PRIVACY AFTER *DOBBS*: HOW THE SHIFTING U.S. LANDSCAPE AFFECTS THE BROADER DEBATE

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EXTENDED ABSTRACT

In June 2022, the Supreme Court of the United States ("SCOTUS") released its decision in *Dobbs v. Jackson Women's Health*, overturning two earlier decisions (*Roe v. Wade* in 1973 and *Planned Parenthood v. Casey* in 1992. The most immediate focus of these three decisions centers around legal protections for abortion throughout the U.S. Under *Roe*, no state (or the federal government itself) could pass a law that restricted abortion in the first two trimesters of pregnancy. The *Casey* decision mostly upheld *Roe*, although it allowed states to pass certain restrictions so long as they did not pose an "undue burden" on pregnant women. These two decisions established the right to abortion as having a foundation in the U.S. Constitution that could not be undermined through basic legislative action. The *Dobbs* decision overturned both *Roe* and *Casey*, thereby declaring these earlier decisions invalid. Abortion was no longer considered to be a fundamental right protected by the Constitution, allowing states to pass laws that would completely ban abortion, which many states did.

Although these three decisions and their related debates are primarily focused on the legality of abortion, they are more properly understood as decisions about the nature of privacy and whether privacy is considered to be a fundamental right in the U.S. In the case of *Roe* and *Casey*, the protection of abortion was an indirect effect of an implicit right to privacy. In both decisions, the right to privacy was determined to be implied by the 14th Amendment's protection of the right to due process. Specifically, according to the legal doctrine of *substantive* due process (as opposed to *procedural* due process), states and the federal government are restricted from passing laws that arbitrarily intrude into citizens' private lives. Both decisions also relied on an earlier decision, *Griswold v. Connecticut*, that described the right to privacy as being part of the *penumbras* of certain explicitly mentioned rights rather than the due process clause. In essence, the interpretation of due process in the *Roe* and *Casey* decisions, as well as the penumbras described by *Griswold*, is comparable to Article 8 (Right to respect for private and family life) of the European Convention on Human Rights. The *Dobbs* decision explicitly argued that the idea that the right to privacy is inherent in the protections of the due process clause is "egregiously wrong" and therefore both decisions must be overturned. (*Dobbs* did not overturn *Griswold*.)

One central point of divergence between the *Dobbs* decision and the findings of *Roe* and *Casey* is a disagreement about the nature of privacy itself. According to the author of the *Dobbs* decision, *Roe* relied on a philosophical view of privacy that "conflated the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference." In other words, the debate rests on whether "privacy" is fundamentally about *secrecy* or *autonomy*. While the *Dobbs* authors adopted the former, which is a considerably narrower construction of privacy, the authors of *Roe* and *Casey*, along with many other scholars, adopted a broader view that leans toward the latter. For instance, Richards

(2022) identifies the distinction between multiple forms of privacy, including *spatial* privacy, *decisional* privacy, and *information* privacy. (Citron (2022) describes *intimate* privacy as another form.) The *Dobbs* authors essentially argued that decisional privacy does not have a constitutional basis.

This debate surrounding the nature of privacy has a long history, particularly in the U.S. where there is no explicit mention of privacy in the Constitution. One of the earliest and most well-known discussions is the characterization by Warren and Brandeis (1890) of privacy as the "right to be let alone," though others found the discussion to be vague and unhelpful. For instance, Thomson (1975) argued that "the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is." Thomson proposed addressing this lack of clarity by focusing on "a cluster of rights" that are primarily focused on "the right over the person" (i.e., the physical body) and rights concerning "owning property." In more recent work, Solove (2007) agreed that privacy was not a singular right but rather that it is "best used as a shorthand umbrella term for a related web of things," though Thomson's limited focus on the person and property miss many important privacy invasions.

In contrast, Rachels (1975) emphasized that "there is a close connection between our ability to control who has access to us and information about us, and our ability to create and maintain different sorts of social relationships." In other words, the purpose of controlling information (secrecy) is about freely interacting with society (autonomy). Nissenbaum (2010) more explicitly links privacy with autonomy, as limiting access to information "contributes to material conditions for the development and exercise of autonomy and freedom in thought and action." Citron (2022) argues that intimate privacy "is a precondition to a life of meaning."

In short, the *Dobbs* decision marks a turning point in U.S. law regarding privacy. The trend in both scholarship and law had been toward broadening the concept of privacy toward a more expansive right beyond simply information privacy, and *Dobbs* has stopped that trend. Although the immediate effect is on the legality of abortion in the U.S., other SCOTUS decisions also relied on the foundation of privacy in the due process clause. As such, it is not clear at this point to what extent this decision will affect the privacy debate.

It should be noted that, although this history is focused on the U.S. perspective, the full impact of the *Dobbs* decision will be international. Many people have noted that this decision will shape how technology companies implement and maintain privacy (Federman, 2022; Krishnan et al., 2022; Privacy International, 2022; Sexton, 2022), how medical organizations protection patient information (Clayton et al., 2023; Henneberg, 2022), and how information gathered from technology companies will affect law procedures (Edelson, 2022; Kamin, 2023; Marathe, 2022; Stuart, 2023). The Internet is a global network, so the capabilities that technology companies build in the U.S. will impact the services and protections that they can provide in other parts of the world.

In this talk, we will discuss the evolution of the concept of privacy through legal scholarship, focusing on how *Dobbs* influences that debate. We will also discuss the multiple forms of privacy (including decisional privacy) and how the U.S. and E.U. differ in their approaches. Finally, we will highlight concerns about how the shifting U.S. legal approach may impact privacy protections on the Internet moving forward.

KEYWORDS: Privacy, decisional privacy, SCOTUS, substantive due process.

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