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Washington v. Glucksberg’s *Original Meaning*

MARC SPINDELMAN*

**ABSTRACT**

This Article elaborates and defends *Washington v. Glucksberg*’s original meaning both on its own terms and against accounts of *Glucksberg* that depict it as having announced and followed a strict test of history and tradition as its basic approach to Fourteenth Amendment substantive due process rights.

The nominal occasion for the present return to *Glucksberg* and its original meaning is the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*. *Dobbs* famously insists that *Glucksberg* supplies it with the authoritative grounds in the Court’s Fourteenth Amendment substantive due process jurisprudence for its own history-and-tradition-based approach to *Roe v. Wade* and constitutional abortion rights. As *Dobbs* figures it, *Glucksberg* signs the constitutional warrant that *Dobbs* enforces by overturning *Roe*.

Proceeding in stages, the Article traces *Dobbs*’ reliance on *Glucksberg* before pivoting to a detailed account of *Glucksberg*’s original meaning, which engages and surmounts *Dobbs*’ undefended tally of *Glucksberg*. Having shown *Dobbs*’ reading of *Glucksberg* cannot be squared with *Glucksberg*’s text and its meaning—as cross-checked against other Supreme Court decisions, as well as new sources found in the Supreme Court archives—the work explains *Dobbs* is also deficient in not providing an independent, full-blown justification, beyond *Glucksberg*’s invocation, for its basic, if contoured, constitutional interpretive method of decision. In context, *Dobbs*’ failure to offer this kind of public accounting, consistent with constitutional and rule-of-law demands, means that *Dobbs* stands exposed as lawless at its foundations. *Dobbs* is thus primed for challenge on these grounds, the very terms of legality that *Dobbs* deploys as it eliminates *Roe* and constitutional abortion rights.

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I. INTRODUCTION

Justice Samuel Alito’s majority opinion in Dobbs v. Jackson Women’s Health Organization complains bitterly about what it insists is Roe v. Wade’s lawlessness. Indeed, Roe’s alleged lawlessness is Dobbs’ cited basis for overturning the earlier ruling and eliminating its constitutional protections for abortion rights.\(^1\) Dobbs’ own survival also depends on its lawfulness. Naturally, Dobbs is confident that its own legal foundations are secure given how the decision is structured. It is, however, mistaken. They are not.

Accounts of Dobbs’ lawlessness are multiplying, but as important and as far-reaching as they have been, they have broadly overlooked a crucial dimension of the case.\(^2\) Dobbs insists that it roots itself in Washington v. Glucksberg, the 1997 Supreme

\(^1\) See, e.g., Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2241, 2265 (2022); see also generally Roe v. Wade, 410 U.S. 113 (1973). Some relevant thoughts on the interpretive approach in this work are in Marc Spindelman, Bostock’s Paradox: Textualism, Legal Justice, and the Constitution, 69 BUFF. L. REV. 553, 558 n.6 (2021).

Court decision best known for rejecting a claimed substantive due process right of terminally ill individuals to end their lives by physician-assisted suicide. 3 Within Dobbs, Glucksberg supplies the key authority for the conservative originalist, or originalist-ish, history-and-tradition approach to Fourteenth Amendment substantive due process rights that Dobbs applies to eliminate Roe’s protections for pregnant women’s and other pregnant people’s abortion choices. 4

Closely re-examined, however, Glucksberg is simply not the kind of conservative history-and-tradition ruling that Dobbs makes it out to be. Glucksberg neither simply announces—nor deploys—the history-and-tradition test that Dobbs says it derives from the older ruling and then goes on to use as the basic doctrinal measure for its own judgments about constitutional abortion rights. 5 True, Dobbs’ account of Glucksberg does not originate within Dobbs itself. 6 Dobbs is, nevertheless, the first Supreme Court
majority opinion to use the history-and-tradition approach purportedly derived from *Glucksberg* to analyze and reconsider the existence of an unenumerated substantive due process right.\(^7\)

This presents a problem for *Dobbs*, which does not otherwise offer its own full-dress, independent, and publicly accessible justification for its history-and-tradition approach to substantive due process protections.\(^8\) Rather, *Dobbs* practically relies on *Glucksberg* as having previously established and operationalized that test.\(^9\) Only if *Glucksberg* actually did so, then, and in the way that *Dobbs* maintains, may *Dobbs* properly insist that, in overturning *Roe*, it is merely following existing constitutional precedent, rather than breaking new constitutional doctrinal ground.\(^10\)

*Dobbs*’ analytic dependence on *Glucksberg* has already been found wanting in other respects.\(^11\) As important as these accounts are, however, they do not engage the full scope of the problem. The *Dobbs* joint dissent by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, for instance, first identified some of the ways that *Dobbs*’ reliance on *Glucksberg* is deficient. The joint dissent flagged *Glucksberg*’s inability to shoulder the doctrinal weight that *Dobbs* places upon it, emphasizing how *Glucksberg*’s method for substantive due process decision-making has been superseded by later cases, specifically, substantive due process rights cases affirming

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\(^8\) The few justificatory gestures *Dobbs* offers, along with their inadequacies in light of *Dobbs*’ demands, are engaged in different ways *infra* Part II.A and Part IV.

\(^9\) See *infra* Part II.

\(^10\) A similar point might be made about *Dobbs*’ treatment of the test for stare decisis. See, e.g., Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 Harv. L. Rev. 728, 749–59 (2024); Varsava, *supra* note 2, at 1863–84.

LGBTQIA+ people’s liberty as epitomized by *Obergefell v. Hodges.* The joint dissent also objected to *Dobbs*’ history-and-tradition-focused analytics because of how they shortchange the history of constitutional sex equality and privacy principles and protections, including the legal recognition of constitutional abortion rights during *Roe*’s nearly half-century reign.

*Dobbs*’ *Glucksberg* problems, though, run even deeper than the joint dissent acknowledges. *Glucksberg*, in the first instance, never propounded and relied on the kind of conservative originalist history-and-tradition test for substantive due process rights that *Dobbs* maintains it did. So, arguing that *Glucksberg* was methodologically superseded by cases like *Obergefell*, though astute given how *Obergefell* marginalized *Glucksberg*, fails to seize the nub of the problem that *Dobbs* has on its hands. *Glucksberg*’s failure to supply *Dobbs* with the legal foundations that *Dobbs* depends on leaves *Dobbs* adrift, lacking an authoritative basis for the rule that it announces. Lawless at its foundations in these ways, *Dobbs* is subject to reversal on these grounds.

Naturally, the Supreme Court that recently decided *Dobbs* is not about to accept this critical mirroring of what it does and does not do and then completely reverse course. That practical fact notwithstanding, the present moment—as *Dobbs*’ ink is still drying—remains ripe for describing *Dobbs*’ “*Glucksberg* gambit,” its reliance on *Glucksberg* as authority for its conservative history-and-tradition approach to substantive due process protections for abortion rights, and for identifying its “*Glucksberg* gap,” *Dobbs*’ *Glucksberg* gambit’s deficiencies in light of what *Glucksberg* actually says.

To those ends, the argument in these pages proceeds as follows. Part II describes *Dobbs*’ “*Glucksberg* gambit,” the way *Dobbs* stakes the lawfulness of its conservative originalist history-and-tradition method for evaluating substantive due process rights on a distinctive but ultimately merely asserted—and undefended—reading of *Glucksberg*. This Part offers a proof of what many of *Dobbs*’ readers may think an obvious and unexceptionable concept, even if its articulation of how *Dobbs* tracks *Glucksberg* lines up the dots in fresh terms. The sum of this Part is that *Dobbs* makes

12 *Dobbs*, 142 S. Ct. at 2319, 2326 (Breyer, Sotomayor, & Kagan, JJ., dissenting); *see also* id. at 2326 (discussing *Obergefell* v. Hodges, 576 U.S. 644, 671 (2015)). *June Medical* belongs in this set, as well. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2113, 2132 (2020). For a thoughtful remapping of *Glucksberg* that converges with the *Dobbs* joint dissent while claiming its own ground, and describing *Dobbs*’ version of *Glucksberg* as one “invented in 2022 for a purpose,” *see* Siegel, *Memory Games*, supra note 4, at 1181–83.

13 *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor, & Kagan, JJ., dissenting).


15 This leaves open the question of whether the reversal itself might be based in Fourteenth Amendment substantive due process, equal protection, privileges or immunities, or on some other ground, which could include the Thirteenth Amendment for the kinds of reasons offered by, among others, Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191 (2022), and Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012).
Glucksberg foundational to its conservative originalist history-and-tradition approach to abortion rights as substantive due process rights.

Recognizing Glucksberg’s centrality to Dobbs and the work it does to give Dobbs a doctrinal basis for its ruling, Part III then turns to Glucksberg, its text, and its meaning. Integral to this discussion are various textual reasons—and some intertextual and confirmatory, contextual ones, some of them sourced in materials in the Supreme Court’s archives—for understanding Glucksberg not to have announced or followed the authoritative conservative originalist history-and-tradition test for substantive due process rights that Dobbs says it did.

Having shown that Glucksberg is not the kind of conservative originalist ruling that Dobbs claims it is, along with what Glucksberg more affirmatively means and entails, Part IV re-engages Dobbs. This Part digs into, to expose, the failure of Dobbs’ Glucksberg gambit, and to illuminate Dobbs’ resulting Glucksberg gap and what that gap means for Dobbs’ conservative originalist history-and-tradition approach to constitutional abortion rights. Dobbs’ Glucksberg gap notably leaves Dobbs exposed—and without justification—on its doctrinal starting point, the matter of its conservative originalist substantive due process interpretive method in the case. Having formally relied on Glucksberg to do the work of establishing the legal authoritativeness of its own history-and-tradition approach to abortion rights, Dobbs needs—but does not provide—its own proper account of its method’s legal bona fides. Given this, Dobbs’ conservative originalist history-and-tradition approach to constitutional abortion rights is both novel and lawless as a matter of substantive due process caselaw, a point that the Dobbs joint dissent made based on different, though at times related, reasons.

Having exposed Dobbs’ lawlessness in these ways, Part V, the Conclusion, briefly considers what all this ought to mean, or otherwise practically might mean, for Dobbs going forward, both in courts of law and in the wider court of public opinion and history.

II. Dobbs’ Reliance on Glucksberg

A. Glucksberg as Grounds

Justice Samuel Alito’s Dobbs majority opinion begins surfacing conservative constitutional originalist, or originalist-ish, ideas about the decisive importance of history and tradition in the substantive due process realm early on. Dobbs’ first express invocation of Washington v. Glucksberg—as a ruling providing a constitutional foundation for its approach to substantive due process rights—arrives just a few pages in.

As it announces what it is doing to Roe v. Wade and Planned Parenthood v. Casey, Dobbs explains that it has decided—and is holding—that these decisions “must be overruled.” This result is legally compelled, Dobbs explains, because 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

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17 Id. at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

Casey now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”

For the moment, Dobbs says it accepts, and does not question, that the Fourteenth Amendment’s due process “provision has been held to guarantee some rights that are not mentioned in the Constitution.” However, “must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” Dobbs borrows the quoted language and its ideas from Glucksberg. In Dobbs’ estimation, because Roe fails Glucksberg’s history-and-tradition test for substantive due process rights, Roe, and hence the abortion rights that it protects, must be eliminated. This also basically holds true, if for somewhat different reasons, for Casey, which ultimately meets the same fate.

Dobbs deepens these initial investments in Glucksberg’s authority when it identifies the contours of two distinct categories of unenumerated rights that are substantively protected by the Fourteenth Amendment’s Due Process Clause. Dobbs itself differentiates these two categories of rights and then specifies which category abortion rights fit into. The first category—including incorporation—concerns “rights guaranteed by the first eight Amendments” made applicable to the states via the Fourteenth Amendment’s Due Process Clause. The second category—which is the one in question here,” by contrast—“comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.” It is these cases—including Fourteenth Amendment substantive due process rights—that Dobbs says it is about.

Having initially teased apart these two distinct strands of constitutional doctrine, Dobbs braids them back together as a predicate for announcing that the Court has “long” taken a conservative originalist approach when “deciding whether a right falls into either of these categories.” Consistent with this approach, Dobbs maintains that the Court has “long” asked “whether the right [in question] is ‘deeply rooted in [our]

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19 Dobbs, 142 S. Ct. at 2242.
20 Id.
21 Id. (quoting Glucksberg, 521 U.S. at 721).
22 Id.
23 Id. at 2241–43. Later, in passing, Dobbs reinforces this conclusion, also holding that abortion is not an aspect of constitutionally protected “ordered liberty.” Id. at 2257. The central thrust of the Dobbs opinion, however, is dedicated to the history-and-tradition point. For relevant passages in Dobbs, see id. at 2242, 2244, 2246–48, 2250, 2252–54, 2259–60, 2282–84.
24 Id. at 2241–43, 2261–78.
25 Dobbs, 142 S. Ct. at 2246.
26 Id.
27 Id. Given Glucksberg’s actual or apparent role in a few of the cases in the first category, see McDonald v. City of Chicago, 561 U.S. 742, 767–68 (2010), and Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019) (citing McDonald, 561 U.S. at 767), their authority is correspondingly weakened by virtue of the reading of Glucksberg offered in these pages.
28 Dobbs, 142 S. Ct. at 2246.
history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’”

**Dobbs** leverages the braiding of the two categories of unenumerated Fourteenth Amendment due process rights in ways that generate the impression that their shared history-and-tradition component is equally well established as to both categories of cases. Nevertheless, a close look at the authorities cited by **Dobbs’** text exposes **Glucksberg** as the only substantive due process precedent that **Dobbs** mentions on this front. From 1997, **Glucksberg** is hardly of ancient vintage—and were antiquity the relevant measure of authority, of course, **Roe** would clearly best it. Moreover, the vintage of the test is subject, as the **Dobbs** dissent notes, to a doctrinal discount by virtue of the Court’s more recent substantive due process cases, which, since **Glucksberg**, have decidedly not abided by the history-and-tradition method that **Dobbs** proclaims is the Court’s longstanding rule.

**Dobbs** then explains that **Glucksberg**’s history-and-tradition test must be satisfied, and not merely considered along with other sources of constitutional judgment, in substantive due process cases—or, at the very least, in abortion rights cases like **Dobbs**. Partly repeating itself, **Dobbs** observes—consistent, it says, with **Glucksberg**’s holding that “the Due Process Clause does not confer a right to assisted suicide”—that “a fundamental right must be ‘objectively, deeply rooted in this Nation’s history and tradition’” to be recognized as constitutionally protected as a matter of substantive due process.

Pretending to teleport back to the time of decision in **Roe**, **Dobbs** applies the test it says it gets from **Glucksberg** to abortion rights as a matter of reconstructive first impression. As it does so, **Dobbs** at first veers toward suggesting that **Glucksberg**’s history-and-tradition approach, over and above being authoritative as precedent, is justified because of its alignments with objectivity and capital-T Truth. Along these lines, **Dobbs** proposes that **Glucksberg**’s assessment of “more than 700 years of

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29 Id. (quoting Timbs, 139 S. Ct. at 691 (second alteration in original), and citing McDonald, 561 U.S. at 764, 767 (internal quotation marks omitted), and Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)).

30 **Dobbs**, 142 S. Ct. at 2246 (citing Timbs, 139 S. Ct. at 686, McDonald, 561 U.S. at 764, and Glucksberg, 521 U.S. at 721).


32 For relevant notations in the dissent, see **Dobbs**, 142 S. Ct. at 2319, 2326 (Breyer, Sotomayor, & Kagan, JJ., dissenting). For the **Dobbs** majority’s sense of the history-and-tradition method as the longstanding rule, see id. at 2246 (majority opinion). Given the larger argument being made in these pages, nothing here is meant to concede that **Glucksberg** actually ruled the day this way, much less in a way that accords with any longstanding practice. It is only to block out the basic story that the **Dobbs** majority opinion tells.

33 See **Dobbs**, 142 S. Ct. at 2246–48; see also, e.g., id. at 2242 (quoting Glucksberg, 521 U.S. at 711, 721).

34 **Dobbs**, 142 S. Ct. at 2247 (quoting Glucksberg, 521 U.S. at 711, 720–21).
‘Anglo-American common law tradition’ was an inquiry founded in an “objective[]” assessment of what is “deeply rooted in this Nation’s history and tradition.” Without elaborating or defending this objectivist stance, Dobbs proceeds to discount it, tacking toward the very different suggestion that it is following Glucksberg because Glucksberg reflects a sensible constitutional governance rule imbued with rule-of-law values of judicial humility, self-restraint, and respect for democratic process deliberations. Quoting Glucksberg, Dobbs explains: “[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.” Leaving aside Glucksberg’s own careful prospective orientation—its focus on what to do when being asked “to break new ground in this field”—history and tradition in Dobbs momentarily cease being objective facts about the social world that the Justices must heed. Instead, history and tradition function as conditions shaping a judicial strategy for resisting the seductions of institutional power that might otherwise lead the Justices to “confuse” what the Fourteenth Amendment’s “liberty” guarantee “protects with [their] own ardent views about the liberty that Americans should enjoy,” thereby ruling the nation according to the Justices’ pleasures and positions rather than the mandates of capital-L Law. Submission to Glucksberg’s method on this level ostensibly functions as a constitutional governance practice that models judicial self-restraint—a kind of judicial chastity—and keeps the Court from roaming freely and imposing the Justices’ policy preferences upon a nation that has a right to decide these matters for itself.

A slow march through what Dobbs then confidently presents as the relevant history and tradition of abortion laws and rights follows. Completing that march, Dobbs summarizes its findings by quoting the dissenting opinion of Justice Byron White, one of the Roe dissenters, in a later abortion case, Thornburgh v. American College of Obstetricians and Gynecologists. As White’s Thornburgh dissent proposed, “Roe itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people.” This being so, as Dobbs’ own Glucksbergian analysis has just indicated, Dobbs reaches “[t]he inescapable conclusion” that Roe and

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35 Dobbs, 142 S. Ct. at 2247 (second internal quotation marks omitted) (quoting Glucksberg, 521 U.S. at 711, 720–21).
36 Dobbs, 142 S. Ct. at 2247–48 (internal quotation marks omitted) (quoting Glucksberg, 521 U.S. at 720).
37 Dobbs, 142 S. Ct. at 2247 (emphasis added).
38 Id.
39 Id. As explained elsewhere, Spindelman, Sex Equality Troubles, supra note 4, at 141–63, Dobbs anticipatorily defeats this aspect of its ruling, too, when it sketches and thereby opens the door to a new Fourteenth Amendment Privileges or Immunities Clause jurisprudence in Footnote 22 of the opinion. Dobbs, 142 S. Ct. at 2248 n.22.
40 Dobbs, 142 S. Ct. at 2248–54.
41 Id. at 2253; Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 793 (1986).
42 Dobbs, 142 S. Ct. at 2253 (quoting Thornburgh, 476 U.S. at 793 (White, J., dissenting)).
the constitutional abortion right it announced are not “deeply rooted in the Nation’s history and traditions,” and, therefore, must be reversed.43

If this conceptually completes Dobbs’ analytic constitutional circle, Dobbs nevertheless continues, reaching for a rhetorical flourish that hammers its reliance on Glucksberg home. “The Court in Roe,” Dobbs writes, “could have said of abortion exactly what Glucksberg said of assisted suicide: ‘Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice].’”44 The analytic excess of this point, and its own strategic elision of how the quote shows Glucksberg actively thinking about contemporaneous social norms in its decision-making, indicate that Dobbs’ doctrinal analysis of Roe and abortion rights moves, from start to end and then some, in what Dobbs represents as Glucksberg’s grooves and light.

Given how foundational Glucksberg is to Dobbs’ analysis, it is curious—and striking—that Dobbs never formally offers any interpretive argument about Glucksberg and its text. Rather, Dobbs’ understanding of Glucksberg functions within Dobbs’ four corners as its own objective fact about Glucksberg’s text that requires no more than textual evocation and simple quotation, not an interpretive account.

But even if common perceptions—or, more precisely, common misperceptions—about Glucksberg help to explain and cover Dobbs’ failure to offer any interpretive argument to underwrite its reading of Glucksberg, Dobbs’ particular construction and deployment of Glucksberg spotlights the need for such a tally. This need is, in fact, urgent in view of how Dobbs practically offers not one, but a series of conflictual and conflicted, and sometimes internally riven, stories about Glucksberg’s meaning—stories that cry out for explanation or justification in relation to Glucksberg’s text, which Dobbs never ventures to supply.

There is, briefly, to begin, Dobbs’ emphatic but sometimes inconsistent rendering of the very test for substantive due process rights that Dobbs claims to draw from Glucksberg. If Dobbs regularly repeats the history-and-tradition formulation it sources in Glucksberg as a veritable conjunctive mantra—history and tradition—Dobbs at times confounds the crispness of this simple story as an approach to substantive due process rights.45 Almost incomprehensibly, Dobbs ventures that satisfying the test may not, finally, even be strictly required for determining the existence of substantive due process rights. Discussing the boundaries of its own application of Glucksberg to abortion rights, for instance, Dobbs at one point explains that it is accepting “for the sake of argument” that “‘the specific practices of States at the time of the adoption of

43 Dobbs, 142 S. Ct. at 2253. Dobbs returns to this theme later in the opinion while again invoking Glucksberg. See, e.g., id. at 2254, 2259–60, 2282–83.

44 Dobbs, 142 S. Ct. at 2254 (alterations in original) (quoting Washington v. Glucksberg, 521 U.S. 702, 719 (1997)).

45 It is also confounded, as described below, by Dobbs’ selective application of the Glucksberg history-and-tradition test to abortion rights and only abortion rights. See Dobbs, 142 S. Ct. at 2243, 2258, 2261, 2266–68, 2277–78, 2280–81; id. at 2309 (Kavanaugh, J., concurring).
the Fourteenth Amendment’ do not ‘mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.’”46

What Dobbs accepts for argument’s sake initially sounds like the Court is already anticipating abandoning Glucksberg’s conjunctive history-and-tradition requirement for a rule of constitutional decision based solely in the dictates of history, defined with reference to “the specific practices of the States” at the time of the Fourteenth Amendment’s adoption.47 Then again, however, back in the present tense, Dobbs also suggests the opposite conclusion, namely, that, in the future, the Court might treat tradition alone as sufficient to underwrite a particular unenumerated substantive due process right, entitling it to new or continued constitutional protections.48 This prospect is crucial for Dobbs’ “Scout’s honor” pledge that, aside from abortion, cases in the Court’s substantive due process canon remain safe within and in the wake of this new ruling.49 But if Dobbs means to say that Glucksberg authorizes it to recognize constitutional rights only on the basis of history or tradition, it does not derive that disjunctive position from Glucksberg, including, more exactly, the history-and-tradition language from Glucksberg that Dobbs quotes, which—superficially anyway—appears to indicate that both historical and traditional conditions must be satisfied before the Court recognizes an unenumerated substantive due process right.50 Dobbs, claiming to be following Glucksberg’s instruction, is manipulating it at will.

Another puzzling feature of Dobbs’ account of Glucksberg relates in a different way to Dobbs’ justification for limiting its adherence to Glucksberg’s history-and-tradition test to abortion rights within the Court’s substantive due process jurisprudence.51 Dobbs’ stance here famously insists that abortion rights are unique among the Court’s substantive due process cases because only abortion involves the

46 Id. at 2258 (majority opinion) (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992)). A variation on this theme arrives when Dobbs notes the tally of state abortion laws at the time of the Court’s decision in Roe. Dobbs, 142 S. Ct. at 2241, 2253, 2260.

47 Id. at 2258, 2285–2300 (Appendix A); see also id. at 2252–54, 2259–61, 2267. For a partial endorsement of this position, see id. at 2300 (Thomas, J., concurring).

48 This inference emerges at least in part from, while converging with, Dobbs’ promises that it is a ruling limited to abortion rights, with other substantive due process rights in other cases being regarded as defensible primarily in terms of tradition, perhaps expressed through stare decisis values, and not history judged strictly by the original public understanding of the Fourteenth Amendment, defined at a low level of generality. See, e.g., id. at 2261 (majority opinion). A similar limit to Dobbs’ sweep is suggested elsewhere in the opinion. See id. at 2243, 2258, 2261, 2266–68, 2277–78, 2280–81; id. at 2309 (Kavanaugh, J., concurring).

49 The language of “Scout’s honor” pledge comes from the Dobbs joint dissent. Id. at 2332 (Breyer, Sotomayor, & Kagan, JJ., dissenting).


51 Dobbs, 142 S. Ct. at 2243, 2258, 2261, 2266–68, 2277–78, 2280–81; id. at 2309 (Kavanaugh, J., concurring).
ending of actual or potential human life.\textsuperscript{52} The unstated implication is that \textit{Glucksberg’s} history-and-tradition test compels the result in \textit{Dobbs} because \textit{Dobbs}, like \textit{Glucksberg}, involves matters of human life and death.

Insofar as this is \textit{Dobbs’} idea, it encounters difficulties when faced with \textit{Glucksberg’s} position on another aspect of the right to die: the right recognized—or, technically, assumed—in the Court’s pre-\textit{Glucksberg} ruling in \textit{Cruzan v. Director, Missouri Department of Health}.

\textit{Cruzan} announced a constitutional liberty interest in refusing unwanted medical treatment, which included a right to terminate lifesaving artificial nutrition and hydration.\textsuperscript{54} This right, like the right to physician-assisted suicide in \textit{Glucksberg} and the abortion right in \textit{Dobbs}, regularly implicates the authority of third-party medical practitioners to act to carry out a patient’s wishes.\textsuperscript{55} While \textit{Glucksberg} itself refused to extend \textit{Cruzan’s} constitutional protections for passive euthanasia to a new right to physician-assisted suicide for the terminally ill, \textit{Glucksberg} did so in ways that reaffirmed \textit{Cruzan} itself.\textsuperscript{56} \textit{Dobbs’} suggestion that \textit{Glucksberg’s} history-and-tradition test now controls where rights involving human life and death are in play suggests, in principle, that \textit{Dobbs} places \textit{Cruzan}—a case that \textit{Dobbs} conveniently never mentions—into doubt and in ways that \textit{Glucksberg} emphatically did not.

Even recognizing that \textit{Glucksberg}, for its part, preserved \textit{Cruzan} partly on the theory that the Court’s earlier ruling derived from respect for common law battery principles, there is no doubt, considering the level-of-generality rule that \textit{Dobbs} says

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  \item \textsuperscript{54} \textit{Cruzan}, 497 U.S. at 278–80; see also \textit{id.} at 287–92 (O’Connor, J., concurring).

  \item \textsuperscript{55} \textit{Id.} at 277–87 (majority opinion); \textit{Glucksberg}, 521 U.S. at 707–08; \textit{Dobbs}, 142 S. Ct. at 2243–44.

  \item \textsuperscript{56} \textit{Glucksberg}, 521 U.S. at 720–26.
\end{itemize}
Glucksberg also makes controlling, consistent with its history-and-tradition test, that
cruzan’s protection for decisions involving the refusal or termination of modern
lifesaving medical interventions is weakened. Approaching rights by defining them
at a low level of generality, the Fourteenth Amendment’s Due Process Clause might
not protect decisions involving medical interventions that did not even exist, and might
not even have been conceivable, at the time of the Fourteenth Amendment’s
enactment. The possibility that Dobbs is inconsistent with Glucksberg and that it may
have overruled Cruzan in silence makes it difficult to see how Dobbs can square its
own history-and-tradition positions with Glucksberg. The same point holds—as others
have rightly noted—as to Planned Parenthood v. Casey and its protections for
abortion rights, which Glucksberg likewise repeatedly cited with approval. Nothing
in Dobbs openly grapples with the wonder of how Glucksberg could have announced
and followed a strict history-and-tradition test that requires Dobbs to overrule Casey when
Glucksberg itself rejected those results.

A final enigma in Dobbs’ account of Glucksberg emerges by contrasting the at
least three different faces of Glucksberg’s test that appear in Dobbs. Beyond the two
more familiar ones—the vision of Glucksberg as announcing a longstanding and
general history-and-tradition test for substantive due process rights, and the vision of
Glucksberg as announcing such a test but one that only applies in cases involving
matters of human life and death—a third face of Glucksberg shows up in Dobbs where
it transforms Glucksberg’s test into a broader method for ascertaining and managing
unenumerated Fourteenth Amendment-protected rights, not only as a matter of liberty
or due process, but also a matter of Fourteenth Amendment privileges or immunities.

In an important but widely overlooked footnote—Footnote 22—which may yet
prove to be historically significant, Dobbs briefly sketches a potentially revolutionary
new conservative originalist jurisprudence of unenumerated rights under the long and
basically defunct Fourteenth Amendment’s Privileges or Immunities Clause. Within
this account, Dobbs installs what it maintains is Glucksberg’s history-and-tradition
test as the basic method by which the Court in future cases will consider challenges
claiming protections for unenumerated fundamental rights under the Fourteenth
Amendment’s Privileges or Immunities Clause.

The potential implications and merits of such a position aside, there is the
interpretive wonder that attends this particular—and, formally, for now, only—
potential expansion of Glucksberg’s reach. Glucksberg’s ostensible history-and-tradition
test can scarcely protect the American public against the “ardent” passions

57 Dobbs, 142 S. Ct. at 2246, 2257; Glucksberg, 521 U.S. at 721, 724–26; Cruzan, 497 U.S.
at 269, 275–78.

58 Glucksberg, 521 U.S. at 710, 726–28; see infra note 80–81.

59 See, e.g., Dobbs, 142 S. Ct. at 2242, 2279; see also, e.g., Siegel, History of History and
Tradition, supra note 11, at 133 n.157. A conceptually parallel play is already unfolding in
the lower federal courts in the context of modern forms of gender-affirming medical care for trans
youth. See, e.g., L.W. ex rel. Williams v. Skrmetti, 83 F.4th 460, 471–79, 487 (6th Cir. 2023);
id. at 507–12 (White, J., dissenting); cf. Deanda v. Becerra, 645 F. Supp. 3d 600, 626 n.14 (N.D.
Tex., 2022), aff’d in part, rev’d in part on other grounds, 96 F.4th 750 (5th Cir. 2024).

60 Spindelman, Sex Equality Troubles, supra note 4, at 141–63.

61 See, e.g., Dobbs, 142 S. Ct. at 2248 n.22.
of Supreme Court Justices, as Dobbs intimates, when Dobbs converts Glucksberg into an opening bid in a potentially new and dramatically transformative Privileges or Immunities Clause jurisprudence that a majority of the Court in Glucksberg nowhere recognized and would not have supported.62

The question here is not about how Dobbs can properly say that Glucksberg authorizes the Court to wedge the Privileges or Immunities Clause back open in ways the Slaughter-House Cases foreclosed over a century and a half ago.63 Rather, the question deals with how Dobbs thinks it is justifiable based on Glucksberg’s text to say that Glucksberg is and means all these different things at once, despite the tensions and contradictions between and among these visions of what Glucksberg stands for. If the Dobbs Court has a theory for how to reconcile all these positions with Glucksberg’s text, it never openly declares it, though the fact remains that Dobbs says that these positions all derive from Glucksberg, a decision integral to Dobbs’ positions throughout its own affirmative argument that Roe was “egregiously wrong” from the start.64

B. Glucksberg as Sword

If Glucksberg functions as the jurisprudential foundation of Dobbs’ own affirmative substantive due process analysis of constitutional abortion rights, Dobbs reaffirms its investments in Glucksberg’s authority in other ways. Notably, Dobbs wields its Glucksbergian history-and-tradition test as a weapon to attack other opinions in the case. Dobbs dramatically takes on the joint dissent in precisely these terms. This is Dobbs: “The [joint] dissent suggests that we have focused only on ‘the legal status of abortion in the 19th century.’”65 This is wrong, according to Dobbs. Explaining why, Dobbs observes:

[O]ur review of this Nation’s tradition extends well past that period. . . . [F]or more than a century after 1868—including “another half-century” after women gained the constitutional right to vote in 1920—it was firmly established that laws prohibiting abortion like the Texas law at issue in Roe were permissible exercises of state regulatory authority.66

Thus, Dobbs reasons, presuming the correctness of its theory of tradition—which at this juncture encompasses both the teachings of history and tradition—that “[t]he dissent cannot establish that a right to abortion has ever been part of this Nation’s

62 Id. at 2247; id. at 2248 n.22. Reasons for saying that the Glucksberg Court would not have opened the door to this kind of position on the meaning of Fourteenth Amendment privileges or immunities are found, among other places, in Transcript of Oral Argument at 6, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521).


64 Dobbs, 142 S. Ct. at 2243, 2265, 2279–80; id. at 2307 (Kavanaugh, J., concurring).

65 Id. at 2260 (quoting id. at 2331 (Breyer, Sotomayor & Kagan, JJ., dissenting)).

66 Id. (majority opinion) (citations omitted).
Accordingly, the *Dobbs* majority reasons, the joint dissent loses because its positions do not satisfy *Glucksberg*’s demands.68

Nested within the point that *Dobbs* has just made is a noteworthy sleight of hand. The *Dobbs* majority, of course, knows that what the joint dissent is saying, at least in part, is that there are different and higher levels of generality at which one can define the right at issue in *Roe*, which originally emerged through an expression, or specification, of the right to bear or beget a child, itself *Eisenstadt v. Baird*’s expression, or specification, of the larger, fundamental constitutional right to privacy first announced by the Court in *Griswold v. Connecticut*.69 Despite this and the other ways that both history and tradition may be mobilized and specified, pointing toward, not against, constitutional protections for abortion rights, *Dobbs* declares that the joint dissent “is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a ‘deeply rooted’ one, ‘in this nation’s history and tradition.’”70 Back again to a more conventional reference to history and tradition now, *Dobbs*—quoting *Glucksberg*—maintains that this is enough support to say that *Dobbs* satisfies, while the joint dissent fails, the pertinent constitutional test.71

*Dobbs* also attacks Chief Justice John Roberts’ *Dobbs* concurrence for the same basic reasons. Unlike the *Dobbs* joint dissent and like the *Dobbs* majority, Roberts’ concurrence would have upheld Mississippi’s fifteen-week abortion ban.72 The Roberts concurrence, however, refuses to repudiate all existing constitutional abortion protections in one fell swoop. Instead, it seeks to maintain some fidelity with the Court’s existing constitutional abortion jurisprudence, while simultaneously rewriting it in new and, frankly, dramatically different terms—terms that, in abandoning viability as a constitutional fulcrum for defining abortion rights, would likely have altered the future course of abortion rights protections, setting them in the very directions the *Dobbs* majority opinion achieves on its own bottom line.73

Understanding the Roberts concurrence to reflect institutionalist concerns, including ideas about constitutional pragmatics that themselves involve ideals of

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67 *Id.*

68 *Id.*


71 *Id.*

72 *Id.* at 2310–11, 2317 (Roberts, C.J., concurring in judgment).

judicial humility and prudence like those Dobbs itself elsewhere mentions, Dobbs drubs Roberts’ concurrence for its “reasonable opportunity to choose” rule.74 According to Dobbs, the concurrence’s “reasonable opportunity” rule—holding that the Constitution protects the right of pregnant people to a “reasonable opportunity” to obtain an abortion without legal rules outlawing it—fails Glucksberg’s test of history and tradition.75 In the Dobbs majority’s estimation, the Roberts concurrence is thus constitutionally defective because it “does not claim that the right to a reasonable opportunity to obtain an abortion is ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”76 Here, Dobbs rejects the Roberts concurrence’s position based on Glucksberg’s authority. Glucksberg is the one case that Dobbs cites for the point.77

Both Dobbs’ own self-account, then, as well as its grounds for rejecting other positions in the case, are founded upon Glucksberg, or, more precisely, on Dobbs’ understanding of Glucksberg as a case announcing a conservative originalist test of history and tradition.78

As a matter of the Supreme Court’s authority to gloss and thereby define the official meaning of its pronouncements, Dobbs is within its rights to say that Glucksberg means whatever the Court wishes to say it means. That authoritative interpretation is binding upon lower courts and other legal actors addressing themselves to Glucksberg’s official meaning. The problem with Dobbs’ particular construction of Glucksberg, however, is that its bare assertions about Glucksberg’s text and the meanings it carries and conveys are not themselves, without more, arguments, much less persuasive arguments, about what Glucksberg originally said and did that make sense of the ruling. To see what Glucksberg’s own text actually says and does, and thus where Dobbs’ interpretation of Glucksberg goes awry, but also where precisely it comes from, requires a return to—and a tour of—Glucksberg itself.

III. Glucksberg’s Original Meaning

A. Rereading Glucksberg: Take One

As foundational as Dobbs makes Glucksberg out to be within and for its ruling—one in which Glucksberg supplies the authoritative legal basis for Dobbs’ constitutional interpretive method, along with its conclusions about Roe and constitutional abortion rights—Glucksberg does not actually announce and then follow a conservative originalist history-and-tradition test as a strict precondition for

74 Dobbs, 142 S. Ct at 2281–83; id. at 2310–15 (Roberts, C.J., concurring in judgment).

75 Id. at 2281–83 (majority opinion); id. at 2310–15 (Roberts, C.J., concurring in judgment).

76 Id. at 2282–83 (majority opinion) (internal quotation marks omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

77 Id. Dobbs does add, however, that the Roberts concurrence does not “propound any other theory that could show that the Constitution supports its new rule.” Id. at 2283. The deeper, beating heart of Dobbs’ position on the Roberts concurrence remains the concurrence’s failure to satisfy what the majority is thinking of as Glucksberg’s test.

78 Justice Brett Kavanaugh’s concurrence not only repeats the majority’s “history and tradition” language, id. at 2304. 2304 n.1 (Kavanaugh, J., concurring), while offering Kavanaugh’s own gloss on it, id. at 2304–06, but also cites Glucksberg, id. at 2306.
its own analysis of substantive due process rights. An articulation of the history-and-
tradition test that Dobbs quotes does surface in Glucksberg, but, in context, it turns
out not to be the announcement of the authoritative constitutional method for deciding
substantive due process cases that Dobbs makes it out to be.

From the outset of its analysis, Glucksberg’s approach to the claimed substantive
due process right of terminally ill individuals to end their lives by physician-assisted
suicide shows the Court engaging with history and tradition. Glucksberg undertakes
this wrestle, however, amidst a larger analysis that is also actively tracking then-
contemporaneous legal “practices.”

A thorough review of Glucksberg shows that its understanding of contemporaneous legal “practices” includes then-contemporaneous American views and values on assisted suicide, largely as seen through the patterning of state laws regarding the practice, along with certain other institutionalized norms, including, significantly, but not only, the Court’s prior substantive due process rulings. These rulings, notably including Planned Parenthood v. Casey, were likewise broadly keyed to the living views and values of the American people.

Glucksberg anticipates its subsequent engagements with these developments as it begins its analysis. Here Glucksberg arrays history, tradition, and practices all on the same level of constitutional significance. “We begin,” Glucksberg observes, “as we do in all due process cases, by examining our Nation’s history, legal traditions, and

79 As Michael McConnell put it in early commentary on Glucksberg:

Significantly, the Court extended [its] historical inquiry all the way to the present, examining recent history to satisfy itself that the traditional condemnation of assisted suicide continues to reflect the mores of the nation. Thus, it is not necessary to show that the challenged practice was protected at the time of adoption of the Fourteenth Amendment, but only that it has enjoyed protection over the course of years. Although the Court did not explicitly say so, the opinion implied that even a traditional norm could come to violate substantive due process if it is subsequently abandoned or rejected by a new stable consensus.

McConnell, supra note 6, at 671 (footnotes omitted). But see id. at 673–74. Writing from a normatively different point of view, Ronald Dworkin described “the narrow, historicist view of the due process clause” as “now probably confined to a core group of the three most conservative members of the present Court—Rehnquist, Scalia, and Thomas—and that is welcome news for those who favor a principled construction of the individual rights that American citizens enjoy against their government.” Dworkin, supra note 6, at 42. For more recent commentary converging on these conclusions with a wider view of caselaw development, see, for example, Hutchinson, supra note 11, at 391–98. Dov Fox and Mary Ziegler trace the history of this history-and-tradition test in The Lost History of “History and Tradition,” 98 S. Cal. L. Rev. __ (forthcoming 2024). Another account of the history-and-tradition approach is in Siegel, History of History and Tradition, supra note 11.

80 See, e.g., Glucksberg, 521 U.S. at 710 (citing, inter alia, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849–50 (1992)); see also, e.g., Dworkin, supra note 6, at 40, 42.
practices.” This is no pure history-and-tradition test. Nor is it a test that registers contemporaneous practices as a practical, if noteworthy, afterthought.

Indeed, as Glucksberg commences its examination of the substance of these various sources of constitutional judgment, it affords contemporaneous practices a noticeable analytic pride of place, if not formally a lexical priority. Glucksberg centers state laws, or, more exactly, the laws of “almost every State—indeed, in almost every western democracy”—that make it “a crime to assist a suicide.” As Glucksberg explains, these state laws against assisted suicide, and the wider contemporaneous American social norms that they reflect, are “not innovations.” They are, “[r]ather, . . . longstanding expressions of the States’ commitment to the protection and preservation of all human life,” part of “consistent and enduring themes of our philosophical, legal, and cultural heritages.” Glucksberg then offers its survey describing the big picture details of what it sees as the relevant 700-plus-year history and related tradition of laws against suicide and assisted suicide.

Emerging from this retrospective cultural heritage tour, Glucksberg picks up exactly where it started and left off: with contemporaneous state laws against assisted suicide. “Though deeply rooted,” Glucksberg comments, “the States’ assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed.”

Glucksberg’s account of these recent legal developments is highly compressed. The account efficiently gestures toward novel medical and technological advances that define a socio-legal context the Court’s opinion treats as relevant—indeed, as integral—to its constitutional inquiry. As Glucksberg writes: “Americans today are increasingly likely to die in institutions, from chronic illnesses.” The authority for this point is a 1983 Presidential bioethics commission report. Glucksberg continues,

81 Glucksberg, 521 U.S. at 710. Importantly, first citation honors at this point in Glucksberg go to Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 849–50 (1992), followed by citations to Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 269–79 (1990), and Moore v. East Cleveland, 431 U.S. 494, 503 (1977). This is a reminder that Glucksberg’s own approach to Fourteenth Amendment substantive due process analysis derives in part from, and so must be consistent with, Casey itself.

82 See infra text accompanying notes 194–202.

83 Glucksberg, 521 U.S. at 710.

84 Id.

85 Id. at 710–11.

86 Id. at 711–16.

87 Id. at 716.

88 Id. at 716–19.


90 See President’s Comm’n Report, supra note 89, at 16–18.
explaining that what makes modern medical and scientific developments constitutionally interesting is that they show how “[p]ublic concern and democratic action are . . . sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect.”91 Bringing its point home, Glucksberg maintains that, despite the recent changes in laws and attitudes around medicine and science at the end of life, state law bans on assisted suicide have widely persisted. Hence Glucksberg’s remark that “voters and legislators continue for the most part to reaffirm their States’ prohibitions on assisting suicide.”92

Glucksberg drills into this position by recounting examples of modern state legal developments. Appropriately enough, it initially turns to Washington’s end-of-life legal rules, which had in some ways been evolving and had, in other ways, stayed more or less fixed. Having already noted at the outset of the opinion that, in Washington, “[i]t has always been a crime to assist a suicide,” Glucksberg here clarifies that the precise assisted-suicide ban now before the Court was “enacted in 1975 as part of a revision of that State’s criminal code.”93 “Four years later,” in 1979, Glucksberg adds, Washington altered its end-of-life care laws in other respects when it enacted “its Natural Death Act,” a law that expressly excluded “mercy killing.”94 More specifically, Glucksberg notes, physician-assisted suicide resurfaced as a political action issue “[i]n 1991, [when] Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide.”95 Soon thereafter, “Washington then added a provision to the National Death Act expressly excluding physician-assisted suicide” from its terms.96

Glucksberg recounts other contemporaneous legal developments around end-of-life care and physician-assisted suicide. It discusses other then-recent efforts to legalize assisted suicide by public initiative. One attempt, in California, failed, while another, in Oregon, passed in 1994.97 Oregon’s “Death With Dignity Act,” as Glucksberg summarizes it, “legalized physician-assisted suicide for competent, terminally ill adults.”98 “Since the Oregon vote, many proposals to legalize assisted suicide have been and continue to be introduced in the States’ legislatures, but none has been enacted.”99 To the contrary, two states—“Iowa and Rhode Island[—]joined the overwhelming majority of States explicitly prohibiting assisted suicide.”100

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91 Glucksberg, 521 U.S. at 716.
92 Id.
93 Id. at 706, 716.
94 Id. at 716–17 (internal quotation marks omitted).
95 Id. at 717.
96 Id. (citation omitted).
97 Glucksberg, 521 U.S. at 717.
98 Id.
99 Id.
100 Id. at 718.
developing trend also manifested at the federal level, even as the Court was deliberating in *Glucksberg*. As the opinion remarks, in April 1997, President William J. Clinton “signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibit[ed] the use of federal funds in support of physician-assisted suicide.”

*Glucksberg* then draws a simple lesson from these developments. It maintains that they show “the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues.” Indeed, illustrating precisely how serious and thoughtful these examinations were, *Glucksberg* namechecks the New York State Task Force on Life and the Law, “an ongoing, blue-ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen . . . convened in 1984” and charged with “a broad mandate to recommend public policy on issues raised by medical advances.” Over the years, says *Glucksberg*, the Task Force weighed in on a number of subjects involving “end-of-life decisions, surrogate pregnancy, and organ donation.” After studying physician-assisted suicide, however, the Task Force unanimously” decided against recommending the legalization of assisted suicide and euthanasia because of the “profound risks to many individuals who are ill and vulnerable.”

Based partly on these risks, the Task Force reasoned that the “potential dangers” of policy changes in this area “outweigh[ed] any benefit that might be achieved.” With this support behind it, *Glucksberg* concludes that, while “[a]titudes toward suicide itself have changed since Bracton, . . . our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition.”

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101 *Id.* The opinion adds a footnote reviewing how “[o]ther countries are embroiled in similar debates.” *Id.* at 718–19 n.16. Within this footnote, the Court’s opinion identifies other legal developments that were unfolding in real time. *Id.*. For some discussion of federal anti-assisted suicide developments in the United States around the time, see Brian H. Bix, *Physician-Assisted Suicide and Federalism*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 53, 61–63 (2003).

102 *Glucksberg*, 521 U.S. at 719.

103 *Id.* (internal quotation marks omitted).

104 *Id.*

105 *Id.; id.* (internal quotation marks omitted) (quoting N.Y. STATE TASK FORCE ON LIFE & THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 120 (May 1994) [hereinafter N.Y. STATE TASK FORCE]).

106 *Glucksberg*, 521 U.S. at 719 (internal quotation marks omitted) (quoting N.Y. STATE TASK FORCE, supra note 105, at 120).

107 *Glucksberg*, 521 U.S. at 719. The *Dobbs* majority opinion quotes part of this language, including its language of contemporaneity (“have consistently condemned, and continue to prohibit”), but without acknowledging how the statement and its context, including what *Glucksberg* then goes on immediately to say about “history, tradition, and practice,” actually undermine, rather than support, *Dobbs’* position on *Glucksberg’s* meaning. *Id.; see Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2254 (2022) (quoting *Glucksberg*, 521 U.S. at 719)).
contemporaneous legal practices, including very recent and ongoing developments, not just history and tradition, categories that break across time past.

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Having identified the relevant “backdrop of history, tradition, and practice” in ways that begin and end with, and so prioritize, “practices,” in the form of contemporaneous American views and values about physician-assisted suicide, Glucksberg formally “turn[s] to . . . [the] constitutional claim” being made, and to be analyzed, in the case.\(^\text{108}\)

Glucksberg opens this part of its discussion with a gloss on the Court’s gloss on the Due Process Clause, this caselaw being another vital dimension of contemporaneous legal practices that Glucksberg honors.\(^\text{109}\)

Almost immediately, Glucksberg situates its engagement of the constitutional claim in the case inside, or anyway in relation to, a long line of constitutional privacy and liberty rulings in which the Court has vindicated “certain fundamental rights and liberty interests.”\(^\text{110}\) Among the rulings that Glucksberg explicitly mentions are rulings on the right to privacy, itself including contraception, and the right to abortion, originally a privacy guarantee.\(^\text{111}\) Notably, Planned Parenthood v. Casey, decided just five years earlier, and dramatically reaffirming Roe’s “essential” holding, makes the

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\(^{108}\) Glucksberg, 521 U.S. at 719. The first and second draft opinions of Chief Justice William Rehnquist’s majority opinion in Glucksberg underscored in this passage that the Court understood that contemporaneous practices had not only evolved but were “yet evolving.” 1st Draft Opinion, Washington v. Glucksberg, No. 96-110 (circulated Mar. 10, 1997) (on file with the Libr. of Cong., Manuscript Div., John Paul Stevens Papers, Box 758, Folder 1) [hereinafter Glucksberg 1st Draft]; 2nd Draft Opinion, Washington v. Glucksberg, No. 96-110 (recirculated Apr. 8, 1997) (on file with the Libr. of Cong., Manuscript Div., John Paul Stevens Papers, Box 758, Folder 1) [hereinafter Glucksberg 2nd Draft]. As the drafts put it: “Against this backdrop of history, tradition, and practice, which is consistent, well-established, yet evolving, we turn to respondents’ constitutional claim.” Glucksberg 1st Draft, supra note 108, at 14; Glucksberg 2nd Draft, supra note 108, at 14. The “yet evolving” language drops out and is replaced by new language by the time of the third draft opinion. 3rd Draft Opinion, Washington v. Glucksberg, No. 96-110 (recirculated Apr. 29, 1997) (on file with the Libr. of Cong., Manuscript Div., John Paul Stevens Papers, Box 758, Folder 1). That language reads: “Against this backdrop of history, tradition, and practice we turn to respondents’ constitutional claim.” Id. at 14.


\(^{110}\) Id. at 720. At a certain point, Glucksberg seems to suggest that its consideration of caselaw is not part of its consideration of “practices,” suggesting that the measure of its ruling may, rather, be history, tradition, practices, and precedents. Id. at 710–20. At another point in the opinion, Glucksberg seems to suggest that its consideration of precedent is about, or anyway involves, “our Nation’s [legal] traditions.” Id. at 723; see also id. at 710–11. Whether one considers the Court’s constitutional precedents and decision-making on their own line or as aspects of “practices,” the important point to bear in mind in this setting is that these touchstones for the Glucksberg Court’s constitutional judgment are contemporaneous ones, not merely ones about the ancient or mid-term past.

\(^{111}\) Id. at 719–20; Roe v. Wade, 410 U.S. 113, 153–54 (1973).
list, mentioned not once, but twice. The normative methodological constitutional foundations of these various rulings, which also include *Griswold v. Connecticut* and *Eisenstadt v. Baird*, are not ultimately found in principles, or the annals, of history or tradition, tradition marking years more recently past. History and tradition are not entirely irrelevant to the normative method of the rulings, but their conclusions are more properly keyed to the living, evolving, and present-day views and values of the American people that sustain them. *Glucksberg* thus indicates, without putting it in these words, that the byproducts of past living constitutionalist Supreme Court rulings remain alive and well within the Court’s substantive due process caselaw, which also, as *Glucksberg* emphasizes, takes into account, if not always decisively, the teachings of history and tradition.

Only after anchoring its constitutional analysis to past substantive due process rulings does *Glucksberg* pivot toward its famous, and oft-quoted, articulation of what is commonly regarded as its history-and-tradition test. On the way to this announcement, *Glucksberg* issues a classic reminder that, in this area of law, the Court must “exercise the utmost care whenever [it is] . . . asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into

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113 Citations to Planned Parenthood of Southeastern Pennsylvania v. *Casey*, 505 U.S. 833 (1992), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), appear together at one point in *Glucksberg*, 521 U.S. at 720. While *Roe* does not expressly make the list in this passage in *Glucksberg*, *id.*, it does not have to. *See infra* note 147. To invoke *Casey* in this setting was to speak of *Roe*’s ongoing validity, given how *Casey* preserved *Roe*’s “essential holding” only five years before *Glucksberg*. *Casey*, 505 U.S. at 845–46. One version of the relevant historical point is suggested by Justice Clarence Thomas’ *Dobbs* concurrence. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2300–02 (2022) (Thomas, J., concurring). The Thomas concurrence in *Dobbs* squarely takes aim at the Supreme Court’s Fourteenth Amendment substantive due process caselaw beyond *Roe* and *Casey*, given that the very idea of substantive due process “is an oxymoron that ‘lack[s] any basis in the Constitution,’” consistent with the strict demands of an historical, originalist understanding of how the Constitution should be read. *Id.* at 2301 (quoting Johnson v. United States, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring)). Of course, in other terms, *Griswold*’s protections for marital privacy, if not a dimension of a constitutional right to privacy, do have, as *Griswold* noted, old legal roots. *Griswold*, 381 U.S. at 486. For a notation on originalism as, originally, in part, an anti-*Roe* project, see Siegel, *Memory Games*, *supra* note 4, at 1148–69.


https://engagedscholarship.csuohio.edu/clevstlrev/vol72/iss4/9
the policy preferences of the Members of this Court.”115 The “established method of substantive-due-process analysis” that Glucksberg then proceeds to articulate—including its language about history and tradition—is an expression of the Court’s declared impulse to judicial humility and its reluctance “to break new ground in this field,” a careful location that gives the decision a decidedly prospective, not retrospective, orientation.116 Given all this, Glucksberg’s text anticipates a question about whether it itself does or could be “breaking new ground” by announcing a new substantive due process test that would dramatically break its own faith with earlier substantive due process precedents that it has practically announced remain beyond active doubt.

Almost, if not exactly, everyone who wishes to read Glucksberg as a conservative originalist—or originalist-ish—ruling making substantive due process analysis turn on strict principles of history and tradition, themselves defined in conservative and low-level-of-generality ways, focuses on Glucksberg’s language about history and tradition, more or less exactly as Dobbs does.117 Despite the familiarity of the relevant language, however, it is worth quoting again here, given its significance. Glucksberg observes:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed[].” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental interest.118

Shorn from its context, including as a redescription of the Court’s “established method of substantive-due-process analysis,” Glucksberg’s suggestion that substantive due process rights must, if they are to be recognized, be “objectively” rooted in history and tradition and implicit in the idea of ordered liberty, appears to imply a broadside attack on the very privacy and liberty cases that Glucksberg has just

115 Id. at 720 (first quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)), and then citing Moore v. E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).

116 Glucksberg, 521 U.S. at 720; id. (internal quotation marks omitted) (quoting Collins, 503 U.S. at 125).


mentioned and reaffirmed.\textsuperscript{119} Again, shorn from its context, this language appears to suggest an abandonment of the very method that \textit{Glucksberg} has described and whose broad contours have shaped its analysis of history, tradition, and contemporaneous practices. And so, for a moment anyway—if one stopped there and did not go on to read the very next sentence in the opinion—it might sound as though \textit{Glucksberg} has majorly changed course, placing earlier substantive due process decisions into doubt, while additionally redefining the approach—focused on an “examin[ation of] our Nation’s history, legal traditions, and practices”—that it previously described as its standard method used “in all due process cases.”\textsuperscript{120}

Indicating that \textit{Glucksberg} is doing no such thing, and, specifically, that it is not actually altering its previous position on the relevant sources of constitutional judgment to be consulted in substantive due process cases, \textit{Glucksberg} immediately follows its description of its two-part inquiry into history and tradition and what is implicit in the concept of ordered liberty, all defined at a low level of generality, by once again re-articulating and re-embracing its earlier formulation of its interpretive method in the case. Here \textit{Glucksberg} observes that: “Our Nation’s history, legal traditions, and practices thus”—“thus”!, it says—“provide the crucial ‘guideposts for responsible decisionmaking,’ that direct and restrain our exposition of the Due Process Clause.”\textsuperscript{121}

In context, then, \textit{Glucksberg} announces a strict test of history and tradition, or, more precisely and more rigorously, a strict test of history and tradition combined with a strict test of what is implicit in the concept of ordered liberty, only to reabsorb that test within the one it has previously articulated and followed. Importantly, it is that test—the test of history, tradition, and practices—that \textit{Glucksberg} then goes on to apply in the remainder of its analysis of the constitutional arguments being advanced in the case.\textsuperscript{122} History, tradition, and practices together provide the key method—the key interpretive law and practice—of the case.

Understood this way, \textit{Glucksberg}’s history-and-tradition test calls out for explanation that \textit{Glucksberg} itself does not provide. Why give expression to this history-and-tradition test if it is merely another way of talking about its test of “history, legal traditions, and practices”?\textsuperscript{123} And how can a test of “history, legal traditions, and practices” equal a test of history-and-tradition plus what is implicit-in-the-concept-of-ordered-liberty? At the least, the multiply conjunctive and rigorous-sounding history-and-tradition and implicit-in-the-concept-of-ordered-liberty test looks very different than the test of history, tradition, and practices that \textit{Glucksberg} in the very next breath,

\textsuperscript{119} \textit{Glucksberg}, 521 U.S. at 720–21. This, of course, is exactly how \textit{Dobbs} reads it in the abortion context, \textit{Dobbs}, 142 S. Ct. at 2253–54, and how Thomas’ \textit{Dobbs} concurrence effectively treats it in relation to other substantive due process decisions. \textit{Id.} at 2300–01 (Thomas, J., concurring).

\textsuperscript{120} \textit{Glucksberg}, 521 U.S. at 720–21; \textit{id.} at 710.


\textsuperscript{122} \textit{Glucksberg}, 521 U.S. at 710, 721.

\textsuperscript{123} \textit{Id.} at 721.
in the very same paragraph, re-announces is its operative method before proceeding to apply it to the case at hand.

There will be time, soon enough, to offer a thicker account of what *Glucksberg* is up to in this passage, after the remaining pieces of the present re-engagement with *Glucksberg*’s text have been set. By that point it will have become clear that *Glucksberg* carries through the stitch of its test of history, legal traditions, and practices in the remainder of its constitutional analysis.

If only here to preview a bit, *Glucksberg*’s famed history-and-tradition test is finally not an authoritative test in the case so much as it is, and at best, an effort in aspirational doctrinal seed-sowing. It does not announce or reflect the Court’s operative method of constitutional interpretation in *Glucksberg*. Rather, it states a position that, at the time of decision in *Glucksberg*, clearly reflected the views of Chief Justice William Rehnquist and Justice Antonin Scalia, but scarcely a majority of the Court. As *Glucksberg*’s author, Rehnquist evidently had the inclination and the latitude to articulate the test in his majority opinion, but only in a way that immediately disavowed that the opinion meant to be saying or doing anything other than re-expressing the test of history, tradition, and practices it had previously declared controlled its analysis. Having planted these seeds, which might be tended to and made to flower in future cases, Rehnquist’s majority opinion immediately covered them over, but without being forced to destroy them altogether. This—in short—is the power of that surprising-unsurprising “thus” that *Glucksberg* offers and that *Dobbs* does not duly engage. When it comes to the remainder of *Glucksberg*’s discussion of the right to physician-assisted suicide for the terminally ill, and the state’s authority to outlaw it, Rehnquist’s majority opinion sticks to history, tradition, and practices, the test agreed to by a majority of the Court.

* * *

And so it is that *Glucksberg*—after noting its disagreement with Justice David Souter’s method for analyzing the claimed substantive due process right in the case, as well as its disagreement with the Ninth Circuit’s approach to defining and analyzing that right—trumpets that it is “now [ready to] inquire whether this asserted right”—

124 See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J.). In correspondence to Rehnquist on *Glucksberg*, dated June 19, 1997, Justice Sandra Day O’Connor asked the Chief Justice to “omit the citation to Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion), an opinion with which [O’Connor] did not fully agree.” Justice Sandra D. O’Connor’s Memorandum to Chief Justice Rehnquist (June 19, 1997) (on file with the Libr. of Cong., Manuscript Div., John Paul Stevens Papers, Box 758, Folder 2 (No. 96-110, Washington v. Glucksberg case file)). The official version of *Glucksberg* contains no reference to Michael H., and neither does the Court’s companion decision in *Vacco v. Quill*, 521 U.S. 793 (1997). The point in the text is made the way it is as a way of recognizing Thomas’ stated position in *Dobbs* on the illegitimacy of Fourteenth Amendment substantive due process as such. *Dobbs*, 142 S. Ct. at 2300–02 (Thomas, J., concurring). In *Glucksberg*’s immediate wake, however, Ronald Dworkin described “the narrow, historicist view of the due process clause” in *Glucksberg* as “now probably confined to a core group of the three most conservative members of the present Court—Rehnquist, Scalia, and Thomas[,]” Dworkin, supra note 6, at 42. Seen this way, it is not inappropriate as a description of positions in *Glucksberg* to count Thomas along with Rehnquist and Scalia.

125 See *Glucksberg*, 521 U.S. at 721.
described as “a right to commit suicide which itself includes a right to assistance in doing so”—“has any place in our Nation’s traditions.”

In focusing exclusively on “our Nation’s traditions” like this, Glucksberg momentarily sounds like it has clipped the wings of its promised inquiry into “history, legal traditions, and practices.” But no sooner does Glucksberg say that it is about to inquire into “our Nation’s traditions” than it returns to the wider promised examination, focused on old historical views, traditions, and contemporaneous legal practices. Thus, as Glucksberg puts it: “Here, as discussed supra, we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults.”

This formulation of the Court’s approach to substantive due process rights does shift the analytic emphasis from earlier in the ruling. Now Glucksberg is prioritizing how tradition, itself backed by a long history, traces through to the present tense. Note with precision, however, that the alteration of the Court’s previous emphasis on practices in favor of an emphasis on tradition in this setting does not at all abandon contemporaneous practices as an ongoing touchstone for Glucksberg’s substantive due process judgment. Glucksberg is in no way suggesting in practice here that only history and tradition matter. Nor does Glucksberg indicate that contemporaneous American views and values on physician-assisted suicide, as reflected in the patterning of state laws around the practice, are irrelevant to its constitutional analysis.

Nor, for that matter, is Glucksberg’s invocation of contemporaneous socio-legal norms an empty gesture. Far from it, Glucksberg explains why it believes that the long and deep roots of contemporaneous bans on assisted suicide matter in this setting. In offering this explanation, Glucksberg returns to the disciplinary function of its history.

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126 Id. at 723. Rehnquist’s Memorandum to the Conference, dated June 11, 1997, clarifies Rehnquist’s disagreement with Justice David Souter’s method of substantive due process analysis, key to Justice John Harlan’s position in Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Rehnquist took Souter’s method to be “a frank abandonment of the method by which we have analyzed substantive due process claims at least since Snyder v. Massachusetts, more than half a century ago, where Justice Cardozo expressed the view that the Massachusetts rule there in question was permissible under the Fourteenth Amendment unless . . . it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” 291 U.S. 97, 105 (1934). Memorandum from Chief Justice William Rehnquist to the Conference (June 11, 1997) (on file with the Libr. of Cong., Manuscript Div., John Paul Stevens Papers, Box 758, Folder 2 (No. 96-110, Washington v. Glucksberg case file)). Rehnquist describes his “opinion in this case” as “follow[ing]ing this line of analysis,” unlike Souter’s opinion, which “substitutes for the established method of analysis a theme which by no means contradicts the established method in every aspect, and which has served as a useful supplement in connection with the established method of analysis.” Id. The Memorandum, in the very next paragraph, goes on to discuss Casey and its relation to Harlan’s method in his Poe dissent, without suggesting that anything in the then-current draft Glucksberg opinion meant to contradict Casey. Id.

127 Id. at 723.

128 Id. at 721.

129 See id.; id. at 710–19.
tradition, and practices approach. “To hold for respondents,” and to recognize the right to physician-assisted suicide that they claimed, Glucksberg ventures, “we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State.”131 The challenges to the Court and its authority from any such move is significantly a problem of the present-day socio-legal scene. Were the Court to tear up bans on assisted suicide in order to recognize the right of the terminally ill to end their lives with a doctor’s help, the Court’s institutional authority would be subject to challenge—a challenge that would presumably emerge from the widespread American, including institutional, opposition to assisted suicide, opposition that is old, “considered,” and enduring.132

After venturing this significantly presentist rationale for rejecting the right to physician-assisted suicide, Glucksberg engages another dimension of contemporaneous legal practices. Here, at last, the Glucksberg Court takes up its own substantive due process caselaw and arguments based upon it, claiming, most significantly, that the Court’s decisions in Cruzan v. Director, Missouri Department of Health and Planned Parenthood v. Casey require the Court, as a matter of principle, to recognize a realm of “self-sovereignty” surrounding “basic and intimate exercises of personal autonomy,” as through physician-assisted suicide for the terminally ill.133

Glucksberg describes these arguments as bids from precedent, what the opinion terms “our jurisprudence in this area,” not claims involving either “this Nation’s history [or] practice.”134 Without elaboration, Glucksberg gerrymanders the term “practices” at this point in its text so as to exclude the Supreme Court’s own constitutional positions. Nevertheless, the Court’s modern substantive due process cases, or at least Cruzan and Casey, central to this discussion, remain decisions that significantly reflect and reinforce then-contemporaneous American sensibilities and law-patterned arrangements about the right to refuse or terminate unwanted but lifesaving medical treatment and the right to end an unwanted pregnancy as a matter of pregnant women’s choice.135

Glucksberg’s discussion of Cruzan casts a mold that is effectively reproduced in its key elements in Glucksberg’s subsequent treatment of Casey. Glucksberg explains that Cruzan’s reasoning emerged from a limited constitutional rights inference that followed from the common law of battery and of informed consent, itself “viewed as generally encompassing the right of a competent individual to refuse medical treatment.”136 In this way, Glucksberg deflects the power of the argument from

131 Id. at 723.
132 Id.
133 Glucksberg, 521 U.S. at 723–24 (citations and internal quotation marks omitted).
134 Id. at 724.
135 The Glucksberg Court cites both Casey and Cruzan, remember, in its earlier formulation of the test involving an examination of “our Nation’s history, legal traditions, and practices.” Id. at 710 (citing, inter alia, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849–50 (1992), and Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 269–79 (1990)). For additional relevant discussion, see, for example, Casey, 505 U.S. at 856–69.
136 Glucksberg, 521 U.S. at 724 (internal quotation marks omitted) (quoting Cruzan, 497 U.S., at 277).
principle—that *Cruzan* affirmed a right to autonomy in end-of-life decisions that should apply equally in the case of physician-assisted suicide—on the grounds that *Cruzan* did not involve a “simpl[e] deduc[tion] from abstract concepts of personal autonomy.”

However accurate as to *Cruzan*’s original train of thought, this position dodges the force of the argument that, having once recognized this right to passive euthanasia and the principle of autonomy underneath it, the Court ought to extend that autonomy principle to protect physician-assisted suicide for the terminally ill, which as an exercise of individual decision-making, or so the argument goes, is no different. *Glucksberg*’s position is even weaker than at first glance it may seem, since it accepts the force of the principled argument as it propounds its historical distinction. It writes: “The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.” If history and tradition are subtly, if plainly, implied by this “never,” however, so are contemporaneous “practices,” a point that *Glucksberg* affirms when, now back in the present tense, it invokes contemporaneous visions of differences between refusal of lifesaving treatment and assisted suicide.

“Indeed,” *Glucksberg* writes, “the two acts [meaning: the refusal of “unwanted [but lifesaving] medical treatment” and assisted suicide] are widely and reasonably regarded as quite distinct.” Lest it be missed, these are, at least in part, contemporaneous judgments. Any doubt on this point is settled when *Glucksberg* reaffirms that contemporaneous practices are relevant to its distinction and analysis. *Cruzan*, *Glucksberg* observes, “recognized that most States outlawed assisted suicide[.]” Then, *Glucksberg* adds on its own account, “even more [states] do [so] today[.]” Accordingly, *Glucksberg* reasons that *Cruzan* “gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide,” a transmutation that *Glucksberg* refuses based on its judgments about the past and the present day.

*Glucksberg* distinguishes *Casey* in ultimately similar terms—terms that affirm the significance of contemporaneous American views and values to the Court’s approach to substantive due process rights. *Glucksberg* refuses to extend *Casey* to encompass a right to physician-assisted suicide, notwithstanding *Casey*’s soaring promise that Fourteenth Amendment liberty, at its “heart,” protects “the right to define one’s own

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137 *Glucksberg*, 521 U.S. at 725.
138 *Id.*
139 *Id.* at 725, 721.
140 *Id.* at 725.
141 *Id.*
142 *Id.*
concept of existence, of meaning, of the universe, and of the mystery of human life.”

Glucksberg contextualizes Casey’s famed “sweet-mystery-of-life” passage as the elaboration of an approach that Casey drew from, and used to describe, the Court’s “prior substantive due process cases” and the rights that they protected. Re-describing the cases this time around, Glucksberg says they involved either rights recognized as a matter of “history and traditions,” “or” rights deemed “fundamental to our concept of constitutionally ordered liberty[.]” In this setting, Glucksberg casually abandons its earlier and provisional depiction, never actually operationalized, of a rigorous test of history-and-tradition and what is implicit in the concept of ordered liberty, precisely the test that Dobbs, at times, being more specific, says that Glucksberg announced. Now Glucksberg relents that the Court’s approach to substantive due process in “prior cases” involved either an inquiry into history-and-tradition or the recognition of a not-especially-rigorous vision of ordered liberty, one that is nowhere as demanding as the one that Glucksberg earlier, momentarily announced, a vision of liberty that Glucksberg associated with Palko v. Connecticut, an incorporation decision providing the Court would only incorporate those ordered liberties it deemed “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”

When Glucksberg at last addresses precisely why it believes Casey does not, in principle, entail a right to physician-assisted suicide for the terminally ill, the opinion delivers a one-two punch. Glucksberg begins by denying that Casey’s language “warrant[s] the sweeping conclusion that any and all important, intimate, and personal decisions are so protected[.]” As before, however, this position is a contortion of the argument that was being advanced in the case, which, far from an all-encompassing claim of a constitutional right to individual autonomy, was one that was carefully calibrated even in the right-to-die setting. Having worked this contortion and made its point, Glucksberg then releases its second punch, one that returns the opinion to its ultimate justification for distinguishing Cruzan. As before, Glucksberg proposes

\[\text{144 Id. at 726 (internal quotation marks omitted) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).}\]

\[\text{145 The description of Casey as including a “sweet-mystery-of-life” passage is from Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting). The relevant language from Glucksberg appears in Glucksberg, 521 U.S. at 727.}\]

\[\text{146 Glucksberg, 521 U.S. at 727.}\]

\[\text{147 Id. In a footnote dealing with “prior cases,” Glucksberg cites Roe v. Wade, 410 U.S. 113, 140 (1973), while parenthetically noting some of its historical analysis. Glucksberg, 521 U.S. at 727 n.19. In this respect, Glucksberg intimates that Roe, too, is properly defensible in terms of Glucksberg’s operative understanding of how the Court’s “prior cases” approached, analyzed, and recognized various substantive due process rights. Id. at 727. For one example of Dobbs’ invocation of the more comprehensive test, see Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2242 (2022).}\]


\[\text{149 Glucksberg, 521 U.S. at 727.}\]
that “[t]he history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.”

Glucksberg leads with history here, but history is now defined in a way that carries it through to the present tense—what “[t]he history of the law’s treatment of assisted suicide in this country . . . continues to be”—in ways that land on contemporaneous practices, as viewed, yet again, in the patterning of state law bans against assisted suicide. These bans—and the vibrancy of the contemporaneous American norms that Glucksberg takes them to reflect—make it perilous for the Court to break the new constitutional ground that assisted-suicide proponents in the case effectively asked the Court to break.

Nearly done, Glucksberg also adverts to contemporaneous practices amidst its discussion of the various legitimate governmental interests that it believes the states have for regulating assisted suicide, including for the terminally ill. Glucksberg repeatedly punctuates this part of its discussion with references to present-day ideas and authorities, including the contemporaneous views and positions of different medical professionals and medical organizations, including the American Medical Association, which, Glucksberg underscores, views “[p]hysician-assisted suicide [a]s fundamentally incompatible with the physician’s role as healer.” Somewhat remarkably given later debates over the relevance of international norms to domestic U.S. constitutional decision-making, Glucksberg finds no reason not to look to developments overseas and in the Netherlands that were then unfolding in real time and involving the Dutch euthanasia “experience,” which Glucksberg regards as legitimating contemporaneous domestic U.S. concerns about the dangers of legalizing physician-assisted suicide.

Throughout Glucksberg’s constitutional analysis—and consistent with its opening description of its approach to substantive due process cases via an inquiry into history, tradition, and practices—contemporaneous American views and values and legal developments surrounding physician-assisted suicide are relevant and integral to Glucksberg’s substantive due process account, giving shape to its bottom-line constitutional conclusions. It is, thus, simply inaccurate, as an account of Glucksberg’s text and what it says and does, to propose that Glucksberg announces a history-and-tradition test that is ready-made for Dobbs’ use in reconsidering and eliminating Roe and its constitutional protections for abortion rights.

150 Id. at 728.

151 Id.

152 Glucksberg, 521 U.S. at 731 (internal quotation marks omitted) (citing CODE OF ETHICS § 2.211 (AM. MED. ASS’N 1994)), then Council on Ethical and Judicial Affairs, Decisions Near the End of Life, 267 JAMA 2229, 2233 (1992), and then N.Y. STATE TASK FORCE, supra note 105, at 103–09).

153 Glucksberg, 521 U.S. at 734. For one engagement with the larger theme of the role of international law in the interpretation of the U.S. Constitution, see generally Joan Larsen, Importing Constitutional Norms from a ‘Wider Civilization’: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283 (2004).

154 See supra Part II.
Faced with what *Glucksberg* says and does, Dobbs’ understanding of *Glucksberg* as a case announcing a strict history-and-tradition test to be used when analyzing substantive due process claims has now effectively collapsed. Discussion of *Glucksberg*’s text, however, is not quite at an end. The more one digs into *Glucksberg*, the more implausible it becomes to credit Dobbs’ assertions that *Glucksberg* supplies a ready-made precedent announcing and following a history-and-tradition-based substantive due process methodology.155

Three other dimensions of *Glucksberg*’s constitutional analysis in particular warrant recognition in this connection. The first focuses on the political process theorizing at work in the Court’s *Glucksberg* opinion, an analysis that practically coordinates the majority opinion to ideas found in Justice Sandra Day O’Connor’s swing-vote, and hence decisive, *Glucksberg* concurrence. The second aspect of *Glucksberg* that reinforces the conclusion that *Glucksberg* is not what Dobbs makes it out to be, to be taken up along with the first, focuses directly on the political process thinking in O’Connor’s concurrence, exposing what it teaches about *Glucksberg*’s meaning—a meaning that is at right angles with Dobbs’ account of *Glucksberg* as a case that announced a strict test of history and tradition for substantive due process rights. The third, and, for present purposes, final dimension of *Glucksberg* that shows it to be other than what Dobbs maintains is also found in O'Connor’s *Glucksberg* concurrence, and, specifically, in how the concurrence handles another aspect of the right to die, involving the medical practice known as terminal sedation. This practice lacks recognizable supports in history and tradition, narrowly defined, but a majority of the Justices in *Glucksberg* nevertheless seemed prepared to view it as encompassed within the Fourteenth Amendment’s Due Process Clause.

### B. Rereading Glucksberg: Take Two

1. Political Process Thinking in *Glucksberg* and O’Connor’s *Glucksberg* Concurrence

    Nested within *Glucksberg*’s account of contemporaneous practices are the working elements of a distinctive twentieth-century constitutional analytic. This analytic—focused on political process thinking, à la *United States v. Carolene Products* and its famous Footnote 4—emerges amidst *Glucksberg*’s assessment of history, tradition, and practices, and then once again in a flourish at the end of the Court’s opinion in the case, where political process thinking breaks into the open to stand on its own.156

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155 A further check on the conclusions here is found in the *Glucksberg* opinion’s own emphasis on how the Court treats the case as involving a facial challenge to assisted-suicide bans, leaving the door open—if only a bit—to future challenges on as-applied grounds. *Glucksberg*, 521 U.S. at 735 n.24. This even slightly open door is inconsistent with the idea that *Glucksberg* is a decisive history-and-tradition-based ruling on the constitutionality of laws banning assisted suicide. For the related suggestion that “at least five Justices make it clear [in *Glucksberg*] that some kind of interest could indeed obtain constitutional solicitude in another, future case,” including along the lines of O’Connor’s concurrence, with its own “emphasis on assuring sufficient pain control, even unto death,” understood to “impl[y] a warning to states that would restrict even that,” see Martha Minow, *Which Question? Which Lie? Reflections on the Physician-Assisted Suicide Cases*, 1997 SUP. CT. REV. 1, 11 (1997).

156 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Notable relevant passages in *Glucksberg* include 521 U.S. at 716–19, 735. The only formal citation to *Carolene*
Insofar as Glucksberg depends on an independent political process rationale to support its conclusion, it does not strictly hew to a history-and-tradition test like Dobbs maintains.\textsuperscript{157}

Glucksberg’s tally of contemporaneous legal practices—focused on the patterning of state laws around the right to die and physician-assisted suicide in particular—embeds a narrative about how state-level political processes are broadly open to the possibilities of law reform. Whereas state laws have shifted around the right to refuse or terminate unwanted but lifesaving medical treatment, state law bans on assisted suicide, Glucksberg observes, have remained on the books to the then-present day.\textsuperscript{158}

Popular political efforts to legalize assisted suicide, including direct democracy efforts, Glucksberg continues, have not proven very successful. As Glucksberg recounts, one such effort, in California, failed, in contrast to the notable exception of Oregon, where its “Death With Dignity Act” became law.\textsuperscript{159} Glucksberg’s working assumption here is, evidently, that political deliberation and the channels of law reform are fully open and functioning in step with constitutional ideas and presumptions about how American political processes should work. Bans on assisted suicide, therefore, deserve the great deference that courts ordinarily afford to policy choices involving ordinary social and economic rights.\textsuperscript{160} Moreover, as Glucksberg sees it, states “are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues.”\textsuperscript{161} No political process defects are visible to the Court.

If, initially, these ideas about the operations of political processes dovetail with the Court’s ideas about judicial second-guessing under the Due Process Clause and the demands for respecting the ordinary operations of the democratic realm, Glucksberg’s return to them in its final passage recasts them in a slightly, but significantly, different light. In this setting, political process considerations function in a last, and rhetorically dramatic, analytic burst, conveying an independent and supplemental justification for Glucksberg’s refusal to step into the constitutional breach and strike down existing assisted-suicide bans. Glucksberg remarks that it is confident it is reaching the right constitutional result in the case, based significantly on the fact that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality,


\textsuperscript{157} This does not mean to overlook the possibility that certain aspects of the Court’s discussion in Dobbs may be read as a subtle and indirect way of acknowledging the point. See, e.g., Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2277 (2022). Then again, Dobbs’ own political process thinking, such as it is, particularly its idea that “[w]omen are not without electoral or political power” and are a majoritarian political force, aims in other directions. \textit{Id.} The point is elaborated, and its connection to earlier decisions, including Carolene Products, described by Spindelman, Sex Equality Troubles, \textit{supra} note 4, at 132–36.

\textsuperscript{158} Glucksberg, 521 U.S. at 716–19, 728.

\textsuperscript{159} \textit{Id.} at 717.

\textsuperscript{160} \textit{Id.} at 728–36; Carolene Prods., 304 U.S. at 152–53, 152 n.4.

\textsuperscript{161} Glucksberg, 521 U.S. at 719.
legality, and practicality of physician-assisted suicide.”¹⁶² Thus, *Glucksberg* concludes, its “holding permits this debate to continue, as it should in a democratic society.”¹⁶³

*Glucksberg*’s political process rationale implies that the Court lacks any special warrant to second-guess the outcomes of political debates on assisted suicide and the right to die. The Court does not delve into the details, but its treatment of the point functionally indicates that the *Glucksberg* Court does not see the case as involving any “discrete and insular minor[ity]” whose rights trigger Footnote 4 scrutiny.¹⁶⁴

Of course, the most obvious candidates for “discrete and insular minority” status in *Glucksberg* are the terminally ill patients—or some of them—whose right to die was at stake in the case. Whereas the *Glucksberg* majority’s analysis on this point is largely gestural, Justice Sandra Day O’Connor’s separate *Glucksberg* concurrence, converging with the majority opinion on the front, supplies more details of the missing reasoning.¹⁶⁵

On its own terms, O’Connor’s *Glucksberg* concurrence is constructed and pivots around constitutional political process thinking. The concurrence opens by observing that “[d]eath will be different for each of us,” and the frank, related recognition that any of us might spend our “last days . . . in physical pain and perhaps [suffering] the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions.”¹⁶⁶ These realities, the concurrence proposes, might lead some of us—and who can know in advance which of us?—to “seek medication to alleviate that pain and other symptoms” that come as life is drawing to an end.¹⁶⁷ Nor, importantly, is it only we, as individuals, who may someday confront these realities. “Every one of us at some point may be affected by our own or a family member’s terminal illness.”¹⁶⁸

Between what may befall us or our loved ones, O’Connor’s concurrence indicates that it expects “the democratic process will . . . strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State’s interests in protecting those who might seek to end life mistakenly or under pressure.”¹⁶⁹ In O’Connor’s concurrence’s view, none of the

¹⁶² Id. at 735.
¹⁶³ Id.
¹⁶⁴ *Carolene Prods.*, 304 U.S. at 153 n.4.
¹⁶⁷ *Glucksberg*, 521 U.S. at 736 (O’Connor, J., concurring).
¹⁶⁸ Id. at 737.
¹⁶⁹ Id.
classic “us–them” problems that beset political process defect cases obtains in this setting. The laws that any of us, or that we all together, support, will govern us all, including what happens with those we love and everyone else. These laws, accordingly, may be understood as invested in, and, just as the Glucksberg majority opinion indicated, reflective of open-minded thinking and a serious accounting of the balance of competing considerations that inform the shape of laws around death and dying, including physician-assisted suicide.

With this background in mind, O’Connor’s concurrence expresses its own version of the majority’s political process theory point. The concurrence ventures that the “States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues.” In consequence, the balancing of patients’ rights and interests against the risks and needs for legal safeguards, given the nature of the right that is involved, ought to be “entrusted to the ‘laboratory’ of the States . . . in the first instance.” The correspondence between this idea and Rehnquist’s opinion’s political process thinking is notable, but not, finally, surprising. The swing-vote Justice’s views find their way into expression in the Court’s majority opinion.

To be sure, there may be—or are—grounds for questioning the soundness of the political process ideas in O’Connor’s Glucksberg concurrence and Rehnquist’s Glucksberg majority opinion. Is it really true that the American public is broadly open-minded about, and both rationally and continually re-evaluating, the law and policy surrounding assisted suicide, including for the terminally ill? One important through-line across time and space in right-to-die debates involves the significant role played in them by conservative religious views and values on the sanctity of life, including as it relates to—opposing—suicide, including physician-assisted suicide. Even recognizing that everyone—all of us, our loved ones, and everyone else—is mortal, and will eventually die, that fact alone hardly means that American attitudes about death and dying, and the laws surrounding them, are by definition rational and subject to open and thoughtful public deliberation in the political realm. Particularly not so long as American society and its cultural norms regularly frame death as fearsome and abhorrent, rather than a fact of life that, appropriately at times, may even be welcomed. Distinctively American dreams of immortality—and its realization—

170 Id. For some accounting of “ins” versus “outs” dynamics in politics and in constitutional political process theorizing, see, for example, Ely, supra note 156, at 76–77, 97–98, 102–03, 106, 135–79.

171 Glucksberg, 521 U.S. at 737 (O’Connor, J., concurring).


174 One snapshot with pertinent reflections is in Jeffrey Kluger, Why Americans Are Uniquely Afraid of Growing Old, TIME (Feb. 23, 2023), https://time.com/6257805/americans-aging-
are hard to shake, and they ideologically torque the rational mix in public conversations over life and death and dying.

Whatever the bases for questioning the overlapping views of O’Connor’s *Glucksberg* concurrence and the *Glucksberg* majority opinion about how the political processes are working in American death-and-dying debates, the pertinent point remains the same. These opinions both invoke and rely on political process ideas, inflected with federalism values, within the matrix of their own constitutional thinking and conclusions. These accounts—which focus on the contemporaneous openness of the channels of collective political deliberation—are in their contemporaneity likewise irreducible to any kind of history-and-tradition test as the sole criterion, or even a necessary criterion, for discovering and respecting substantive due process rights. The *Glucksberg* Court’s overall reliance on political process thinking confirms the conclusion that *Dobbs* errs when reading *Glucksberg* as announcing an actual strict test of history and tradition for adjudicating substantive due process rights.\(^{175}\)

2. O’Connor’s *Glucksberg* Concurrence—Of Terminal Sedation

One last grouping of points that emerges from Justice O’Connor’s *Glucksberg* concurrence remains to be considered. From another direction, these points reaffirm that *Glucksberg*, whose ultimate meaning O’Connor practically controlled, cannot properly be understood as a ruling announcing a simple substantive due process test of history and tradition as *Dobbs* maintains.

Over and above O’Connor’s concurrence’s focus on political process thinking to support its conclusions on the right to physician-assisted suicide in the case is an important, though still regularly overlooked, constitutional starting-point assumption about the case that it makes. This assumption presumes—and, accordingly, has sometimes been understood practically to have announced—substantive due process protections for the exercise of palliative care unto death via the practice sometimes known as “terminal sedation.”\(^{176}\)

As O’Connor’s *Glucksberg* concurrence observes, “The parties and amici agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness resistance. For an important account of cultural notions of death and dying in the African American community in the twentieth century, see generally Karla C. F. Holloway, *Passed On: African American Mourning Stories* (2002).

\(^{175}\) Of course, this is not to say—nor intimate—that political process matters are wholly unrelated to questions about the past—either, in this respect, history or tradition. Who is and is not a discrete and insular minority, of course, has long involved inquiries into histories and traditions of social and legal discrimination. See, e.g., Erwin Chemerinsky, Constitutional Law: Principles and Policies 744 (7th ed., 2023). The *Glucksberg* majority opinion and O’Connor’s *Glucksberg* concurrence, however, both make their points about political processes in terms that emphasize how they have been and are open to change around law at the end of life.

and hastening death.”

Returning to contemporaneous “practice” this way, laws on terminal sedation in the states that O’Connor’s opinion has in view were not unique.

O’Connor’s position mentions, but is not the only opinion in Glucksberg to implicate, customary state law permissions allowing terminal sedation to occur. Justice John Paul Stevens’ separate Glucksberg concurrence relatedly notes that “the American Medical Association [“AMA”] unequivocally endorses the practice of terminal sedation—the administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain even when it is clear that the time of death will be advanced.” This AMA position, as Stevens’ concurrence describes it, stood and stands in stark contrast to the AMA’s opposition to assisted suicide, which the Glucksberg majority also sees and treats as an independent constitutional factor recommending its rejection of the physician-assisted suicide rights of the terminally ill.

The existence of terminal sedation as a state law authorized practice, one that the AMA approved of, does not only function as a constitutionally assumed end in O’Connor’s concurrence. Within O’Connor’s opinion, legal and professional respect for terminal sedation operate as constitutional conditions precedent to O’Connor’s opinion’s decision to uphold state bans on assisted suicide against constitutional attack. As O’Connor’s opinion explains, it takes the position that it does on the assisted suicide question presented in the case in part because nobody’s life in those states whose laws were immediately under consideration was being prolonged in a state of pain in order to satisfy relevant state law. Legally, in those jurisdictions, a patient’s


178 Glucksberg, 521 U.S. at 736–37 (O’Connor, J., concurring) (citing, in part, WASH. REV. CODE § 70.122.010 (1992)); see Glucksberg, 521 U.S. at 780 n.15 (Souter, J., concurring in judgment).

179 See also, e.g., Vacco, 521 U.S. at 807 n.11 (1997).

180 Glucksberg, 521 U.S. at 751 (Stevens, J., concurring in judgment). As Justice John Paul Stevens’ concurrence continues: “The purpose of terminal sedation is to ease the suffering of the patient and comply with her wishes, and the actual cause of death is the administration of heavy doses of lethal sedatives.” Id.


182 Glucksberg, 521 U.S. at 736–37 (O’Connor, J., concurring).
pain could be controlled and alleviated even unto the point of hastening a patient’s death.\textsuperscript{183}

Tallying O’Connor’s concurrence’s views along with the views of the other Justices who joined her concurrence or otherwise agreed with this aspect of it, a majority of the \textit{Glucksberg} Court presumed the existence of constitutional protections for a right to terminal sedation, a right whose existence could not have been based at the time of \textit{Glucksberg}, or now, exclusively on the teachings of history or tradition understood in a narrow sense.\textsuperscript{184} From aught that O’Connor’s opinion explains, the legality of terminal sedation as a matter of state law, presumably reflecting local and perhaps other contemporaneous views about the impropriety of forcing patients to endure pointless pain and suffering at life’s end, may have been enough, when combined with the AMA’s endorsement of the practice, to give terminal sedation constitutional bearing—in \textit{Glucksberg} as well as in some future case.

Interestingly, nothing in O’Connor’s concurrence suggests that the constitutional stature of terminal sedation, such as it is in her opinion and otherwise in \textit{Glucksberg}, should be made to turn on arguments about the operations of ordinary political processes. The constitutionally moving force of the cause is, apparently, in its humanity, along with O’Connor’s concurrence’s corresponding sense that freedom from needless pain and suffering at life’s end must accord with the American people’s basic values, reflected in contemporaneous legal practices, which in this setting at least broadly accord with medical elites’ and the medical establishment’s positions. No more than that might have been required expressly to afford terminal sedation’s substantive due process protections had the question been formally called in \textit{Glucksberg}.\textsuperscript{185}

If this is right, O’Connor’s concurrence may be impugned for its willingness to contemplate and practically make the case for a constitutional right to terminal sedation while not contemplating and accepting the related case for a similar right of the terminally ill to end their lives by physician-assisted suicide. The practices look like one another both as a matter of individual autonomy and in political process terms.\textsuperscript{186} Whether criticized for these reasons or not, the concurrence’s more favorable treatment of terminal sedation is the basis for making the relevant point: O’Connor’s concurrence’s position on terminal sedation, like its position on political

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.} Justices Ruth Bader Ginsburg and Stephen Breyer both wrote brief concurrences that noted their agreement with O’Connor’s position in the case. \textit{Id.} at 789 (Ginsburg, J., concurring in judgment); \textit{Id.} at 789 (Breyer, J., concurring in judgment). \textit{Accord} Kamisar, \textit{supra} note 165, at 904–05. \textit{See also}, e.g., McConnell, \textit{supra} note 6, at 673–74. Stevens and Souter, writing separately, both figured a practical right to terminal sedation in ways that, taken in the context of their opinions, suggest constitutional protections for that right. \textit{See, e.g.}, \textit{Glucksberg}, 521 U.S. at 746, 748–50, 751 (Stevens, J., concurring in judgment); \textit{Id.} at 780–82 (Souter, J., concurring in judgment). \textit{Accord} Minow, \textit{supra} note 155, at 11.


\textsuperscript{186} This is not to overlook the possible ways of distinguishing them from one another, but rather only to note the analogy between them on autonomy and political process lines. \textit{Cf.} \textit{Opinion 5.3, Withholding or Withdrawing Life-Sustaining Treatment}, \textit{AM. MED. ASS’N CODE OF ETHICS}, https://code-medical-ethics.ama-assn.org/sites/amacoedb/files/2022-08/5.3.pdf (last visited Jun. 7, 2024).
process theorizing, puts it at right angles to any suggestion that Glucksberg, which O’Connor, after all, joined, actively or effectively announced and depended upon a strict test of history and tradition as a necessary precondition for the discovery and protection of new substantive due process rights. 187

That O’Connor would not have joined an opinion in Glucksberg making that kind of announcement is not only indicated by her Glucksberg concurrence. Looking beyond it, that conclusion is amply confirmed by O’Connor’s opinions both on and off the Court that speak to her views on strict history-and-tradition-bound constitutional analytics. Perhaps most famous among the expressions of O’Connor’s views on this front is her decision to coauthor the Casey joint opinion, which reaffirmed Roe’s “essential holding” based not on the teachings of history or tradition, strictly understood, but rather based more heavily on contemporaneous views and values and understandings of judicial statecraft in the abortion realm. 188

No less significant, however, is a dispute that preceded Casey and that centered around Justice Antonin Scalia’s attempt in Michael H. v. Gerald D. to index substantive due process protections to principles of history and tradition, understood at relatively low levels of generality. 189 In a separate opinion that Justice Anthony Kennedy joined, O’Connor flatly rejected Scalia’s preferred interpretive methodology because of what that approach to substantive due process rights would presumably have done to place other substantive due process rights and rulings into doubt. 190 Rehnquist’s majority opinion in Glucksberg effectively brought the dreams of Scalia’s Michael H. positions forward, if only in seedling form—no great surprise given that Rehnquist joined Scalia’s expression of these dreams in Scalia’s Michael H. opinion. But, again, Glucksberg brings the seeds of these dreams forward in a very particular way, and only fleetingly, before expressly folding its novel history-and-tradition test back into the conventional test of history, tradition, and practices that O’Connor, and so a majority of the Court, could live with. This was the test a majority of the Court was ready to say governed in the substantive due process realm. Nor is Glucksberg’s failure to mention Michael H. a coincidence. O’Connor helped see to it, and in a way


that protected the Court’s handiwork, not only in Michael H. itself, but also, before Glucksberg, in Casey.\footnote{As O’Connor put it to Rehnquist in correspondence dated June 19, 1997: “I would prefer you omit the citation to Michael H. v. Gerald D., 491 U. S. 110 (1989) (plurality opinion), an opinion with which I did not fully agree.” Justice Sandra D. O’Connor’s Memorandum to Chief Justice Rehnquist (June 19, 1997) (on file with the Libr. of Cong., Manuscript Div., John Paul Stevens Papers, Box 758, Folder 2 (No. 96–110, Washington v. Glucksberg case file)).}

Against all this, which is to say, against Glucksberg’s actual original meaning, Dobbs can insist all that it wants that Glucksberg propounded a substantive due process rights test that makes the existence of a claimed substantive due process right dependent upon a strict account of the teachings of history and tradition. Dobbs’ insistence aside, Glucksberg itself teaches that it did no such thing. Glucksberg could not and would not have announced and then followed the kind of strict history-and-tradition test Dobbs maintains that it did, because a majority of the Court in Glucksberg—including the swing-vote Justice in the case—did not support it.

IV. Dobbs Reconsidered in Light of Glucksberg’s Original Meaning

There is nothing esoteric in this multilayered reading of Glucksberg. All there is, finally, is what Glucksberg says and does—a straightforward, if close, reading of the Court’s decision in the case, cross-illuminated by relevant reference points within and beyond the four corners of Glucksberg’s majority opinion’s text.

To accept this understanding of Glucksberg—which defies Dobbs’ simplistic and erroneous reduction of the case and its complexities to a history-and-tradition test, an interpretation of the case that lifts key language from Glucksberg out of context without explanation or defense beyond simple quotation—one need not hold any particular set of views on the morality of abortion, assisted suicide, terminal sedation, or constitutional protections for them. Whatever one’s views on those questions, Glucksberg’s text does not boil down to the conservative originalist history-and-tradition substantive due process test that Dobbs purports to find in it.

Dobbs thus has a major problem of justification on its hands. Without Glucksberg to authorize its approach to Roe and constitutional abortion rights, Dobbs has invoked no other valid substantive due process case as authority for its so-called “long” “established method” for analyzing substantive due process rights.\footnote{Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2246, 2260 (2022).} \footnote{Id. at 2246.} Dobbs’ substantive due process analytics are in these terms, and partly by Dobbs’ own tacit admission, wholly novel as an authoritative approach in the substantive due process realm, the realm that Dobbs itself affirms is the one that counts for purposes of its reconsideration of constitutional abortion rights.\footnote{See supra Part II; see also Dobbs, 142 S. Ct. at 2304, 2304–05 n.1 (Kavanaugh, J., concurring).}

And yet there is one key moment in the Dobbs opinion—at the very conclusion of its treatment of the relevant history and tradition of abortion rights—when, for an

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instant, *Dobbs* nearly seems to be heeding *Glucksberg*’s actual test, picking up on state abortion law practices at the time of *Roe*. Here, *Dobbs* maintains that “by the *Roe* Court’s own count,” at the time of that decision, “a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother.”\(^{195}\)

*Dobbs* does not register this point to justify the position that its logics might normally be taken to imply. *Roe*’s broad protections for abortion rights may not have been fully underwritten by contemporaneous legal practices at the time, but *Roe*’s differential vindication of abortion rights where pregnant women’s lives were at stake amply was.\(^{196}\) Indeed, the *Roe* dissenters, on whose authority *Dobbs* repeatedly builds, would have vindicated constitutional abortion protections in cases where pregnant women’s lives or health were at stake.\(^{197}\) *Dobbs*, however, leapfrogs over all of that to engage *Roe*’s abortion protections as reflections of a “trend toward liberalization” where abortion was concerned.\(^ {198}\) For *Dobbs*, that liberalizing trend, and where it was heading, is insufficient to rescue *Roe*. All that matters for *Dobbs*, if even that, is where the trend was by the time of the Court’s ruling in *Roe*. And so *Dobbs* emphasizes that, despite the liberalizing trend, some jurisdictions, having broken with the old traditions against the practice, were still criminalizing some abortions while “regulat[ing] them more stringently than *Roe* would allow.”\(^ {199}\)

If *Dobbs* means here subtly to suggest that, in the last analysis, it actually understands *Glucksberg* to have held space for history, tradition, and contemporaneous practices, it chooses a strange way of doing so. After all, were evolving practices in issue, then *Roe*’s prophesying might not be wholly illegitimate in the basic way that *Dobbs* suggests.\(^ {200}\)

Moreover, *Dobbs*’ provisional alignments here with the real *Glucksberg* test are perilous for *Dobbs*’ method and conclusions in another sense. If *Dobbs* tracks *Glucksberg*’s original meaning, then the question of abortion’s constitutional status in *Dobbs* should not be determined with singular reference to history, tradition, or even the contemporaneous patterning of state laws on abortion frozen in time as of 1973 when *Roe* came down. *Dobbs*’ larger analysis should be taking account of the evolution of, including today’s, contemporary American views, values, and practices around and supporting legal abortion rights.

Perhaps sensing that its brief discussion of contemporaneous legal practices as of the time of *Roe* could scuttle its strict history-and-tradition work, *Dobbs* cuts its inquiry and observations short. Quoting Justice White, *Dobbs* returns to the ground

\(^{195}\) *Dobbs*, 142 S. Ct. at 2253 (majority opinion).


\(^{198}\) *Dobbs*, 142 S. Ct. at 2253 (internal quotation marks omitted) (citing, in part, *Roe*, 410 U.S. at 140 & n.37).

\(^{199}\) *Dobbs*, 142 S. Ct. at 2253.

\(^{200}\) Id.
that it has otherwise been occupying to insist that Roe’s own assessment of then-extant legal practices provides a “convincing[] refutation of" the notion that the abortion liberty is deeply rooted in the history or tradition of our people.”\textsuperscript{201} Hence, Dobbs says, the “inescapable conclusion” that it must reach is “that a right to abortion is not deeply rooted in the Nation’s history and traditions.”\textsuperscript{202} Then again, from another vantage point, Dobbs’ brief and questionable consideration of legal practices at the time of Roe in its own way goes to show that Glucksberg does not make Dobbs’ conclusions inevitable.

To say this re-raises how Glucksberg’s original meaning conflicts with Dobbs’ novel history-and-tradition approach to substantive due process analysis and substantive due process rights. Unfortunately for Dobbs, because it constructs its Glucksberg gambit as the only real justification for its conservative history-and-tradition approach to substantive due process issues, the decision otherwise provides no full-dress, independent, and publicly accessible justification for why it has adopted this new interpretive method as the basis for overturning Roe and eliminating all constitutional abortion rights. Recognizing conventional constitutional and rule-of-law demands for publicly accessible and reasoned justifications for what the Court does is a baseline for lawful judicial decision-making, Dobbs stands as a legal failure.\textsuperscript{203}

The residuals that, with effort, may be found in Dobbs do not make up the difference. The other constitutional cases that Dobbs discusses—cases in the Court’s incorporation line—may be decisions that, as Dobbs indicates, have involved the operations of a demanding test of history and tradition outside the substantive due process arena, but, without Glucksberg as their bridge, these decisions are unavailing in the abortion setting.\textsuperscript{204} Indeed, the Court’s incorporation cases are unavailing for the very reasons that Dobbs itself gives: The cases govern different questions about rights found in the first eight Amendments and whether they are properly incorporated against the states.\textsuperscript{205} They do not involve the question Dobbs considers, about those rights that, like abortion, go unmentioned as such in the Constitution’s text.\textsuperscript{206}

Much the same can be said for Dobbs’ inchoate gestural defenses of what it regards as Glucksberg’s strict history-and-tradition test in the substantive due process arena. Dobbs mentions, but then abandons, its claims that this test has objectivity to recommend it—an abandonment that is called for, whether Dobbs accepts it or not.\textsuperscript{207} History and tradition are, after all, matters of art and argument, not capital-T Truth or

\begin{itemize}
\item \textsuperscript{201} Id. (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 793 (1986) (White, J., dissenting)).
\item \textsuperscript{202} Dobbs, 142 S. Ct. at 2253.
\item \textsuperscript{203} See generally, e.g., John Rawls, The Idea of Public Reason Revisited, 64 U. Ch. L. Rev. 765 (1997).
\item \textsuperscript{204} Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2246–47 (2022); see also supra text accompanying notes 24–29.
\item \textsuperscript{205} Dobbs, 142 S. Ct. at 2246.
\item \textsuperscript{206} Id. at 2246–48; see also supra text accompanying notes 24–29.
\item \textsuperscript{207} See supra text accompanying notes 35–39.
\end{itemize}
capital-S Science.\textsuperscript{208} Dobbs' intimations that its strict history-and-tradition test may be justified, or called for, as a condition of judicial modesty and self-restraint, an anti-passion principle, founder on other grounds.\textsuperscript{209} Beyond the immodesty and the evident ambitions of Dobbs' invocation of Glucksberg as a predicate for a new Privileges or Immunities Clause jurisprudence that could place the Slaughter-House Cases in its sights, there are, more immediately, the realities of Dobbs' own jurisprudential radicalism to be considered. This radicalism—found in Dobbs' decision, in one fell swoop, to eliminate Roe, Casey, and constitutional abortion rights after nearly fifty years of practice, recognition, and reaffirmation—stands in stark contrast with the still far-reaching, but relatively more modest and self-restrained positions in Chief Justice Roberts' Dobbs concurrence.\textsuperscript{210}

So, Dobbs has no caselaw support in Glucksberg for its strict history-and-tradition approach to abortion rights as substantive due process rights, and it has no full-dress, independent, and publicly accessible account at hand by which persuasively to defend the test on its own terms. Nor, for that matter, does Dobbs offer any comparative analysis that would explain why its strict history-and-tradition approach to abortion rights and substantive due process is to be preferred to the interpretive method operating in all the Court's previous abortion rights decisions and in other substantive due process cases, including Glucksberg—cases that Dobbs says it also accepts. The public justification that Dobbs actually needs, but nowhere even begins to provide, is a bespoke explanation that would somehow rationalize a strict history-and-tradition-based analysis of abortion rights, but only abortion rights, in the substantive due process realm, one that also explains the remainder of the doctrinal patterning that Dobbs cuts.\textsuperscript{211}

Lacking any of these foundations or tallies, Dobbs is legally adrift. It is a decision that lacks supports in substantive due process precedent or adequate public reason for eliminating Roe and its constitutional abortion rights safeguards. The description of

\textsuperscript{208} Relevant perspective is in Siegel, History of History and Tradition, supra note 11, at 106–07, 127–46; see also, e.g., Michael H. v. Gerald D., 491 U.S. 110, 137–41 (1989) (Brennan, J., dissenting). To the extent that Dobbs' claims also serve to reflect and reinforce democratic values, there is Dobbs' own anti-democratic deployment of Glucksberg's authority as contemplated in Dobbs' Footnote 22, 142 S. Ct. at 2248 n.22, along with other arguments about the opinion's tensions with democracy to consider, including those sketched by Murray & Shaw, supra note 10; see also Siegel, History of History and Tradition, supra note 11, at 147–57.

\textsuperscript{209} See supra text accompanying notes 35–39.

\textsuperscript{210} Dobbs, 142 S. Ct. at 2248 n.22; Slaughter-House Cases, 83 U.S. 36, 78–80 (1872); Dobbs, 142 S. Ct. at 2310–17 (Roberts, C.J., concurring in judgment).

\textsuperscript{211} Dobbs' supplemental justification for abortion's uniqueness does not amount to this kind of account, except perhaps as a kind of partial, tacit, if also unwitting, concession that the Court's history-and-tradition approach is itself an approach that, like conservative originalism in the Reagan Justice Department, is tailor-made to eliminate Roe, on which, see Siegel, Memory Games, supra note 4, at 1148–69. The point in the text holds even if it is reframed in somewhat more general terms, seeking an argument that explains abortion's uniqueness as involving matters of human life and death.
Dobbs first suggested by the Dobbs joint dissent thus gets it right: Dobbs is a naked power grab.212

Dobbs’ failure to be a lawful or a law-bound ruling in these terms is related to, but ultimately runs deeper than, the lawlessness of its “selective originalism,” here: its selective application of its history-and-tradition test to abortion rights and only to abortion rights.213 Singularly eliminating abortion rights by overturning Roe, and thereby devastating Casey’s jurisprudential foundations, cleared significantly for those very reasons, while declaring other constitutional privacy and substantive due process cases and rights are safe against the acid of its conservative originalist interpretive approach, Dobbs, as others have noted, and for reasons that others have noted, fails to treat like cases in the same jurisprudential line alike. This failure makes Dobbs lawless in these additional terms as well.214

Dobbs’ selective originalism, a serious rule-of-law problem, is notably a flaw that could evanescence if and as the Court moves in future cases toward the positions urged by Justice Clarence Thomas’ Dobbs concurrence, calling for the entirety of the Court’s substantive due process jurisprudence, in what some are sure is a truer conservative originalist turn, to be destroyed root and branch.215

Dobbs’ Glucksberg gap, by contrast, will not merely persist should future Supreme Court rulings expand Dobbs’ method in those directions. Dobbs’ Glucksberg gap stands to loom even larger the more the Court widens Dobbs’ reach to cover additional ground, whether by, say, eliminating the remainder of the Court’s substantive due process protections, or by making good on Footnote 22 and its novel vision of unenumerated, fundamental rights under the Fourteenth Amendment’s Privileges or Immunities Clause.216 If Dobbs is not underwritten by Glucksberg’s authority, and given that it otherwise offers no reasoned public justification for its particular conservative originalist history-and-tradition approach to abortion rights as substantive due process rights, Dobbs cannot bear the weight of its own conclusions.

Much less could Dobbs, therefore, sustain the additional weight associated with expanding its authority to govern the outcomes in other cases. Future conservative


214 See, e.g., Dobbs, 142 S. Ct. at 2258. Were there any doubts about the strength of Dobbs’ argument for abortion’s uniqueness, they might be resolved in the face of Glucksberg and its practical recognition of a right to terminal sedation, on which, see supra Part III.B.2, or of the Court’s ruling in Cruzan recognizing a right to passive euthanasia. Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 279 (1990). Both those rules of decision defeat Dobbs’ insistence that Roe and Casey are unique within the Court’s substantive due process jurisprudence because only they involve the termination of actual or potential life.

215 Dobbs, 142 S. Ct. at 2301–02 (Thomas, J., concurring).

216 Id. at 2248 n.22 (majority opinion). For elaboration, see Spindelman, Sex Equality Troubles, supra note 4, at 141–63. In still other terms, Dobbs could gain ground by other plays involving sex discrimination grounded in its history-and-tradition method, sometimes also operative in the context of other kinds of individual rights. One possibility is suggested by United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), cert. granted, 143 S. Ct. 2688 (2023).
originalist history-and-tradition rulings eliminating existing substantive due process rights or announcing new ones either in substantive due process or privileges or immunities terms, likewise claiming Glucksberg as authority, will thus pile unsupported inference on unsupported inference, adding weight to, and reasons for recognizing Dobbs’ own internal collapse.

The stakes of this argument for Dobbs’ security and its future are high. In one sense, it is already too late for anyone to rally to Dobbs’ defense by trying to supply the kind of interpretive argument justifying Dobbs’ reading of Glucksberg that Dobbs does not itself give. The object of such an argument would at most shore up Dobbs’ history-and-tradition test as a proper derivation from Glucksberg, or one that is otherwise called for, after the fact. Post-hoc attempts to rescue Dobbs from its own terms and deficits, however, will in reality be no more than that: after-the-fact rationalizations for what Dobbs has done, or, more precisely, what Dobbs has failed to do. They, accordingly, reinforce Dobbs’ constitutional and legal shortcomings, highlighting what and where Dobbs is lacking in its own terms and what it flubbed when it had, but refused, the chance to build sustainable, lawful foundations beneath its ruling.217

Moving as swiftly as Dobbs does, and in the kind of huge jurisprudential leap that it takes, and without the secure legal footing of Glucksberg that it claims to have beneath it, and otherwise offering no publicly accessible and persuasive case for its history-and-tradition approach to substantive due process, including, specifically, abortion rights, Dobbs is—and remains—a lawless ruling. Consistent with its own instructions about what is to be done to and with judicial precedents in instances such as these, Dobbs itself is now and already ripe for overturning for the very reasons of constitutional error correction that it sets as its own compass when eliminating Roe and constitutional abortion rights.218

V. CONCLUSION: DOBBS’ TRUTHS

Of course, constitutional error correction is not the only relevant criterion in deciding what to do with a case like Dobbs, any more than it was in Dobbs itself, no matter what Dobbs teaches on this front. Dobbs gives established precedents, particularly Roe and Casey, short and doctrinally novel shrift, altering the rules about how to assess substantive due process rights and the conditions for stare decisis, in ways that now make a constitutional decision’s non-originalist underpinnings a significant, even driving, reason for putting the decision out to pasture.219

217 These include the kinds of foundations that Roberts’ Dobbs concurrence suggested. For the Dobbs majority’s own critical discussion of the Roberts concurrence, see 142 S. Ct. at 2281–83. See also, e.g., Ed Kilgore, John Roberts Had a Vague Plan to Only Half-Kill Abortion Rights, N.Y. MAG. (June 24, 2022), https://nymag.com/intelligencer/2022/06/john-roberts-plan-half-kill-abortion-rights.html. Saying this in no way overlooks the very serious problems that beset the Roberts concurrence in its own terms.

218 See, e.g., Dobbs, 142 S. Ct. at 2265.

There will yet be time to engage the full range of constitutional considerations for what to do with *Dobbs* if and when the actual moment for Supreme Court reconsideration of the decision arrives.\textsuperscript{220}

Until then, reflecting on *Dobbs* in the present tense, the American people deserve to know the stuff that *Dobbs* is made of. They deserve to know that *Dobbs*’ claims to legality, based in *Glucksberg*, its own deep reason for eliminating *Roe* and constitutional abortion protections, are not, finally, to be found where *Dobbs* publicly says it grounds them. As *Dobbs*’ central legal authority, invoked and marshalled to secure the legal basis for *Dobbs*’ conservative originalist history-and-tradition approach to constitutional abortion rights, and as *Dobbs*’ further basis for overturning those rights as part of the Court’s Fourteenth Amendment substantive due process doctrine, *Glucksberg* is itself reconstructed by *Dobbs* long after the fact as an established precedent, the key substantive due process precedent as it happens, for what *Dobbs* does to validate a conclusion it evidently wished to reach on other grounds.

*Dobbs*’ failure to supply other public reasons to the American people for its decision, particularly those whose constitutional rights it strips in its own naked power play, means that *Dobbs*’ conservative originalism, specifically, its history-and-tradition test, along with the test’s application to abortion rights, may properly be questioned by the American people, whatever their views, as a lawful constitutional governance practice and decision.

*Dobbs*’ raw exercise of judicial power, properly understood, gives the American public not just the occasion, but also reasons, for critiquing *Dobbs* and the conservative constitutional originalist project that, in its own way, but not because of *Glucksberg*, underwrites it. *Dobbs*’ conservative originalism—pure, or impure, as some originalists maintain—seems unlikely to call it a day with *Dobbs*, just as it seems certain that, within the current Supreme Court’s originalist project, *Glucksberg* will continue to be cited as authority—as warrant—for its work.

Nevertheless, and just the same, *Glucksberg* does not roll like *Dobbs* claims. It never did, and never will. That is the instruction of *Glucksberg* and its own original meaning.

\textsuperscript{220} One opening bid has already arrived in Brief of Amici Curiae Professor David S. Cohen, Professor Greer Donley, and Dean Rachel Rebocho in Support of United States, *Moyle v. United States*, No. 23-726 (Mar. 28, 2024).