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Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in Dobbs Threatens Privacy and Free Speech Rights

Leonard Niehoff
University of Michigan Law School, lniehoff@umich.edu

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Recommended Citation

Niehoff, Leonard. "Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in Dobbs Threatens Privacy and Free Speech Rights." *Communications Lawyer* 38, no. 3 (2023): 24-33.

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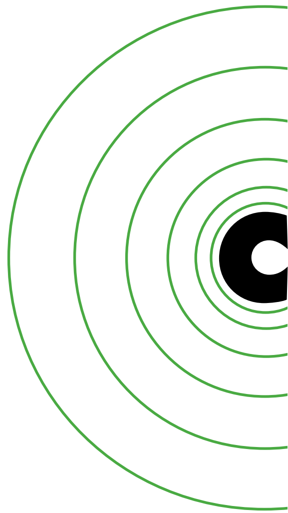

Communications Lawyer

Publication of the Forum on Communications Law
American Bar Association
Volume 38, Number 3, Summer 2023

THE JOURNAL OF MEDIA, INFORMATION, AND COMMUNICATIONS LAW

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Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in *Dobbs* Threatens Privacy and Free Speech Rights

By Len Niehoff

Len Niehoff is a professor at the University of Michigan Law School and is of counsel to the Honigman law firm, where he helps lead the media defense, appellate advocacy, and higher education practices. The views expressed here are his own.

The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[1] has drawn considerable attention because of its reversal of *Roe v. Wade*[2] and its rejection of a woman's constitutional right to terminate her pregnancy. The *Dobbs* majority, and some of the concurring opinions, emphasized that the ruling was a narrow one.[3] Nevertheless, there are reasons to think the influence of *Dobbs* may extend far beyond the specific constitutional issue the case addresses.

This article explains why *Dobbs* could have significant and unanticipated implications for the law of privacy and the law of free expression. I argue that two approaches to constitutional adjudication taken by the Court in *Dobbs* could unsettle a number of important privacy and free speech principles that we have come to think of as established. In short, I maintain that in *Dobbs*, the Court took an unprecedented approach to precedent and an unhappily original approach to originalism.

Let's turn first to the view of precedent and *stare decisis* taken by the *Dobbs* Court.[4] And let's begin by putting *Dobbs* back into the context of a signal moment toward the end of the term in which it was decided. Over the course of three business days, the Court issued opinions involving three of the most divisive issues of our time: guns, abortion, and prayer in public schools. In every one of those cases, the Court cast aside longstanding law.

In reversing *Roe v. Wade*, the *Dobbs* Court abandoned a precedent that had stood for almost half a century. The day before, in *New York State Pistol and Rifle Association v. Bruen*,[5] the Court held that a New York State gun regulation that dated to the early 1900s violated the Second Amendment.[6] Just a few days later, in *Kennedy v. Bremerton School District*,[7] the Court held that a school district had violated the Free Exercise Clause of the First Amendment by firing a high school football coach for praying midfield after games. In doing so, the Court jettisoned the standard it adopted more than 50 years ago in *Lemon v. Kurtzman*.[8]

In sum, between a Thursday and the following Monday, more than 200 years of law went by the wayside. That's a lot of activity for a purportedly nonactivist Court. And those seismic shifts in legal doctrine had dramatic consequences on the ground—on the reproductive autonomy of women, on legislative efforts to keep communities safe from firearm violence, and on attempts by public schools to maintain the separation of church and state.

The speed and sweep of those changes also suggest a nonchalance about the principle of *stare decisis*

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that could place all of the Court's constitutional precedents at potential risk: No matter the vintage of the precedent. No matter how ingrained that precedent has become in legal doctrine. No matter how thoroughly that precedent has set our societal expectations or shaped how we understand our rights and responsibilities. In short, after *Dobbs*, everything we think we know about the Constitution seems up for grabs and may be.

A closer look at the specific approach to precedent taken in *Dobbs* validates the concern. In *Dobbs*, the Court identified five factors to consider in determining whether precedents like *Roe* and *Casey*[9] should be overruled. It described those factors as (1) the nature of the error in the precedent, (2) the quality of the reasoning in the precedent, (3) the workability of the rule imposed by the precedent, (4) the disruptive effect on other areas of the law caused by the precedent, and (5) the presence or absence of reliance on the precedent. In *Dobbs*, the Court devoted the vast majority of its analysis to the first four factors. The reliance factor received only about a page of attention.

This imbalance reveals one of the deep flaws in the approach to *stare decisis* taken in *Dobbs*. Think of it this way: Each of the first four factors relates in some sense to the correctness of the precedent. But if the Court correctly decided the earlier case, or at least decided it correctly enough, then the principle of *stare decisis* does very limited work. A correctly decided case doesn't need *stare decisis* to prop it up; no right-thinking court would consider knocking it down.

Accordingly, *stare decisis* plays its most significant role in cases where the Court concludes that its prior decision was decided incorrectly but also believes that other considerations outweigh the value of correcting the error. It is, of course, appropriate for the Court to assess the magnitude and impact of that error in making this calculation. But once the Court has concluded that the error was significant, it must turn its attention elsewhere to determine whether the decision should stand despite its imperfections. If the Court doesn't make this shift, then the analysis consists in nothing more than asking over and over again, in different ways, whether the previous decision was a mistake.

Given that the *Dobbs* Court concluded that *Roe* and *Casey* included significant errors in reasoning, we would expect the opinion to include an expansive discussion of the relevant reliance interests and how they figure into the jurisprudential calculus.[10] *Dobbs*, however, took a very dismissive approach to those interests. This is true in at least two respects.

First, the Court declared that "traditional reliance interests" arise only "where advance planning of great precision is most obviously a necessity."[11] One might think that reproductive and family planning would fit this description, but the Court rejected that argument. The Court noted that abortions are generally unplanned. And it added that, once authority over abortion returned to the states, people could continue to make plans—they might just need to make different ones.[12]

Second, the Court rejected the kind of societal reliance interest that it had recognized in its decision in *Casey.* The controlling opinion in *Casey* observed that "people had organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[13] The *Dobbs* Court spurned this reasoning, thereby overruling not only the substantive holding of *Casey* but also its approach to *stare decisis*. *Dobbs* thus abandoned *Casey* as a precedent about precedent, a remarkable development given that the Court had on a number of prior occasions cited *Casey* as authoritative on this point.[14]

In departing from the approach taken in *Casey*, the *Dobbs* Court declared that it was "ill-equipped to assess 'generalized assertions about the national psyche.'"[15] But this is a peculiar—if not even disingenuous—argument. On multiple previous occasions, the Court has invoked abstract and intangible forms of societal reliance as grounds for applying *stare decisis*.[16] Furthermore, the Court did not need to engage in wild speculation to acknowledge the significance that a woman's right to terminate her pregnancy had acquired within our culture; to the contrary, it seems like a matter appropriate for judicial notice.[17] Finally, it is ironic that this originalist Court would doubt its ability to determine how people think about things today when it has so much confidence in its capacity to determine how they thought about things in 1791.[18]

It's very hard to know how much significance, if any, reliance interests have in the application of *stare decisis* after *Dobbs*. Justice Clarence Thomas has repeatedly expressed the view that reliance should have no role at all in the analysis; from his perspective, if the Court has wrongly decided an issue, then it should fix things, period.[19] And although a majority of the Court may not (or at least not yet) go along with that extreme position, *Dobbs* clearly treats reliance as a minor consideration at best.

The crabbed approach to *stare decisis* taken by the Court in *Dobbs* makes every precedent more susceptible to attack, and there is no obvious reason to think this vulnerability doesn't extend to the Court's decisions under the First Amendment. Indeed, as noted above, in *Kennedy*, the Court worked a fundamental change in Establishment Clause jurisprudence, abandoning the longstanding (if often criticized) *Lemon* test. In addition, while *Roe v. Wade* had longevity on its side, many significant First Amendment precedents have fewer years of service to their credit. I will discuss a few of them later in this article.

A number of commentators have speculated that *New York Times Co. v. Sullivan*[20] is among the decisions at risk before the current Court. The concern is valid. Multiple sitting justices have publicly expressed doubts about the merits of the decision; and the skepticism apparently extends to members of the Court from both the conservative and the liberal wings.[21] Even fans of the decision have noted some of its more puzzling dimensions.[22]

Still, prior to *Dobbs* the *stare decisis* arguments in support of *Sullivan* would have appeared strong. *Sullivan* has been the law of the land for almost 60 years. Generations of journalists have reported on public officials and public figures with the understanding that the First Amendment affords additional protection when they do so. Publishers and broadcasters have made critical decisions about which stories to tell and when to tell them against the backdrop of that protection. As a society, we have come to expect the free flow of information about government officials and high-profile individuals that the actual malice standard facilitates.

Furthermore, *Sullivan*'s importance as precedent does not lie just in its impact on defamation law and its imposition of the actual malice standard. *Sullivan* gave the Supreme Court an essential part of its First Amendment vocabulary. A number of phrases from the opinion have acquired a central place in our understanding of what the First Amendment means and have been cited in cases that have nothing to do with libel. For example, its phrase "uninhibited, robust, and wide-open" early became deeply ingrained in our descriptions of the free speech principle and has remained so.[23] Overruling *Sullivan* could call into question the continuing force and effect of that language and destabilize the free speech doctrine in substantial and unimagined ways.

Despite these arguments, the approach to *stare decisis* taken in *Dobbs* raises serious questions about whether *Sullivan* will stand. As noted earlier, the Court apparently now views the correctness of the

precedent as the overwhelmingly important consideration in the analysis. Reliance is at best an anemic factor—if it is a factor at all. Under this approach, if a majority of the Court thinks *Sullivan* was wrongly decided, then that fact alone may sign its death warrant.

Second, even if the Court does treat reliance as a meaningful consideration, it's not clear that *Sullivan* meets the "traditional reliance" test endorsed in *Dobbs*. In part, the uncertainty derives from a lack of clarity about what that test actually requires. *Dobbs* tells us little about what it means for reliance to implicate "advance planning with great precision," beyond the fact that a woman's decision to terminate her pregnancy doesn't qualify as an example. As a result, it's hard to tell whether *Sullivan*—or, for that matter, any other precedent—satisfies the expectations set by *Dobbs*.

A critic of *Sullivan* might argue that the precise meaning of the test doesn't matter because journalists, editors, and media outlets do not "rely" on the actual malice standard in *any* sense of the word. Ironically, such an argument may find support in a point that journalists, media outlets, and their lawyers make with pride: In preparing and vetting news reports, their goal is to get the story right, not to hide behind the protections offered by *Sullivan*. Indeed, in my experience of almost 40 years doing pre-publication and pre-broadcast review, the conversations among reporters, editors, and their lawyers about what to say and when to say it overwhelmingly focus on issues like accuracy, fairness, and sourcing; they rarely, if ever, wander into the intricacies of actual malice.[24]

A *Sullivan* critic might further argue that it doesn't *matter* whether journalists, editors, and media entities have come to rely on the actual malice standard in their planning and in making decisions about what to print and broadcast. After all, the approach to *stare decisis* taken in *Dobbs* suggests that the abolition of that standard would simply require the media to change their plans and make different decisions—just like women who previously had the right to terminate their pregnancy. Yesterday you had the protection of the actual malice standard; today you don't—live with it.

This argument reveals another deep flaw in the reasoning of *Dobbs*. The idea that individuals have no reliance interest in a right because, in its absence, they can simply plan differently obviously proves too much. All rights become wholly expendable under this approach. In this analysis, we have no reliance interest in *Brown v. Board of Education*[25] because, in its absence, we can just plan to live in a racially segregated society.

The approach to *stare decisis* taken in *Dobbs* is therefore wrong in multiple respects. It departs from the Court's earlier precedent on precedent. It focuses disproportionately on the correctness of the earlier ruling. It reduces reliance interests to a nullity. It so thoroughly diminishes the precedential importance of every Supreme Court ruling as to put at serious risk whole bodies of constitutional doctrine we have long viewed as settled. If we take seriously what *Dobbs* says about precedent, then it is one of the most far-reaching and potentially dangerous decisions in the Court's history.

It seems unlikely that the Court intended to go so far. Rightly or wrongly, the *Dobbs* majority plainly saw *Roe* and *Casey* as uniquely problematic precedents. It is not clear that the Court would so easily discard other longstanding principles that have become deeply embedded in constitutional doctrine and our national character. Furthermore, an approach to precedent that diminishes the importance of the Court's rulings does nothing to enhance its legitimacy as an institution; and this Court already has a significant legitimacy problem on its hands.[26]

If the Court retreats from the crabbed approach to *stare decisis* taken in *Dobbs*, then good arguments exist to leave most, if not all, of privacy and free speech doctrine right where they are. *Sullivan* offers an

excellent example. As I will discuss later, a solid case can be made that *Sullivan* was correctly decided, even under the Court's new and extreme originalism. But let's assume, for the sake of argument, that a majority of the Court concludes that *Sullivan* was mistaken in material respects.

If the Court views reliance interests more broadly than it did in *Dobbs* and gives them the weight they deserve, then *Sullivan* should stand. It may be true that journalists, editors, and media entities try to get the story right—they don't try to avoid getting the story knowingly wrong—but they still rely on *Sullivan*. Every important publication and broadcast decision is made within the context of overall risk assessment, and the actual malice standard plays a critical role in making those judgments. The fact that conversations about what and when to publish usually do not focus on actual malice does not make its protections any less significant. Furthermore, it would seem grossly unfair to deprive the press of the breathing room afforded by *Sullivan* because reporters and editors set a higher standard for themselves than an absence of malice.

As noted above, *Sullivan* implicates other kinds of reliance interests as well. As a society, we have come to rely on the benefits of a rigorous press that is unafraid to report on the conduct of the powerful and influential. And the Court itself has long relied on *Sullivan* as an expression of bedrock First Amendment values and principles.

In short, although the *Dobbs* Court's unprecedented approach to precedent casts a worrisome shadow over cases like *Sullivan*, all hope is not lost. A more balanced and intellectually coherent approach to *stare decisis* than we find in *Dobbs* would give *Sullivan* a good chance for survival. And the Court may conclude that it needs to take such an approach to restore some muscle to its precedents and to preserve what remains of its institutional integrity.

Having considered the *Dobbs* Court's unprecedented approach to precedent, let's look at its unhappily original approach to originalism and consider its implications for privacy and free speech doctrine. This extreme originalist methodology—placing tremendous weight on the historical question of what the relevant constitutional provision meant at the time it was adopted—was for many years something of an outlier, championed by Justices Antonin Scalia and Thomas but otherwise attracting few allies. With the addition of Justices Neil M. Gorsuch, Brett M. Kavanaugh, and Amy Coney Barrett, all of whom identify to some degree with this school of thought, originalism now represents the majority view of the Court.

Of course, most constitutional scholars readily concede that history has a place in constitutional interpretation. But, over the years, critics have raised a number of objections to making "original intent" or "original meaning" the centerpiece of an interpretive theory. One of the most recent and comprehensive critiques of the approach appears in Erwin Chemerinsky's book *Worse Than Nothing: The Dangerous Fallacy of Originalism*, published in 2022 and accurately predicting the outcome of *Dobbs*.

Chemerinsky points out five problems with originalism, especially in its most extreme form. The first is what he calls "the epistemological problem." This problem gets at the impossibility of knowing with any degree of clarity what the authors of a provision intended when they wrote it. Chemerinsky acknowledges that originalists today often place less stress on original intent and more stress on the original meaning of words, but he argues that this move doesn't help matters because the latter is usually just as unclear.

The second is what Chemerinsky calls "the incoherence problem." This problem gets at the fact that there is little or no historical evidence that the framers actually wanted their intent to control constitutional interpretation. To the contrary, he argues, the evidence that exists points in the opposite direction. Chemerinsky notes the resulting irony: Anyone who would be true to original intent must therefore

abandon original intent.

The third is what Chemerinsky calls "the abhorrence problem." This problem assumes, for the sake of argument, that we can ascertain the original meaning of constitutional language. The problem arises because honoring that original meaning will lead to results our society would find morally repugnant. He notes, for example, that under the original meaning of the Eighth Amendment, the government could punish a crime by pillorying, branding, or cropping or nailing of the offender's ears.

The fourth is what Chemerinsky calls "the modernity problem." This problem gets at the fact that the framers did not anticipate—and could not have anticipated—the vast social, technological, and other changes that have occurred since the founding documents were written. Ironically, Justice Samuel A. Alito Jr.—the author of *Dobbs*—highlighted the problem during the argument in *Brown v. Entertainment Merchants Association*[27] when he poked fun at one of Justice Scalia's originalist-driven questions by remarking: "I think Justice Scalia wants to know what James Madison thought of video games."

The fifth is what Chemerinsky calls "the hypocrisy problem." This problem gets at the fact that the Court's originalists sometimes depart from originalism when it suits their purposes. A glaring example of this comes in Justice Scalia's opinion in *District of Columbia v. Heller*,[28] when his interpretation of the Second Amendment abruptly shifts from the meaning its words had at the time it was adopted to the current popularity of handguns as personal self-defense weapons. Of course, Justice Scalia had to make such a move if he wanted to uphold the right to carry a semiautomatic pistol with a 19-round clip instead of a flintlock rifle, but it obviously has nothing whatsoever to do with original intent or original meaning.

In an editorial published in *The Detroit News* in June 2022,[29] I pointed out a sixth problem as well, which I'll call "the competence problem." This gets at the fact that the judges who decide these issues, and the lawyers who litigate them, aren't historians. And, generally speaking, when we try to do history, we're not very good at it.

Justice Scalia's opinion in *Heller* provides a case in point. Justice Scalia relied heavily there on historical analysis; indeed, he gave us roughly 45 pages of it. But multiple scholars have persuasively argued that Justice Scalia's historical methodology was profoundly confused and inconsistent and that a correct reading of the past leads to the opposite conclusion from the one he reached.[30]

The problem of competence magnifies when we consider the front lines of constitutional interpretation: federal district and state trial courts. In *Bruen*, Justice Thomas declared that the originalist approach controls in determining whether the Second Amendment affords a right to carry firearms outside the home. He then provided dozens of pages of historical analysis to buttress his conclusion that it does.

After completing his historical analysis, Justice Thomas expressed confidence that, in future Second Amendment cases, lower courts will have no trouble looking to history for helpful guidance and analogies. There are good reasons to doubt this rosy assessment, and we might wonder when Justice Thomas last visited an overworked and under-resourced trial court that has neither the time nor the expertise to play amateur constitutional historian.

Despite all of these objections to originalism, it seems clear that a majority of the Court has aligned itself with an originalist approach to constitutional interpretation, at least for now. That could have dire consequences for privacy and free speech doctrine. Chemerinsky titled his final chapter "We Should Be Afraid," and he has a point.

Let's consider privacy first. Although *Dobbs* addressed only a woman's right to choose to terminate her pregnancy, its critique of due process–based liberty and privacy rights extends far beyond abortion. As Chemerinsky points out, rejecting that line of reasoning logically requires rejecting numerous rights the Court has long recognized: "the right to marry, the right to procreate, the right of custody of one's own children, the right to keep one's family together, the right to control the upbringing of one's children, the right to purchase and use contraceptives, the right to engage in private consensual same-sex sexual activity, and the right of competent adults to refuse medical treatment."[31]

More relevant to the focus of this publication and this article, the originalist approach also puts at risk the Fourth Amendment guarantee against unreasonable government searches and seizures. The protections afforded by the Fourth Amendment matter a great deal to journalists and media entities. Indeed, it's difficult to imagine anything more chilling to the exercise of freedom of speech and of the press than the freewheeling government surveillance of newsrooms and intrusions into the cellphones and laptop data of journalists.

Chemerinsky points out that, for almost 40 years, the Supreme Court—following an originalist approach—believed that the Fourth Amendment prohibited only physical trespasses. Accordingly, the Court did not think that wiretaps constituted "searches" at all, let alone unreasonable ones.[32] The Court abandoned that view in its 1967 decision in *United States v. Katz*,[33] but a justice dedicated to the most extreme form of originalism could easily find appeal in the pre-*Katz* approach.

It is similarly unclear whether important free speech precedents would survive the Court's current approach to originalism. Again, let's think about *Sullivan*. The central reasoning of *Sullivan* arguably aligns well with an originalist sensibility; using the sort of analogical reasoning that Justice Thomas endorsed in *Bruen*, the *Sullivan* Court drew a direct line from (a) the early condemnation of seditious libel to (b) private defamation claims brough by public officials. And scholars who have taken a close look at history have concluded that *Sullivan* got things right.[34]

Nevertheless, the several paragraphs of history offered up in *Sullivan* seem superficial when set beside the extended originalist analyses provided by Justice Scalia in *Heller* and Justice Thomas in *Bruen*—putting aside the substantive merit of those analyses. The Court may view the limited historical exploration provided by *Sullivan* as an invitation to take a deeper dive. And this is troublesome because, for the reasons identified by Chemerinsky, we may justifiably worry that the Court will find in its historical research whatever answers it has a predisposition to find.

The threat to free speech goes well beyond *Sullivan*. For example, an originalist approach could put at risk *Philadelphia Newspaper v. Hepps*,[35] in my view an equally important precedent that places the burden of proving falsity on plaintiffs in cases involving matters of public interest. *Hepps* follows logically from prior rulings and, I believe, was rightly decided. But the decision contains only passing references to the common law and no material discussion of history. Plus, to the extent *Hepps* cites and relies on *Sullivan*, it may stand atop a frail reed.

Or consider the protection that the Court afforded to rhetorical hyperbole and other loose, figurative expression in *Milkovich v. Lorain Journal*.[36] The Court derived that principle from the factual falsity requirement imposed by *Hepps*. If *Hepps* falls, then arguably *Milkovich* may fall with it.

The Court's current originalism could even put in peril the vital protection afforded to parody and satire, which invigorate so much of our public discourse. In *Hustler v. Falwell*,[37] Justice William H. Rehnquist famously invoked the history of political cartoons in upholding the right of a publication to make fun of

a public figure. But that opinion, too, relied to some extent on *Sullivan*. And it's far from certain that the Court's current originalists would find sufficient heft in the scant two paragraphs that Justice Rehnquist devoted to the history of cartooning, much of which concerned editorial drawings made well after the Founding Era.

The Court's new originalism also raises questions about the durability of the principle, reflected in cases like *Hustler* and *Snyder v. Phelps*,[38] that intentional infliction of emotional distress claims cannot lie against public-interest speech because "outrageousness" is too vague a standard. Indeed, originalism calls the question of whether the bedrock First Amendment principles of vagueness and overbreadth have deep historical roots. Of course, the Due Process clause of the Fourteenth Amendment also provides protection against vague laws, but that argument simply shifts the originalist inquiry from one constitutional provision to another.[39]

After *Dobbs*, we can no longer say that this Court's novel and extreme originalism comes to us as a wolf in sheep's clothing. To borrow Justice Scalia's apt phrase from a different context: "this wolf comes as a wolf."[40] Nevertheless, several considerations may lead us to conclude that these important free speech principles will survive, even with the new originalism flashing its teeth and clawing at the door.

First, it's helpful to remember that originalism itself is neither new nor controversial. Justice Brennan probably thought he was doing historical originalism in *Sullivan* when he talked about the roots of the actual malice standard and when he connected libel suits brought by public officials to the threats posed by seditious libel. Justice Rehnquist almost certainly thought he was doing it when he wrote about editorial cartoons in *Hustler v. Falwell*. Originalism exists along a spectrum, and always has. It therefore may not manifest in its most extreme form in every justice's thinking in every case.

Second, some justices may draw back from the most extreme form of originalism in light of the sorts of problems identified by Chemerinsky. For example, the "abhorrence problem" will almost certainly limit the application of originalism in the Eighth Amendment context. And the "modernity problem" poses insoluble difficulties for the new originalism in areas affected by dramatic technological development and change, like the First Amendment and the Fourth Amendment.

In cases involving ideologically freighted issues, such as abortion and gun rights, a majority of the Court may have been able to look past the flaws inherent in originalism's most extreme form. But it is not clear that all of the same justices will be as willing to do so when it comes to freedom of expression. Free speech has a long history as a shared and nonpartisan value. And any limitation placed on speech has a terrible symmetry to it, affecting voices on both sides, as likely to silence conservatives as liberals.

Third, even justices who endorse the most extreme form of originalism recognize that it has off ramps. In *Bruen*, for example, Justice Thomas acknowledged that sometimes a strict historical approach will prove inadequate and a more nuanced mode of analysis (like reasoning by analogy) will be necessary. He also conceded that new and unanticipated circumstances and technologies may call for new solutions and doctrines. Indeed, he had to do so to avoid an interpretation of the Second Amendment that allows us to carry a musket but not a Glock.

Those of us who advocate for preserving free speech rights therefore have room to work within originalism's walls. In many instances, we will have history on our side. When the history is unclear, or even arguably against us, we can explain why it offers an inadequate tool for navigating the constitutional labyrinth at hand and why a more nuanced approach is required. We can use our imaginations to develop helpful analogies. We can explain why Founding Era understandings of speech do not suffice to meet

current technologies and social conditions. We have arguments to make, and they're good ones. They make sense in ways that the new originalism—with its blind eye toward contemporary circumstances and its almost fetishistic preoccupation with Founding Era sensibilities—sometimes does not.

Maybe we will win those arguments. Maybe we will lose them. There have never been any guarantees. And, in any event, despair is not a strategy.

Martin Luther King Jr. famously said that "everything that is done in the world is done by hope." So, hope has to be an integral part of our job description.

That, and eternal vigilance.

Endnotes

1. 142 S. Ct. 2228 (2022).
2. 410 U.S. 113 (1973).
3. *Dobbs*, 142 S. Ct. at 2277–78, 2280–81. *See also id.* at 2309 (Kavanaugh, J., concurring). Justice Roberts concurred only in the judgment in the case.
4. For a general overview of the interests served by adherence to precedent and the doctrine of *stare decisis*, *see* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 Harv. L. Rev. 4–8 (2023) (forthcoming).
5. 142 S. Ct. 2111 (2022).
6. Of course, *Bruen* did not involve the overturning of a judicial precedent, but some of the arguments that counsel caution in overturning longstanding court decisions similarly counsel caution in striking down longstanding statutes.
7. 142 S. Ct. 2407 (2022).
8. 403 U.S. 602 (1971).
9. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
10. *See* Varsava, *supra* note 4, at 8–9.
11. *Dobbs*, 142 S. Ct. at 2276.
12. *Id.*
13. *Casey*, 505 U.S. at 856.
14. *See* Varsava, *supra* note 4, at 34–35.
15. *Dobbs*, 142 S. Ct. at 2276 (quoting and citing *Casey*, 505 U.S. at 957 (opinion of Rehnquist, C.J.)).
16. *See* Varsava, *supra* note 4, at 31–35.
17. *See* Fed. R. Evid. 201.
18. For a detailed critique of the Court's treatment of reliance interests in *Dobbs*, see Varsava, *supra* note 4.
19. *See id.* at 36–37.
20. 376 U.S. 254 (1964).
21. *See* Adam Liptak, *Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision*, N.Y. Times, July 2, 2021. *See also* Eugene Volokh, *Justice Kagan's Views on* New York Times v. Sullivan*, as of 1993*, Volokh Conspiracy (July 2, 2021), https://reason.com/volokh/2021/07/02/justice-kagans-views-on-new-york-times-v-sullivan-as-of-1993/.
22. *See*, *e.g.*, Leonard Niehoff, *Three Puzzling Things About* New York Times v. Sullivan*: Beginning the Anniversary Conversation*, 29 Comm. Law. 10 (2012–2013).
23. *See*, *e.g.*, Harry Kalven Jr., U*ninhibited, Robust, and Wide-Open: A Note on Free Speech and the Warren Court*, 290 Mich. L. Rev. 289 (1969); Lee C. Bollinger, Uninhibited, Robust, and Wide-Open: A Free Press for a New Century (2010). *See also* Snyder v. Phelps, 562 U.S. 443 (2011) (quoting this language in a nonlibel case).
24. There is a scene in the 1981 film *Absence of Malice* that portrays an attorney providing advice to his newspaper client as to whether it can run a story likely to have a devastating consequence for a number of individuals. In essence, the lawyer says: If you don't *know* the story is false, then go ahead and run it; you are "absent malice" and the objects of the reporting are powerless to do you harm. I wager that no media defense lawyer has ever given their

client advice that is so callous and so inconsistent with the canons of journalistic ethics. And, if they did, it probably amounted to malpractice because the actual malice standard provides a helpful defense but not a silver bullet against a defamation claim.

25. 347 U.S. 483 (1954).

26. Dozens of articles have been written documenting the Court's escalating legitimacy problem. *See*, *e.g.*, *America's Supreme Court Faces a Legitimacy Crisis*, The Economist, May 7, 2022.

27. 564 U.S. 786 (2011).

28. 554 U.S. 570 (2008).

29. Len Niehoff, *Here's What the Supreme Court Is Getting Wrong*, Detroit News, June 29, 2022.

30. *See*, *e.g.*, Adam Winkler, *Heller's* Catch-22, 56 UCLA L. Rev. 1551 (2009).

31. Erwin Chemerinsky, Worse Than Nothing: The Dangerous Fallacy of Originalism 190–91 (2022).

32. *Id*. at 119–20.

33. 389 U.S. 347 (1967).

34. *See*, *e.g.*, Matthew L. Schafer, *In Defense:* New York Times v. Sullivan, 82 La. L. Rev. 81 (2021).

35. 475 U.S. 767 (1986).

36. 497 U.S. 1 (1990).

37. 485 U.S. 46 (1988).

38. 562 U.S. 443 (2011).

39. It may be worth noting that Justice Thomas joined the majority in *Snyder*—although Justice Alito dissented, and three of the other current originalists were not on the Court at the time.

40. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).