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# The Framers Were Big Fans of Liberty, Unlike Samuel Alito

BY DAVID H. GANS

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Sen. Susan Collins and then-Judge Samuel Alito on Capitol Hill in 2005. Win McNamee/Getty Images

Justice Samuel Alito's draft majority opinion in *Dobbs v. Jackson Women's Health Organization* would overrule *Roe v. Wade*, permit states to enact the most draconian bans on abortion, and provide a roadmap for taking away fundamental rights the Supreme Court has protected for nearly a century. At its core is one of the most crabbed conceptions of liberty ever penned by a Supreme Court justice. To Alito, liberty is essentially an empty idea. From this follows Alito's prescription: devise a legal test that stops courts from safeguarding unenumerated fundamental rights and then use it to scrap *Roe*.

Alito's opinion suggests that liberty is to be feared, not celebrated as a core feature of our constitutional heritage. "Liberty," he insists, is a "capacious term" that could have hundreds of possible meanings, and he worries that the judiciary will engage in "freewheeling judicial policymaking" in the guise of protecting liberty. He insists that the Supreme Court should be extremely loath "to recognize rights not mentioned in the Constitution" for fear that the Supreme Court will "usurp authority that the Constitution entrusts to the people's elected representatives." Because liberty could mean anything, in his view, it means almost nothing.

According to Alito, only the most overwhelming, centuries-old historical evidence—essentially the sort of historical grounding that rights in the Bill of Rights can point to—could possibly justify the protection of an unenumerated fundamental right. The right to abortion recognized in *Roe v. Wade*, he argues, spectacularly fails this test; extending his reasoning, so might the right of people of different races, or of the same sex, to marry—protected in *Loving v. Virginia* and *Obergefell v. Hodges*—and the right to use contraceptives protected by *Griswold v. Connecticut*, as others have pointed out. Alito's opinion bulldozes a century of case law protecting fundamental rights to bodily integrity and marriage, and the right to decide for one's own self whether, when, and with whom to form a family.

What fundamental rights have the kind of historical backing Alito seems to demand? What other fundamental rights can claim a historical lineage equivalent to rights in the Bill of Rights? Few, if any, would seem to measure up to the strict standard Alito lays out. That is not a bug, but a feature, of Alito's approach. To Alito's way of thinking, many of the rights we cherish as part of our heritage of liberty are not rights at all.

*[Read: The People Who Promised Roe Was Safe Are Already Selling Their Next Bridge]*

The role of the courts in our constitutional system is to protect basic rights and liberties from the tyranny of the majority, not to reduce them to insignificance through wordplay. The Constitution presupposes that not all the rights it guarantees will be found in its text. When the founding generation added the Bill of Rights to the Constitution in 1789, it was understood that no list of protected rights could possibly be exhaustive. As future Supreme Court Justice James Iredell aptly observed, "Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." The Ninth Amendment, which provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," codifies that essential idea.

Alito's basic move defies the Constitution. He disparages the idea that we have fundamental rights that are basic to bodily integrity, human dignity, and equal citizenship,

simply because they are not mentioned in the text. He flouts the rule of construction the Ninth Amendment prescribes.

Hollowing out our constitutional ideal of liberty is indefensible on its own terms. It is particularly so when one considers a primary purpose of the 14th Amendment: to redress the horrific abuses of slavery and ensure the promise of liberty for all, regardless of race. The 14th Amendment was necessary because, in the wake of the abolition of chattel slavery, states of the former Confederacy sought to strip Black people of every basic liberty, including their rights to bodily integrity and to choose their families for themselves. To Americans who struggled and spilled blood to make the 14th Amendment a part of our Constitution, liberty was not an empty idea; it was central to the difference between being a full, equal citizen and being enslaved. Rights to bodily integrity, to marry, to decide whether to establish a family, and to reproductive freedom were part of liberty. As Michigan Sen. Jacob Howard asked during debate over the Reconstruction amendments, “Is a free man to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home? What definition will you attach to the word *freeman* that does not include these ideas?” *Roe*’s roots can be found in the 14th Amendment’s embrace of these bedrock rights.

Alito bemoans how capacious liberty is; the Reconstruction Framers celebrated that fact. As Rep. Jehu Baker of Illinois insisted, the 14th Amendment would provide “a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue.” Rather than maintain a status quo that licensed the suppression of fundamental rights, Sen. Carl Schurz of Missouri described the 14th Amendment as having effected a “great constitutional revolution”: “It made the liberty and rights of every citizen a matter of national concern” and “made a republic of equal citizens.”

Alito’s draft opinion asks “what the Fourteenth Amendment means by the term ‘liberty,’” but then answers that question in a manner completely divorced from the 14th Amendment’s text and history. Liberty, human dignity, and equal citizenship lie at the core of the 14th Amendment’s text and history. By Alito’s account, they are entirely absent.

Alito paints his opinion as a vindication of textual fidelity to the Constitution. But reducing one of the most powerful constitutional concepts to an empty idea and stripping Americans of the right to control their bodies and their lives would surely represent one of the lowest points in the history of the Supreme Court. 📌

[Read more of Slate’s coverage on abortion rights here.](#)

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