The Delray Democrat

A Dangerous and Slippery Slope[1]

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We should be very concerned that the reversal of *Roe v. Wade* is the beginning of a slippery slope turning back the calendar and eliminating many of our rights.

You would hope that, with the demise of Roe, the right would be content that they won their long sought after victory. However, it may just be the beginning. Emboldened by radical Republicans in state legislatures and activist judges willing to eliminate fifty-year-old legal precedent, there is no reason to trust that other rights are safe.

If we understand the draft of the Court's decision in *Dobbs v. Jackson Women's Health Organization*, the basis for overturning Roe is that abortion is not mentioned in the Constitution. Justice Alito wrote: "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely — the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."

Couple that legal theory with the fact that some on the right oppose birth control as vehemently as they do abortion (remember that Christian advocacy groups praised President Trump when he said he would eliminate the ACA's mandate that employers cover workers' birth control) and it is not a stretch to see birth control as the next right in their crosshairs.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the U.S. Supreme Court ruled that the Constitution protects the liberty of married couples to buy and use contraceptives without government restriction. The Court invalidated a Connecticut law that prohibited any person from using any drug or medical instrument that prevented conception. The Court found that the law violated the "right to marital privacy."

When considering the *Griswold* decision, keep in mind that the Constitution does not mention privacy. Two members of the Court dissented on that basis and said that the Court should not interfere with the law. Based on *Dobbs*, this nearly 60-year-old decision is fair game.

If a right is not mentioned in the Constitution, or is not implicitly protected by the Due Process Clause because it is "deeply rooted in this Nation's history," it could be eliminated. In addition to birth control, gay marriage, Miranda warnings, and Public Defenders are not mentioned in the Constitution and are not deeply rooted in our history. That puts them at risk.

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[1] *The Delray Democrat*, May 2022, page 1.

In writing for the majority in the draft opinion of *Dobbs*, Justice Alito certainly recognized that the Court's decision was going to open the floodgates when he felt compelled to write: "To ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedent that do not concern abortion."

However, to the radical right and its activist judges, his caveat will be meaningless.

In *Obergefell v. Hodges*, the Supreme Court ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The 5–4 ruling requires all fifty states, the District of Columbia, and the Insular Areas to perform and recognize the marriages of same-sex couples on the same terms and conditions as the marriages of opposite-sex couples, with all the accompanying rights and responsibilities. However, gay marriage is not mentioned in the Constitution. Finding implicit protection in the Fourteenth Amendment may not be enough inasmuch as the criminalization of homosexuality is far more deeply rooted in our history than gay marriage.

Keep in mind that sodomy (commonly used to prosecute homosexual men) was a crime in every state until 1962 when states began adopting a penal code that removed consensual sodomy as a crime. In 1986, the Supreme Court in *Bowers v. Hardwick* upheld the constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between consenting adults. The majority opinion reasoned that the Constitution did not confer "a fundamental right to engage in homosexual sodomy". A concurring opinion by Chief Justice Warren E. Burger cited the "ancient roots" of prohibitions against homosexual sex, quoting William Blackstone's description of homosexual sex as an "infamous crime against nature."

That decision was not overturned until 2003 in Lawrence v. Texas. In that case, the Court ruled that sanctions of criminal punishment for those who commit sodomy are unconstitutional. The Court reaffirmed the concept (as used in Roe) that the Constitution provides a "right to privacy" even though it is not explicitly enumerated. The Court based its ruling on the notions of personal autonomy to define one's own relationships and of American traditions of non-interference with private sexual decisions between consenting adults. It is easy to imagine how the rationale in Dobbs could be used to overturn this case founded upon the notion that there are implicit protections in the Constitution.

Justice Thomas might have to recuse himself or dissent in any attack on Loving v. Virginia, in which the Court ruled that laws banning interracial marriage violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution. It is harder to imagine this case being overruled because it is based more soundly in the Equal Protection Clause (and because of the political backlash), but the Constitution does not mention marriage and anti-miscegenation laws are deeply rooted in our nation's history.

If the right's obsession with how judges who were Public Defenders are soft on crime and grooming children for abuse continues, *Miranda* and *Gideon v Wainwright* become potential targets.

In *Miranda v Arizona*, the Court ruled that the Fifth Amendment to the Constitution restricts prosecutors from using a person's statements made in response to interrogation in police custody as evidence at their trial unless they can show that the person was informed of the right to consult with an attorney before and during questioning, and of the right against self-incrimination before police questioning, and that the defendant not only understood these rights, but voluntarily waived them. Miranda was viewed by many as a radical change in American criminal law, since the Fifth Amendment was traditionally understood only to protect Americans against formal types of compulsion to confess and four Justices voted against the decision.

In Justice Harlan's dissent, he stated "nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities." And Justice White added that the Court added a new constitutional right when it had no "factual and textual bases" in the Constitution. He wrote: "The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings … has no significant support in the history of the privilege or in the language of the Fifth Amendment." He added that the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.

That language would certainly resonate with Republicans today.

In *Gideon v. Wainwright*, the Court ruled that the Sixth Amendment to the Constitution requires U.S. states to provide attorneys to criminal defendants who are unable to afford their own. The case extended the right to counsel, which had been found under the Fifth and Sixth Amendments to impose requirements on the federal government, by imposing those requirements upon the states as well. Prior to that decision, in spite of protections under the Sixth Amendment, there was no requirement for courts to appoint counsel to criminal defendants except in capital cases. The decision created the need for Public Defenders. Even Florida required Public Defenders in all of its circuits.

Warnings to suspects and the Public Defender's Office are not in the constitution and were not part of the nation's history until the 1960s when the Supreme Court made it so. Those decisions bucked the deeply rooted history of this nation. As much as they are now part of the fabric of our society, might they too be at risk?

The hubris of the radical right and their activist judges should concern us all.