right to same sex copulation,<sup>81</sup> or the right to own and view pornography in one's home.<sup>82</sup> All of these decisions turned on the penumbral right of privacy.<sup>83</sup> Other more basic examples include the right to freedom of movement,<sup>84</sup> the right to choose how to rear and educate one's child,<sup>85</sup> the right to procreate,<sup>86</sup> and even the

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80. *See generally* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a Virginia State law prohibiting Caucasians and people of color from marrying, finding that the right to marry, and therefore to marry whom one chooses, is protected by the Constitution). *Obergefell v. Hodges*, 576 U.S. 644, 666 (invalidating laws banning same-sex marriages and refusing to recognize their legality when performed in other States that permit them, finding that "the decision whether and whom to marry is among life's momentous acts of self-definition.").

81. *See generally* *Lawrence v. Texas*, 539 US 558, 578 (2003) (finding that a Texas law criminalizing consensual, sexual conduct between individuals of the same sex violates Due Process under the Fourteenth Amendment).

82. *See generally* *Stanley v. Georgia*, 394 U.S. 557, 565, 568 (1969) (finding that the First Amendment does not allow a state to criminalize the private possession of obscene matter for personal use.). *Miller v. California*, 413 U.S. 15, 36–37 (1973) (overturning the conviction of Marvin Miller and remanding to the appellate court for further review, finding unconstitutional a law prohibiting him from distributing "obscene" material in a mass mailing advertisement for pornographic material he was selling); *Renton v. Playtime Theaters*, 475 U.S. 41, 54–55 (1986) (confirming that municipalities are barred by the First Amendment from banning adult theaters, though they may constrain them with zoning restrictions that limit their location to remote areas).

83. *Griswold*, 381 U.S. at 484 ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion . . . [The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance); *see Poe v. Ullman*, 367 U. S. 497, 516–22 (1961) (Douglas, J., dissenting) ("This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live."). As examples, Justice Douglas points to the First Amendment right of association, the Third Amendment's proscription of housing soldiers "in any house" during peacetime without consent, the Fourth Amendment's affirmation of a person's right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures", the Fifth Amendment's proscription of the government to force an individual to incriminate themselves, and the Ninth Amendment's proscription from denial or disparagement of any rights not expressly enumerated in the Constitution.

84. *See generally* *Crandall v. Nevada*, 73 U.S. 35, 49 (1868) (finding that a state cannot use taxation to inhibit people from leaving a State).

85. *See generally* *Pierce v. Soc'y of Sister*, 268 U.S. 510, 534 (1925) (finding that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them.).

86. *See generally* *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding that the right appropriate is a fundamental right and states cannot compel criminals to be sterilized based on conviction for certain crimes.). *See also* *Wisconsin v. Yoder*, 406 U.S.

right of prisoners to engage in hunger strikes.<sup>87</sup> Are these all issues of privacy? Of course they are, but in considering the formula of Justice Alito’s challenge of the constitutionality of abortion services,<sup>88</sup> do these cases lend themselves neatly under the privacy rubric? Because of the addition of actions to private thought, perhaps not.<sup>89</sup>

Given the real-world implications involved in all of the foregoing example cases, and the self-facing consequence which results, “self-sovereignty,” as a proposed legal doctrine in this Article, appears to epitomize well the kind of freedom described by Locke<sup>90</sup> and impliedly recognized in such previously discussed cases as *Union Pacific Railway Company*,<sup>91</sup>

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205 (1972) (striking down a law requiring compulsory education past the eighth<sup>th</sup> grade on the basis that a parent’s freedom of religion outweighs the interest of the State in educating its children.).

87. See generally *Zant v. Prevatte*, 286 S.E.2d 715, 716–17 (1982) (“A prisoner does not relinquish his constitutional right to privacy because of his status as a prisoner. The State has no right to monitor this man’s physical condition against his will; neither does it have the right to feed him to prevent his death from starvation if that is his wish.”).

88. *Dobbs*, 142 S. Ct. at 2267 (“[C]iting a broad array of cases, the Court found support for a constitutional ‘right of personal privacy, [but the Court] conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference”); see *Whalen v. Roe*, 429 U.S. 589, 599–00 (1977). Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce*, 268 U.S. 510 (right to send children to religious school); *Meyer v. Nebraska* 262 U.S. 390, 401–02 (right to have children receive German language instruction). What remained was a handful of cases having something to do with marriage, *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry a person of a different race), or procreation, *Skinner*, 316 U.S. 535 (right not to be sterilized); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married persons to obtain contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (same, for unmarried persons). But none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed “potential life.”

89. See *Dobbs*, 142 S. Ct. at 2235–36 (“While individuals are certainly free to *think* and to *say* what they wish about “existence,” meaning,” the “universe,” and “the mystery of human life,” they are not always free to *act* in accordance with these thoughts.”) (original emphasis). Justice Alito’s point here has merit. One cannot act on any impulse. Where his coherence breaks down, however, and as will be discussed further in this Article, is where the consequences of such actions have impact primarily upon the acting individual.

90. See LOCKE, *supra* note 28, at 19.

91. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

*Schloendorff*<sup>92</sup> and *Cobbs*.<sup>93</sup> It generally and specifically fits more uniformly and ubiquitously, lending itself neatly to the legal precepts of “privacy,” while also assimilating constitutional protections the Court has recognized to exist for such rights as that to refuse life-saving medical services or to marry whomever one loves, or to engage in physical intimacy with any person of any gender, or to choose to use pregnancy-preventing materials. For each such act, being profoundly private, the Constitution must protect them simply because they are the exercise of one’s private understanding and personal autonomy, and particularly because the ultimate impact of each action is upon no other person than the one engaging in the action (and those consenting to participation).<sup>94</sup>

Justice Alito would use “history and tradition” to further obscure the concept of “self-sovereignty.”<sup>95</sup> The coherence of his analysis asserts that unless it has been done before, and over time assumed as a traditional part of our society, then he declares that it cannot be found to have constitutional protection.<sup>96</sup> However, notwithstanding the earlier discussion of how “history and tradition” is flawed, if Justice Alito wishes to use “history and tradition” as his north star, then he should begin with the Framers’ intent to use Lockean principles,<sup>97</sup> and heed their articulated purpose for Bill of Rights’ as a restraint on the government’s oppressive invasion of private rights, “not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.”<sup>98</sup> Thus, for Justice Alito’s described purpose, “history and tradition” should begin with the laws from which they arise, not

92. *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 91, 93 (N.Y. 1914).

93. *Cobbs v. Grant*, 502 P.2d 1, 10 (1972).

94. It is predictable that an argument will be made that pregnancy is not only self-facing. This is accepted for purposes of the discussion herein, and will be addressed later. In brief preview, the self-facing aspect must be recognized and addressed, and then balanced against the equities of the “potential life” (this term having been used by Justice Alito in *Dobbs*, 142 S. Ct. first at 2236 and then throughout) for a just outcome for both the mother and the State’s interest in protecting “potential life” to result. One should not be recognized without the other as there are always two interests involved.

95. See *Dobbs*, 142 S. Ct. at 2236, 2258 (finding that Respondent’s and Solicitor General’s reliance on *Lawrence* and *Obergefell* “prove too much,” because they over-generalize the right to define one’s “concept of existence” (citing *Casey*, 505 U.S. at 851) as “licens[ing] fundamental rights to illicit drug use, prostitution, and the like,” none of which have “any claim to being deeply rooted in history” (citing *Compassion in Dying v. Washington*, 85 F.3d 1440, 1444 (9th Cir. 1996)).

96. See *id.* at 225.

97. See Howard, *supra* note 41; Helderman, *supra* note 41, at 235.

98. James Madison, *Letter to Thomas Jefferson* (Oct. 17, 1788).

necessarily how they are later applied. But that would not work well for the “scheme of ordered liberty” he seems to favor in his analysis.

### *E. Liberty Has Limits*

To be clear, all rights have their limits. As Justice Alito says it, “individuals are [] free to *think* and to *say* what they wish . . . , [but] they are not always free to *act* in accordance with those thoughts.”<sup>99</sup> As an example of this admitted truism, the protections of the First Amendment end where one falsely shouts fire in a theater,<sup>100</sup> or speaks to incite others to violence (i.e., the interests of the speaker versus the safety of others).<sup>101</sup> Another example is the Second Amendment, the purpose of which, the Court has found, is to protect one’s general right of self-defense,<sup>102</sup> but limits that right to where harm or death to a person (one’s self or others) may result—and even then only where there is a danger of great injury or death from the aggressor<sup>103</sup> (i.e., one cannot settle an argument with a bullet).

In the case of “self-sovereignty,” a similar limit should be expected, in that its limits lie where its exercise would unreasonably impose upon the rights of another or would unreasonably disrupt public order or safety. At that point, it is proposed here, the government should have power to reasonably constrain its exercise.

This would comport with the Lockean principle that “[e]very one, as he is bound to preserve himself, and not to quit his station willfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the

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99. See *Dobbs*, 142 S. Ct. at 2235–36.

100. See *Schenk v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

101. See generally *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969). See also *Giboney v. Empire Storage Ice, Co.*, 336 U.S. 490, 502 (1949).

102. See generally *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (finding that that a D.C. ban on handgun possession, a weapon historically used for self-defense in the home, violated the Second Amendment).

103. GEORGE E. DIX, *GILBERT LAW SUMMARIES: CRIMINAL LAW XXXIII* (18th ed. 2010) (“[a] person is privileged to use such force as reasonably appears necessary to defend him or herself against an apparent threat of unlawful and immediate violence from another.”). See generally DAVID C. BRODY & JAMES R. ACKER, *CRIMINAL LAW* 130, 137 (2014) (discussing that the use of deadly force is justified only where one reasonably believes it necessary to prevent the other’s infliction of great bodily harm or death); RANETA LAWSON MACK, *A LAYPERSON’S GUIDE TO CRIMINAL LAW* 141 (1999).

preservation of the life, the liberty, health, limb, or goods of another.”<sup>104</sup> More importantly, this would fit well under the rubric offered by Justice Alito, that “[o]rdered liberty sets limits and defines the boundary between competing interests.”<sup>105</sup>

However, contrary to Justice Alito’s definition of “ordered liberty” above,<sup>106</sup> he makes no analysis as to the balancing of competing interests inherent in the question of abortion. *To wit*: though he gives lip service to the concept of “competing interest” as being a part of “ordered liberty,”<sup>107</sup> and even gives short shrift credit to *Roe* and to *Casey* for attempting a balance,<sup>108</sup> he, himself, never makes the effort at establishing a balance (nor do any of the concurring Justices). In fact, upon touching the concept, he immediately moves from the notion of balance, directing his (and our) attention instead to rebutting disparagingly his fellow dissenting Justices, and to arguments in advance of (and to attempt at undercutting) criticisms and legal punditry he predicts to follow his decision.<sup>109</sup>

By leaving unanswered the question as to whether a woman has a right of control over her person and her destiny as mother or progenitor, he precludes having to address the next logical inquiry into whether that right extinguishes at the simple moment of her egg’s fertilization. And without having to explore that inquiry, he can avoid entirely the application of his concept of ordered liberty and the balance found under its rubric between the woman’s right of self-sovereignty, and any claimed interest of the State to interfere with it.

Worse, still, is that Justice Alito has now disqualified the Court entirely from addressing the question of balance. He declares that the Court has not the “authority to weigh [policy] arguments [on abortion] and decide how abortion may be regulated in the states.”<sup>110</sup> However, this reasoning misdirects our attention (yet again) from what is central before the Court, the

104. LOCKE, *supra* note 28, at 107.

105. *Dobbs*, 142 S. Ct. at 2236.

106. *Id.*

107. *Id.*

108. *Id.* (“*Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed ‘potential life,’” citing *Roe*, 410 U.S. at 150 and *Casey*, 505 U.S. at 852 as the source of quoted term “potential life”).

109. *Id.* at 2236. As soon as Justice Alito references the effort of *Roe* and *Casey* to balance interests, he quickly shifts to how others may believe abortion rights should be more expansive or strict, giving no time at all in the remainder of his decision to any balancing considerations.

110. *See Dobbs*, 142 S. Ct. at 2259.

question of a woman’s “self-sovereignty,” over her body and her destiny, when she becomes pregnant. If Justice Alito truly desired “ordered liberty,” that would have been the start of his analysis. And if he could then find his way to still concluding that there is no right to abortion services arising from the right of a woman to her self-sovereignty over her body, then, at the least, his naked intentions and that of his cohort of Court Justices, would be more explicitly honest.

And so, “we end this [analysis and article] where we began,”<sup>111</sup> acknowledging Justice Alito’s intellectual prowess as a judge, his knowledge of the Constitution, and, additionally, his ability to use both to masterfully achieve in *Dobbs* the outcome he preferred and waited so long in his career to achieve.<sup>112</sup>

#### IV. CONCLUSION

It must be that, in a free society guided by ordered liberty, a person enjoys the right to control themselves, their body, their person, their identity, and their role and destiny in life. If accepted, then included under that rubric is the right of a woman to choose whether to remain gravid, to assume the role of mother or progenitor, to choose her partner for either of those purposes, and to assume the permanent physical consequences that would come with such a commitment.

The question of abortion is fraught with controversy because, at the start of the discussion, it is a weighing of the right of a woman to self-sovereignty, and then ends with the interests of preserving “potential life.”<sup>113</sup> When this question comes before the Court, its sole purpose, if it is to apply ordered liberty, should be to balance those rights as best as it is able, based on whatever information the Court can amass. That is its function, according to Justice Alito. Yet, that function is in fact abandoned by him.

When *Dobbs* came before the Court, balance was exactly what was asked of it—was fifteen weeks, on balance, a reasonable time frame for the erosion of a woman’s right to choose after which the State’s interest in preserving the potential life of the fetus may supersede it?<sup>114</sup> However, rather than address that question in furtherance of ordered liberty, Justice Alito instead reframed the matter to address his personal criticism of *Roe* and his personal

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111. *See id.* at 2284.

112. *See* sources cited, *supra* note 5.

113. *Dobbs*, 142 S. Ct. at 2236.

114. *See Dobbs*, 142 S. Ct. at 2243 (“The law at issue in this case [is] Mississippi’s Gestational Age Act” which prohibits an abortion after fifteen weeks); MISS. CODE ANN. § 41-41-191 (2018).

conscience regarding abortion. And as he addresses a question never asked in pursuit of his own agenda, he and his cohort fathomed not to just eliminate *Roe* from the law, but to fashion a decision to permanently proscribe the Court from ever addressing the issue of a woman's right to control her person.<sup>115</sup>

Access to abortion services was never truly the central right at issue before the Court in *Roe*, *Casey*, or *Dobbs*. It was the right of a woman to self-sovereignty. As offered in this Article, if the Constitution protects a person's right to speak their mind,<sup>116</sup> to own weapons for self-defense,<sup>117</sup> to be free of government intrusion into their home or their own person,<sup>118</sup> then it protects a woman's sovereign right to not bear a child, to not endure the rigors and permanent physical change that would result, and to not be either a mother to or progenitor of another human being. The abortion question has only ever been a tangential issue, arising from the fundamental principle of self-sovereignty, a right which must have constitutional protection to make "the express guarantees [of the Constitution] fully meaningful."<sup>119</sup> And as such, what *Roe* and *Casey* attempted to resolve, and what was asked of the Court to determine in *Dobbs*, was the balance between competing interests – to establish where must the right of the mother end in favor of the interests of the potential life that is forming within her.

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115. See *Dobbs*, 142 S. Ct. at 2243 ("This Court has neither the authority nor the expertise to adjudicate those [impassioned and conflicting arguments about the effects of the abortion right upon the lives of women], and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa*, 372 U. S. 726, 729–30 (1963)); Kavanaugh concurring at 2306 ("This Court [] does not possess the authority either to declare a constitutional right to abortion or to declare a constitutional prohibition of abortion.").

116. See *Dobbs*, 142 S. Ct. at 2277 ("This Court has neither the authority nor the expertise to adjudicate those [impassioned and conflicting arguments about the effects of the abortion right upon the lives of women], and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the 'original constitutional proposition' that 'courts do not substitute their social and economic beliefs for the judgment of legislative bodies.'" (citing *Ferguson v. Skrupa*, 372 U. S. 726, 729–30 (1963)); *id.* at 2306 (Kavanaugh, J., concurring) ("This Court [] does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion." (emphasis in original)).

117. U.S. CONST. amend. II.

118. U.S. CONST. amends. III, IV and VIII.

119. See *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965) (defining "penumbra" as being an unenumerated right that "is necessary in making the express guarantees [of the Constitution] fully meaningful").

If *Roe* was so flawed, then limiting the Court's action to just doing away with it was an egregious error by Justice Alito. He should have offered a new starting point, first by simply acknowledging the constitutionally protected right of a woman to self-sovereignty, and then applying some of the ordered liberty he professed to be the scheme intended by the Constitution. It was incumbent upon him to offer a new test by which a balance could be made between the interests involved as best as possible.

It is not proposed by this Article that the Court could offer a completely clear standard or even a clean rule that would fit all circumstances. It is without doubt a complex issue, and any balancing test offered would be subject to years of rigor and further refining to establish general limits, accepted boundaries, and necessary exceptions therefrom. It would be a long and difficult road, but a necessary one to travail for the purpose of upholding the Constitution, for preserving the sovereign right of a woman's personal autonomy, and for applying the form of ordered liberty as Justice Alito describes it – a road not new to this or any Court before it.

Whether Justice Alito's actions are the result of his theological biases or his role as a judiciary, history will ultimately decide. However, given his posture and rhetoric for so long<sup>120</sup> and the way he comes to his conclusion as described herein, his motivation seems clear. All that can be said of his decision at this moment is that the pendulum will eventually swing back the other way (and likely remain there). However, until that day comes, Justice Alito and his cohort will have sacrificed a great many lives<sup>121</sup> for the sake of advancing his and their personal beliefs<sup>122</sup> over the Bill of Rights' fundamental purpose.<sup>123</sup>

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120. See sources cited, *supra* note 5.

121. Oriana Gonzalez, *Health Experts See Rise in Maternal Mortality Rates Post-Roe*, AXIOS (July 5, 2022), <https://www.axios.com/2022/07/05/maternal-mortality-death-abortion-ban-roe> (“The maternal death rate in the U.S. could increase by 24% if a nationwide abortion ban was enacted, according to a University of Colorado study”); see also Kate Zernike, *Medical Impact of Roe Reversal Goes Well Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sept. 10, 2022), <https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html>.

122. See sources cited, *supra* note 5.

123. See LOCKE, *supra* note 28 at 7–9.