

PRIVACY AND PROPHYLACTICS

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INTRODUCTION

Constitutional prophylactics give the Supreme Court an avenue to protect enumerated rights. These prophylactics are not constitutional rights in themselves, but are instead merely preventative measures taken by the Court to ensure a constitutional right will not be violated.¹ The constitutionally recognized right to privacy has retained a unique and scattered trajectory in constitutional jurisprudence.² While a careful reading of the Constitution will not uncover the word “privacy,” constitutional-rights doctrine has

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1. *See* *Chavez v. Martinez*, 538 U.S. 760, 770 (2003) (explaining that prophylactics are judicially created rules designed to protect core constitutional rights).

2. *See* *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (noting, in the First Amendment context, that the “Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.”); *Katz v. United States*, 389 U.S. 347, 350 (1967) (noting that the Fourth Amendment “protects individual privacy against certain kinds of governmental intrusion . . .”); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (noting, in the Fifth Amendment context, that “strict application of the federal privilege against self-incrimination reflects the Constitution’s concern for the essential values represented by our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life.” (internal quotation marks omitted)).

developed two distinct lines of prophylactics: first, in criminal procedure and, second, in contraception and abortion.³

This Note will consider the links between the privacy prophylactic framework employed in the criminal procedure setting and the Court's jurisprudence leading up to and after *Roe v. Wade*.⁴ The Note argues that decisions that announced prophylactic rules do not have the same *stare decisis* weight that is afforded to decisions establishing "true constitutional rules."⁵ Thus, our analysis of the prophylactic cases for their precedential value becomes less restricted compared to cases that announced constitutional rules.

"Privacy" played a central role in the development of criminal procedure. In the seminal criminal procedure case *Mapp v. Ohio*,⁶ the Court noted that the Fourth Amendment creates "[t]he right to privacy, no less important than any other right carefully and particularly reserved to the people."⁷ The "Miranda Rights" established in *Miranda v. Arizona*⁸ protects an individual's Fifth Amendment rights and the underlying privacy concerns of self-incrimination.⁹ Notably, the Court has repeatedly described the

3. See Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. REV. 1, 9 (2009) ("Constitutional privacy developed along two trajectories. First, by focusing on matters of procreation, family, and marriage, the Supreme Court recognized a right to privacy. Although the Constitution does not specifically refer to privacy, the Court grounded the right of privacy in both particular Bill of Rights provisions and in the structure of particular rights taken in combination. Second, by articulating the value protected by the Fourth Amendment prohibition against unreasonable searches and seizures, the Court recognized a core right to privacy in one's person, home, papers, and effects. Again, the Constitution does not explicitly name privacy for protection. Nonetheless, the Court developed a Fourth Amendment jurisprudence focused on protecting reasonable expectations of privacy.").

4. 410 U.S. 113 (1973).

5. Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985).

6. 367 U.S. 643 (1961).

7. *Id.* at 656.

8. 384 U.S. 436 (1966).

9. Charles Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968) ("Privacy, thus, is control over knowledge about oneself." (explaining that self-incrimination reveals information to the authorities that the suspect would not otherwise do if not pressured and coerced)).

“Miranda Rights” as “prophylactic”¹⁰ in the years following the *Miranda* decision.

Within familial life, the Court decided two landmark constitutional-rights cases on privacy concerns: *Roe v. Wade*¹¹ granted a constitutional right to abortion on the basis of a woman’s right to privacy.¹² And *Obergefell v. Hodges*¹³ constitutionally protects same-sex marriage because it would be contradictory to recognize a right to privacy that did not extend to the choice of which relationships to enter.¹⁴

The Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*,¹⁵ which struck down the constitutional right to abortion, can also be explained using the prophylactic framework that the Court has adopted to understand *Miranda*. On closer inspection, *Roe* announced a prophylactic rule. Thus, departing from *Roe* becomes less exceptional and severe.

I. PROPHYLACTICS DEFINED

A prophylactic rule creates “a judicial work product somehow distinguishable from judicial interpretation of the Constitution . . .

10. *E.g.*, *Vega v. Tekoh*, 142 S. Ct. 2095 (2022) (“Since *Miranda*, the Court has repeatedly described *Miranda* rules as ‘prophylactic.’”); *see also, e.g.*, *Howes v. Fields*, 565 U.S. 499, 507 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011); *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010).

11. 410 U.S. 113 (1973).

12. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

13. 576 U.S. 644 (2015).

14. *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. . . . *Indeed, the Court has noted 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.*” (internal quotations omitted) (emphasis added)).

15. 142 S. Ct. 2228 (2022).

[I]t is that sort of extraconstitutional rule that overenforces what the Constitution, as judicially interpreted, would itself require; it expand[s] or sweeps more broadly than the constitutional constraints that do or would emerge from straightforward judicial interpretation.¹⁶ In sum, prophylactics are judicially fashioned rules that go further than necessary to protect what the Court sees as a fundamental constitutional right. To employ an example from Talmudic law, consider the prohibition against consuming meat and milk together. The literal prohibition, as written in the Torah, forbids one from cooking a kid in the milk of its mother.¹⁷ One might conclude that the prohibition covers only the act of cooking red meat in the milk of that animal's actual mother. But the prohibition extends to cooking—or eating—*any* meat with the milk or dairy product of *any* other animal. To shore up the Torah's prohibition, the Sages of the Talmud prohibited even the consumption of chicken (which is not considered "meat") and milk to fence off any chance that one would come to eat meat and milk together.¹⁸ Like the Sages, the Court has employed a prophylactic framework in the realm of criminal procedure, protecting Fifth Amendment rights by establishing an over-inclusive rule in *Miranda*. Prohibiting eating chicken and milk to protect against the possibility of eating red meat and milk parallels how the *Miranda* framework protects against the possibility of violating someone's right against compelled self-incrimination.

16. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 28–29 (2004) (internal quotations omitted); see Grano, *supra* note 5, at 105 ("What distinguishes a prophylactic rule from a true constitutional rule . . . is that [a] prophylactic rule" . . . is a court-created rule that can be violated "without violating the Constitution itself and that functions as a preventive safeguard to insure that constitutional violations will not occur." (internal quotations omitted)).

17. See Exodus 23:19.

18. Mishnah Torah, Halachot Maachalot Assurot 9:4.

II. PRIVACY, PROPHYLACTICS, AND *MIRANDA*

Privacy plays a central role in criminal procedure doctrine. *Boyd v. United States*¹⁹ described the Fourth and Fifth Amendments as protection against all governmental invasions into “the sanctity of a man’s home and the privacies of life.”²⁰ Privacy concerns form the foundation of the Fourth Amendment. That Amendment prohibits the government from conducting unreasonable searches and seizures without first obtaining a warrant.²¹ The warrant must be supported by probable cause, particular in its description of things to be searched or seized, with the officer swearing an affirmation to that effect.²² The Amendment especially targeted “general warrants.”²³ To protect the privacy of one’s home, the Constitution put limits on when and how the government can access this sacred area. The Fifth Amendment brings a more individualized privacy concern: one’s own incriminating statements.²⁴ One’s own statements are private and should only be made public if the individual freely chooses to speak.²⁵

19. 116 U.S. 616, 630 (1886).

20. *Id.* at 630.

21. U.S. CONST. amend. IV.

22. *Id.*

23. See *Henry v. United States*, 361 U.S. 98, 100–01 (1959) (explaining that colonial revulsion against general warrant and writs of assistance is reflected in Fourth Amendment); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 285 (1984) (“[T]he Framers did not build the warrant clause into the Constitution to prevent warrantless searches. Instead, they sought to prohibit the newly formed government from using general warrants—a device they believed jeopardized the liberty of every citizen.”).

24. See *Fisher v. United States*, 425 U.S. 391, 399 (1976) (holding that Fifth Amendment protection of privacy does not prevent every invasion of privacy but only compelled, self-incriminating invasions of privacy).

25. Efen Lemus, *When Fingerprints Are Key: Reinstating Privacy to the Privilege Against Self-Incrimination in Light of Fingerprint Encryption in Smartphones*, 70 SMU L. REV. 533, 559 (2017) (“When the government compels an individual to reveal the contents of his mind . . . the individual risks disclosing private information that he intends to keep away from the rest of the world. Therefore, [there is] . . . the value of an individual’s capacity to modulate the amount and character of information that he

Before incorporation of the Fifth Amendment, the Court struggled to develop a doctrinal test to easily gauge if one voluntarily incriminated oneself. Cases such as *Brown v. Mississippi*²⁶ and *Ashcraft v. Tennessee*²⁷ relied on fact-intensive analyses to assess if the defendant voluntarily made self-incriminating statements. For example, the Court would ask whether the facts eliciting the confession “shock[ed] the conscience.”²⁸ If yes, the confession would be inadmissible because it violated the Due Process Clause of the Fourteenth Amendment.²⁹

After the Fifth Amendment was incorporated,³⁰ the Court moved away from this fact-intensive approach that focused solely on voluntariness. In *Miranda v. Arizona*, the Court instituted “Miranda Rights” to assess if one voluntarily or involuntarily incriminated oneself. Chief Justice Warren, writing for the majority, explained that,

The current practice of incommunicado interrogation is at odds with one of our Nation’s most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.³¹

In practice, in order to dispel the inherent compulsion and coercion in custodial interrogations, the police are obligated to

makes known to others. After all, privacy . . . is the control we have over information about ourselves.” (internal quotations omitted)).

26. 297 U.S. 278 (1936).

27. 322 U.S. 143 (1944).

28. See *Rochin v. California*, 342 U.S. 165, 209 (1952).

29. See *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (“Prior to *Miranda*, the admissibility of an accused’s in-custody statements was judged solely by whether they were ‘voluntary’ within the meaning of the Due Process Clause.”).

30. See *Malloy v. Hogan*, 378 U.S. 1 (1964).

31. *Miranda*, 384 U.S. at 458.

administer a series of warnings to the suspect.³² As a way of protecting the suspect's privacy interests, the warnings remind the suspect of his right to remain silent. Without these warnings, a suspect may very well succumb to the pressure and coercion of the interrogation room. These warnings not only remind the suspect of his rights, but they also reinforce that the police respect the suspect's choices.

The Court emphasized that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."³³ Yet, in the next paragraph, the Court noted that,

[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. *Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect . . . [U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.*³⁴

The question then remains: are the "Miranda Rights" constitutional rights? On the one hand the Court demands that the suspect be informed of his rights and these safeguards must be followed;

32. *Id.* at 444–45 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. likewise, if the individual, is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.").

33. *Id.* at 467.

34. *Id.* (emphasis added).

on the other, the Court draws back by saying that there could be other ways to mitigate the compulsion and coercion of custodial interrogation. The Court's current jurisprudential outlook frames the "Miranda Rights" as a prophylactic to the Fifth Amendment's right against self-incrimination.³⁵ But the Court's opinion in *Miranda* nowhere describes the rule it announces as "prophylactic" in nature. From a strict reading of *Miranda*, the "Miranda Rights" emerge as constitutional rights in and of themselves.³⁶

*Michigan v. Tucker*³⁷ first described the "Miranda Rights" as a "prophylactic," but the full force of this categorization took hold in *Oregon v. Elstad*.³⁸ The Court, quoting *Michigan v. Tucker*, noted that "[t]he prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected'. . . . Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."³⁹

Miranda's prophylactic framing reached new heights in the beginning of the 1990s, as the Court supplemented the prophylactic warnings with another layer of protection. In a colorful dissent in *Minnick v. Mississippi*,⁴⁰ Justice Scalia scolded the majority for adding protections⁴¹ that veered too far from any grounding in the Constitution:

35. *United States v. Patane*, 542 U.S. 630, 636 (2004) ("[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self Incrimination Clause.").

36. *See Dickerson v. United States*, 530 U.S. 428, 447 (2000) (Scalia, J., dissenting) ("It was once possible to characterize the so-called *Miranda* rule as resting (however implausibly) upon the proposition that what the statute here before us permits—the admission at trial of un-*Mirandized* confessions—violates the Constitution. *That is the fairest reading of the *Miranda* case itself.*" (emphasis added)).

37. 417 U.S. 433, 439 (1974).

38. 470 U.S. 298, 305 (1985).

39. *Id.* at 305-07.

40. 498 U.S. 146 (1990).

41. The Court ruled that once counsel is requested, no interrogation of the accused can happen without the counsel present.

Today's extension of the *Edwards* prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement. This newest tower, according to the Court, is needed to avoid "inconsisten[cy] with [the] purpose" of *Edwards'* prophylactic rule . . . which was needed to protect *Miranda's* prophylactic right to have counsel present, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution.⁴²

Miranda's characterization as a prophylactic, with no available constitutional claim, remained steady for many years. Yet, with the prophylactic framework fully entrenched in the Court's criminal procedure jurisprudence, the Court in *Dickerson v. United States*⁴³ moved away from the "prophylactic" language. In response to *Miranda*, Congress enacted 18 U.S.C. § 3501 with the clear objective of restoring voluntariness as the only inquiry into whether confessions should be admissible.⁴⁴ The Court held in response to this statute, "*Miranda*, being a *constitutional decision* of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts."⁴⁵ The Court noted that "*Miranda* is constitutionally based"⁴⁶ and "*Miranda* announced a constitutional rule."⁴⁷

How can *Miranda* be classified as both a "constitutional rule" and a "prophylactic" with no cause of action attached to it?⁴⁸ Justice Scalia summed up this inconsistency: "Since there is in fact no other

42. *Id.* at 166.

43. 530 U.S. 428 (2000).

44. Under the statute, statements made by criminal defendants were to be admitted as long as they were made voluntarily, irrespective of if the defendant received the *Miranda* warnings.

45. *Id.* at 432 (emphasis added).

46. *Id.* at 440.

47. *Id.* at 444.

48. For example, in *Vega v. Tekoh*, 142 S. Ct. 2095 (2022), the Court ruled that a failure to administer the *Miranda* Rights does not provide a basis for a claim under § 1983.

principle that can reconcile today's judgment with the post-*Miranda* cases that the Court refuses to abandon, what today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extra-constitutional Constitution, binding on Congress and the States."⁴⁹ In fact, Justice Scalia's "extraconstitutional" concern surrounding prophylactics existed before *Miranda* was ever decided. To appreciate the origin of these concerns, we begin with *Griswold v. Connecticut*.⁵⁰

III. *GRISWOLD* AND *ROE*: PROPHYLAXIS ON PROPHYLAXIS

In *Griswold*, the Court struck down a state law prohibiting the possession, sale, and distribution of contraceptives to married couples under the Due Process Clause of the Fourteenth Amendment.⁵¹ Justice Douglas, writing for the majority, reasoned that this statute violated one's privacy interests.⁵² While he understood and appreciated the absence of "privacy" in the Constitution,⁵³ Justice Douglas instead relied on prior cases to conclude that a "privacy" violation raises a constitutional concern. In developing his opinion, he noted that the First Amendment protects a wider range of issues than those written in the text.⁵⁴ Summing up, he concluded, "Without those peripheral rights the specific rights would be less secure."⁵⁵ Upholding the Constitution means protecting the "spirit"

49. *Dickerson*, 530 U.S. at 461; see Yale Kamisar, *The Rise, Decline and Fall(?) of Miranda*, 87 WASH. L. REV. 965, 989 (2012) ("Although these earlier cases seemed to be based on the view that *Miranda* was not a constitutional decision, their significance has not been diminished one whit. Despite the invalidation of the federal statute, the downsizing of *Miranda* brought about by these earlier cases remains in place today."). The Court in *Vega* likewise dealt with this tension. *Vega*, 142 S. Ct. at 2105 ("[O]ur decision in *Dickerson* did not upset the firmly established prior understanding of *Miranda* as a prophylactic decision." (citations omitted)).

50. 381 U.S. 479, 485 (1965).

51. *Id.* at 485.

52. *Id.*

53. *Id.*

54. *Id.* at 482 (citations omitted).

55. *Id.* at 483.

of the enumerated rights by solidifying the peripheral rights. If the Constitution fails to protect peripheral rights, then those enumerated rights stand in jeopardy of being neglected and violated.

Justice Douglas reasoned, “The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁵⁶ The enumerated rights in different amendments created “zones of privacy” where the State could not enter.⁵⁷ The bedroom fell in this zone. As the Court noted, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”⁵⁸ For Justice Douglas, ensuring the sanctity of the marital bedroom creates a peripheral right, intended to protect those rights enumerated in the Constitution that have their roots in underlying privacy concerns.

Without explicitly saying, Justice Douglas described the right of privacy in the bedroom as a prophylactic to enumerated rights.⁵⁹ The government’s ability to regulate what happens in the bedroom creates a fear that the government would enter homes without warrants or require people to incriminate themselves, violating enumerated rights in the Fourth and Fifth Amendment. Justice Douglas saw privacy as the underlying concern behind many of the enumerated rights and attempted to fence off any chance of violation.

56. *Id.* at 484.

57. *Id.*

58. *Id.* at 485.

59. See Ryan C. Williams, *The Paths to Griswold*, 89 NOTRE DAME L. REV. 2155, 2178–79 (2014) (“The conventional explanation of Justice Douglas’s opinion starts with the conception of particular Bill of Rights guarantees ‘emanat[ing]’ a sphere of additional rights whose judicial protection is necessary to protect the core rights specified in the constitutional text. . . . Though judicial enforcement of such ‘peripheral’ or ‘prophylactic’ rights is not entirely free from controversy, such rights are now a familiar part of constitutional law.” (emphasis added)); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA* 97 (1990); Anthony R. Blackshield, *Constitutionalism and Comstockery*, 14 U. KAN. L. REV. 403, 445–47 (1966); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 190–96 (all analyzing and understanding *Griswold* as announcing a prophylactic rule.).

Using *Griswold* and “privacy” rights emanating from various amendments as a foundation, the Court took up the question of abortion in *Roe v. Wade*. Roe argued that the abortion statute violated some combination of her “personal liberty embodied in the Fourteenth Amendment’s Due Process Clause,” her “personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras,” or “among those rights reserved to the people by the Ninth Amendment.”⁶⁰ The Court largely echoed the sentiments raised in *Griswold* regarding the grounding of “privacy” rights in the Constitution.⁶¹ After listing the myriad of cases recognizing the right to privacy, the Court added the caveat that only those privacy rights “implicit in ordered liberty”⁶² are within the reach of constitutional protection.⁶³

The Court noted that this right of privacy extended to marriage.⁶⁴ Using a combination of factors, the Court concluded that a woman has a choice whether to terminate her pregnancy.⁶⁵ The Court’s reasoning unfolded in two parts. First, a right to privacy emanates from the Constitution, which the Court has applied in several

60. *Roe v. Wade*, 410 U.S. 113, 129 (1974) (internal quotations omitted).

61. *Id.* at 152 (“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” (internal quotations omitted)).

62. *Id.*

63. See Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 667–68 (2005) (noting that “the concept of implicit ordered liberty” has “evolved into a device as easily invoked to declare invalid ‘substantive’ laws that sufficiently shock the consciences of at least five members of this Court” (quoting *In re Winship*, 397 U.S. 358, 381–82 (1970) (Black, J., dissenting)); see also *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (“[T]he development of this Court’s substantive-due-process jurisprudence . . . has been a process whereby the outlines of the ‘liberty’ specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.”).

64. *Roe*, 410 U.S. at 152–53 (listing cases).

65. This right was not absolute. The Court implemented the “trimester” framework to govern when a women’s right to terminate a pregnancy is operative. See *id.* at 155, 164.

different contexts. However, the guarantee of privacy only applies to rights deemed fundamental or implicit in the concept of ordered liberty. Second, allowing access to abortion paralleled the Supreme Court's rationale in prior precedents regarding marriage and familial life. Logically, abortion sat at the crossroads of privacy and familial life. Therefore, a law that prohibited abortion violated the Fourteenth Amendment's Due Process Clause, since such a law undermined a woman's privacy rights. The Court concluded that the right of privacy "encompass[ed] a woman's decision whether or not to terminate her pregnancy."⁶⁶

At first glance, *Roe* fashioned another prophylactic, with its foundation in the prophylactic instituted in *Griswold*.⁶⁷ Like Justice Douglas in *Griswold*, the Court in *Roe* expressed concern with governmental intrusion into peoples' personal and intimate lives. But the Court's ruling protected a more distant concern than the one addressed in *Griswold*. Disguising the decision as the logical outgrowth of *Griswold*, the Court's prophylactic scheme ran as follows: The Constitution guarantees a right to privacy. *Griswold* protected this right by restricting the government's access to the marital bedroom. *Roe*, aiming to protect the marital bedroom, in turn, gave women the right to obtain an abortion. In other words, the Court in *Roe* protected the judicially created right from *Griswold*, which itself ensured an enumerated right. *Roe* illustrates yet another application of "prophylaxis built upon prophylaxis."⁶⁸

After a conservative turn in the composition of the Court, *Planned Parenthood v. Casey*⁶⁹ reaffirmed "the essential holding of *Roe v.*

66. *Id.* at 153.

67. Cf. Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1575 (2021) ("Although some commentators criticized *Roe* for its prophylactic character, many women's-rights advocates praised the Court's decision to paint with a broad brush." (emphasis added)).

68. *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990).

69. 505 U.S. 833 (1992).

Wade.⁷⁰ The Court began its analysis with a justification for “substantive due process”⁷¹ and used that as a springboard to argue that “all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.”⁷² Privacy was one such right. As the Court noted,

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter These 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.⁷³

While the Court thoroughly focused on the word “liberty” and the rights encompassed therein, “privacy” remained at the forefront of the Court’s reasoning in reaffirming *Roe*. The Court implicitly drew on Justice Harlan’s conception of “liberty” from *Poe v. Ullman*.⁷⁴ There, Justice Harlan explained that the “liberty” guaranteed by the Due Process Clause spans “a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”⁷⁵ The right to privacy falls under the all-encompassing concept of “personal liberty.” Thus, any abridgment of the right to privacy fuels an attack on personal liberty. With

70. *Id.* at 846. *But see* Paul B. Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 34–37 (1993) (arguing that *Casey* actually overruled *Roe*).

71. *Casey*, 505 U.S. at 846 (“Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, . . . the Clause has been understood to contain a substantive component as well. . . .”).

72. *Id.* at 847 (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurring opinion)).

73. *Id.* at 847, 851.

74. *Poe v. Ullman*, 367 U.S. 497 (1961).

75. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

its grounding in an underlying privacy concern, the right to abortion ensures the protection of personal liberty.

IV. PROPHYLACTICS AND *STARE DECISIS*

As recounted here, prophylactics appear throughout our legal tradition.⁷⁶ First Amendment doctrine includes many prophylactics.⁷⁷ Furthermore, the Court continues to employ prophylactics within Fourth Amendment jurisprudence. Four years after *Dickerson* quibbled on the constitutionality of *Miranda*, the Court held once again in *United States v. Patane*⁷⁸ that “the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause.”⁷⁹ Most recently, the Court in *Vega v. Tekoh* affirmed the same understanding.⁸⁰

Miranda's underpinnings encompass the privacy concerns inherent in custodial interrogation, and the “*Miranda* Rights” aim to alleviate those concerns. However, the “*Miranda* Rights” protect more than what the Constitution requires. As the Court noted in *Oregon v. Elstad*, “The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.”⁸¹ Given the broad nature of the “*Miranda* Rights,” failure to administer the warnings produces no constitutional violation.⁸²

76. See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (arguing for the legitimacy and necessity of prophylactic rules).

77. *Id.* at 198.

78. 542 U.S. 630 (2004).

79. *Patane*, 542 U.S. at 636.

80. *Vega v. Tekoh*, 142 S. Ct. 2095, 2102 (2022) (“Since *Miranda*, the Court has repeatedly described the rules it adopted as ‘prophylactic.’”).

81. *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

82. *Id.*

Likewise, *Griswold* and *Roe* put in place prophylactics based on underlying privacy concerns.⁸³ In striking down the Connecticut statute in *Griswold*, the Court overprotected the enumerated rights in the Constitution.⁸⁴ The same holds true for abortion in *Roe*, which built upon the *Griswold* decision. Recall the reasoning in *Griswold*: “Without those peripheral rights the specific rights” — that is, those enumerated in the Bill of Rights — “would be less secure.”⁸⁵ With prophylactics, even if protective measures are violated, the core right remains safe. As Joseph Grano explains, “[W]hat distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution.”⁸⁶ Accordingly, “prophylactics” are not constitutional rights in and of themselves but rather court-created rules to protect core enumerated rights.⁸⁷

Since prophylactics are not constitutional rights, I argue that they not be afforded the same deference as “true constitutional rules” when evaluating prior decisions for purposes of *stare decisis*.⁸⁸ The protection of a core constitutional right forms the foundation of a prophylactic. If we assume as the Court concluded in *Elstad*, *Patane*, and *Vega*, that a prophylactic violation sets off no constitutional violation, this “weakens the judicial commitment to *stare decisis*” in cases involving prophylactics “because it allows courts to invoke

83. It should be noted that *Griswold* and *Miranda* were decided only one year apart on the Warren Court. Chief Justice Warren authored *Miranda* and joined the majority opinion in *Griswold*.

84. See Williams, *supra* note 59, at 2178–79 .

85. *Griswold*, 381 U.S. at 482–83.

86. Grano, *supra* note 5, at 105.

87. See Berman, *supra* note 16, at 38 (“This is what Grano means in claiming that [prophylactics] are “court created,” not “true constitutional rules.” “Prophylactic rules” and “constitutional rules” are not simply synonyms” (quoting Grano, *supra* note 5, at 105; Joseph D. Grano, *Miranda’s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. Chi. L. Rev. 174, 187 (1988))).

88. Grano, *supra* note 5 at 105; see also *Dobbs*, 142 S. Ct. at 2235 (“The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.”).

writtenness as a generically valid reason to depart” from prior decisions.⁸⁹ Furthermore, the “prophylactic rules must protect constitutional rights: The legitimacy of proposed prophylactic rules diminishes as the distance from constitutional rights grows.”⁹⁰ As explained, the Court in *Roe* simply protected an already existing judicially-created right. *Griswold* stands one step removed from the constitutional right of “privacy.” *Roe*, which built off of *Griswold* stands two steps removed. When the rule in question involves a prophylactic and not a “core right,” the belief that *stare decisis* is not an “inexorable command”⁹¹ holds even more weight.

This prophylactic framework can help explain *Dobbs*. The majority in *Dobbs* completely rejected the *stare decisis* argument made in *Casey*. The Court in *Casey* laid out “a series of prudential and pragmatic considerations”⁹² that ought to be weighed in order to decide whether the costs of overruling a prior case are too great. Those considerations include: (1) whether the central rule of the prior case proves unworkable; (2) whether the rule caused reliance and its removal would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether the facts of that case have changed or been viewed differently.⁹³

89. Jane Pek, *Things Better Left Unwritten?: Constitutional Text and the Rule of Law*, 83 N.Y.U. L. REV. 1979, 1998–99 (2008); see also Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL’Y 479, 486 (1996) (“Judicial review came from a theory of meaning that supposed the possibility of right answers—from an originalist theory rooted in text.”).

90. Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 964 (1999). This sentiment is also echoed in Talmudic law. See Babylonian Talmud, Beitzah 3a (“The Rabbis did not institute a new law to prevent one from violating an existing Rabbinic law, which was instituted to prevent one from violating a Biblical law.”).

91. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–406 (1932).

92. *Casey*, 505 U.S. at 854.

93. *Id.* at 854–55.

The Court easily dismissed the first three factors.⁹⁴ The final consideration carried the decision. The Court reasoned that no underlying change had occurred in the facts since *Roe* or in the understanding of them. The Court analogized to *Lochner v. New York*⁹⁵ and to *Plessy v. Ferguson*,⁹⁶ where the facts or the understanding of the facts changed over time, leading to their demise in *West Coast Hotel Co. v. Parrish*⁹⁷ and *Brown v. Board of Education*,⁹⁸ respectively. The Court reasoned that “*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions.”⁹⁹ But *Roe* did not rise to the level of *Plessy* or *Lochner*. As the Court explained,

Because neither the factual underpinnings of *Roe*’s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.¹⁰⁰

94. *Id.* at 855–57.

95. 198 U.S. 45 (1905).

96. 163 U.S. 537 (1896).

97. 300 U.S. 379 (1937).

98. 348 U.S. 886 (1954).

99. *Casey*, 505 U.S. at 863–64.

100. *Id.* at 864. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (“[S]tare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’” (quoting *THE FEDERALIST* No. 78, at 490 (Hamilton) (H. Lodge ed. 1888))); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (“The doctrine of *stare decisis* would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter.”); Frederick

Thus, the *Casey* Court upheld the prophylactic regime of *Roe* using privacy and *stare decisis* as anchors of the reasoning.

In *Dobbs*, the Court dismissed this approach and adopted a five-factor test to assess whether a prior precedent should be overruled.¹⁰¹ The Court focused on the implausible interpretation of the Constitution and reasoning in *Roe* and *Casey*. “*Roe*’s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed. *Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people.”¹⁰²

If prophylactic privacy concerns laid the foundation for *Roe* and *Casey*, then the Court’s ruling in *Dobbs* mirrors Justice Scalia’s argument in *Minnick v. Mississippi*. *Roe* and *Casey*, to borrow from Justice Scalia’s dissent, stood as “prophylaxis built upon prophylaxis.”¹⁰³ *Roe* built upon the prophylactic nature of *Griswold*, and *Casey* reinforced the judicially created right to abortion. Consistent with the Court’s prophylactic understanding of the “Miranda Rights,” abortion falls to the same logic: a prophylactic with no constitutional claim attached. The Court, in overruling *Roe*, did not depart from a constitutional right, but merely removed the fence around the constitutional right of privacy. The Constitution, as our governing text

Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 387 (2007) (“[I]f a court under a purported regime of *stare decisis* is free to disregard any previous decisions it believes wrong, then the standard for disregarding is the same when *stare decisis* applies as when it does not, and the alleged *stare decisis* norm turns out to be doing no work. If this is so, then *stare decisis* does not in fact exist as a norm at all. But if, by contrast, it requires a better reason to disregard a mistaken precedent than merely that it is believed mistaken, a *stare decisis* norm can be said to exist even if it is overridable.”).

101. *Dobbs*, 142 S. Ct. at 2265 (“In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.”).

102. *Id.*

103. *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990).

and final arbiter, upholds this interpretation. As Jane Pek notes, having “the presence of an authoritative text...implies definitive answers to constitutional questions, expressed in the words of the constitutional document—that is, it implies that a true meaning of the Constitution exists.”¹⁰⁴ Pek’s argument holds even more weight in this context because *Roe* centered around a prophylactic, not a true constitutional rule. The Court in *Dobbs* commented that *Roe* lacked any foundation in the constitutional text.¹⁰⁵ As already mentioned, prophylactic decisions hold less weight than cases that announce true constitutional rules. Accordingly, departing from a prophylactic precedent is much less dramatic and extreme.

We can think of prophylactics as “federal common law.” As Professor Martha A. Field explained, federal common law refers “to any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional.*”¹⁰⁶ Thus, “a court makes federal common law when it decides that the due process clause of the fourteenth amendment protects a married couple’s right to use contraceptives in the privacy of the home.”¹⁰⁷ Likewise, the Court makes federal common law when it creates an exclusionary rule (like “Miranda Rights”) that enforces the Fifth

104. Pek, *supra* note 89, at 1999.

105. *Dobbs*, 142 S. Ct. at 2266.

106. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986). Thomas Merrill has a similar conception of the federal common law. See Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (“Federal common law . . . means any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of ‘interpretation’ in either a conventional or an unconventional sense.”).

107. Field, *supra* note 106, at 892.

Amendment's protection against self-incrimination.¹⁰⁸ These prophylactic rules constitute federal common law.¹⁰⁹

Since judges manufacture these prophylactics, "in formulating the rule, the judiciary chooses the best rule based upon its own notions of policy and upon whatever policies it finds implicit in the constitutional and statutory provisions it does have an obligation to follow."¹¹⁰ This lends a lot of flexibility to the chosen rule because a subsequent court might employ different notions of "policy," leading to divergent results in what they find "implicit" in the Constitution. Intuitively, this proposition holds weight because "constitutional principles bind judges in a way that federal common law does not. . . . Because the application of federal common law principles depends on prudential considerations[,] . . . judges can distinguish or disregard them when prudential considerations. . . . dictate. Constitutional principles, on the other hand, are unaffected by prudential concerns. The Constitution binds absolutely."¹¹¹ With this framework in mind, the right to "abortion," seen as a prophylactic, belongs to federal common law, subject to the different considerations of the Court. By overturning *Roe*, the Court in *Dobbs* exercised its federal common law ability to fashion a new rule (or to take one away).

But what restraint exists in limiting the judiciary from fashioning new federal common law? Operating in the arena of "substantive due process," the Court in *Dobbs* relied heavily on the reasoning set forth in *Washington v. Glucksberg*.¹¹² The Court reasoned that the

108. *Id.* at 892 ("[A] court also makes federal common law when it adopts an exclusionary rule in order to enforce the fourth amendment's prohibition of unreasonable search and seizure.").

109. *Id.* ("Whether such prophylactic rules are compelled by the Constitution or are simply inspired by it . . . they constitute federal common law."); see also Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 33 (1975) (arguing that prophylactic rules are federal common law).

110. Field, *supra* note 106, at 893.

111. Robert L. Nightingale, *How to Trim A Christmas Tree: Beyond Severability and Inseparability for Omnibus Statutes*, 125 YALE L.J. 1672, 1693 (2016).

112. 521 U.S. 702 (1997).

“‘established method of substantive-due-process analysis’ requires that an unenumerated right be ‘deeply rooted in this Nation’s history and tradition’ before it can be recognized as a component of the ‘liberty’ protected in the Due Process Clause.”¹¹³ The Court in *Glucksberg* warned that “[w]e must . . . exercise the utmost care whenever we are asked to break new ground in this field, . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”¹¹⁴ A cursory look at this cautionary tale may initially seem to contradict Professor Field’s account of the discretionary role that judges use in crafting federal common law. One might wonder how “the judiciary chooses the best rule based upon its *own notions of policy and upon whatever policies* it finds implicit”¹¹⁵ in the Constitution without transforming the Due Process Clause into the policy preferences of the individual Justices, as *Glucksberg* warned. Professor Field’s approach sounds like a subjective inquiry performed by judges. But in fact, these two propositions do not oppose each other. From the majority’s perspective in *Dobbs*, choosing the rule based on policy considerations and what the Justices find implicit in the Constitution is an *objective* inquiry done by surveying vast amounts of history to assess if the rule is deeply rooted in our history and tradition.¹¹⁶ Thus, the Court accomplished exactly what Professor Field instructed without turning the “liberty protected by the Due Process Clause” into the Justices’ own “policy preferences.”¹¹⁷

This approach to federal common law rule making goes hand in hand with the first two factors of the Court’s analysis of when to

113. *Dobbs*, 142 S. Ct. at 2260 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

114. *Glucksberg*, 521 U.S. at 720.

115. Field, *supra* note 106, at 893 (emphasis added).

116. See *Dobbs*, 142 S. Ct. at 2247 (“Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of ‘Anglo-American common law tradition,’ and made clear that a fundamental right must be ‘objectively, deeply rooted in this Nation’s history and tradition.’” (quoting *Glucksberg*, 521 U.S. at 720–21 (citations omitted))).

117. *Glucksberg*, 521 U.S. at 720.

turn away from *stare decisis*. The Court explained that the “nature of the error” in *Roe* “usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.”¹¹⁸ Furthermore, the “quality of the reasoning” in *Roe* “found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. . . . [W]ithout any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules.”¹¹⁹ Fashioning a federal common law rule and overturning precedent collapses into a single inquiry in *Dobbs*. When the Court evaluated the “nature of the error” and the “quality of the reasoning” behind the prior decision, they were fashioning a new rule “based upon its own notions of policy and upon whatever policies it finds implicit”¹²⁰ in the Constitution. The *Dobbs* Court’s new test for evaluating prior decisions can be viewed as an application of the Court’s federal common law rule making ability.

CONCLUSION

Is the “right to privacy” within substantive due process in jeopardy after *Dobbs*? The Court dismissed this concern by ensuring that “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 precedents that do not concern abortion.”¹²¹ But using the arguments I set forth would certainly put *Miranda* in peril. *Miranda* exists as a bona fide prophylactic, a quintessential common law rule. The Court in *Dickerson* dodged the

118. *Dobbs*, 142 S. Ct. at 2265.

119. *Dobbs*, 142 S. Ct. at 2266.

120. Field, *supra* note 106, at 893.

121. *Dobbs*, 142 S. Ct. at 2277–78; *but see id.* at 2301 (Thomas, J., concurring) (“As I have previously explained, ‘substantive due process’ is an oxymoron that “lack[s] any basis in the Constitution.”). This prophylactic framework that I have applied to *Roe* and *Dobbs* might apply to other areas of substantive due process, but I do not address that here.

constitutionality issue of *Miranda*. *Patane*, and more recently, *Vega*, have reaffirmed the prophylactic nature of *Miranda*. The Court could once again exercise their federal common law-making ability by evaluating the “Miranda Rights” using their own conceptions of policy and what they find implicit in the Constitution.

This could lead the Court to scrap the “Miranda Rights” entirely using the test put forward in *Dobbs*. If the Court overruled *Roe* and *Casey*, which were viewed as establishing a constitutional right for almost fifty years, does that mean *Miranda* is next?¹²²

122. See Comment, *Vega v. Tekoh*, 136 HARV. L. REV. 430, 438–39 (2022) (“*Roe* and *Miranda* share some similarities: Both were landmark decisions from a half century ago establishing rights not explicitly mentioned in the Constitution . . . Now that *stare decisis* has failed to save even *Roe*, which protected a . . . constitutional right, *Miranda*—protecting only a prophylactic constitutional rule now shaken and subject to aspersion by the *Vega* Court—may fall next.”).