Addiction and Liberty

Matthew B. Lawrence

Associate Professor

Emory University School of Law

Roadmap

- **Part 1:** *Dobbs* and Supreme Court's embrace of *Glucksberg* test for recognition of fundamental rights.
- **Part 2:** Application of test to new situation—right to freedom from addiction?

Part 1: Legal test for recognition of substantive due process rights

Fundamental rights refresher

- Fourteenth Amendment prohibits state from depriving a person of life, liberty, or property without due process of law.
- "Substantive due process" gives special protection to "fundamental rights"
- Fundamental rights include those **explicit** in constitution (bear arms, speech, free exercise, etc.)
- Fundamental rights also include rights **implicit in concept of ordered liberty**.
  - Established examples include: Right to send children to private school/parental rights (*Pierce v. Soc'y of Sisters*), right to reputational liberty (*Paul v. Davis*), right to refuse life-saving medical treatment (*Cruzan*), interracial marriage *(Loving*), same sex marriage *(Obergefell*).
  - Rejected examples include: Right to try potentially life-saving medicine (*Abigail Alliance*), right to suicide (*Glucksberg*).
- **Question: What "test" do courts apply to determine whether an asserted right is fundamental or not?**

Before *Dobbs*

- Dispute: *Glucksberg* test or *Poe*/*Obergefell*?
- **Glucksberg (Rehnquist 1997)—History and tradition**: "The Court's established method of substantive due process analysis has two primary features: First, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition. Second, the Court has required a "careful description" of the asserted fundamental liberty interest."
- **BUT Obergefell (Kennedy 2015)--Reasoned judgment**: "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "**has not been reduced to any formula**." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. **History and tradition guide and discipline this inquiry but do not set its outer boundaries.** See *Lawrence*, *supra*, at 572. That method respects our history and learns from it without allowing the past alone to rule the present."

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL. *v.* JACKSON WOMEN'S HEALTH ORGANIZATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19–1392. Argued December 1, 2021—Decided June 24, 2022

Mississippi's Gestational Age Act provides that "[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks."

Obergefell on *Glucksberg*:

"Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), **it is inconsistent** with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."

Dobbs on *Glucksberg*:

"**We have held** that the 'established method of substantive-due-process analysis' requires that an unenumerated right be 'deeply rooted in this Nation's history and tradition' before it can be recognized as a component of the 'liberty' protected in the Due Process Clause." (quoting *Glucksberg* and applying test to right to abortion).

Takeaway: The majority in *Dobbs* made clear that it views *Glucksberg* (focusing on history and tradition, and careful definition of the asserted right) as the binding legal test for all substantive due process questions.

Lawyers know well that the test the court adopts often determines the outcome of the case…

The 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.'" *Glucksberg*, 521 U. S., at 721; see *post*, at 12–14 (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ.). The dissent does not identify *any* pre-*Roe* authority that supports such a right—no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. Compare *post*, at 12–14, n. 2, with *supra,* at 15–16, and n. 23. Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion "however and whenever performed" except if necessary to save "the life of the mother," *Roe*, 410 U. S., at 139; and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States. Compare *post*, at 12–14, nn. 2–3, with *supra,* at 23–25, and nn. 33–34.[47]

The majority's embrace of the *Glucksberg* test had determinative implications for abortion, and also has significant implications for substantive due process doctrine more broadly (assuming the *Glucksberg* test sticks).

- What happens to rights that were recognized based on the "reasoned judgment" approach (like same-sex marriage and access to contraception)? Held up now by *stare decisis* alone?
  - (Majority asserted that they were/are safe, but dissent wondered if they really are given logical implications of *Dobbs* majority's doctrinal approach and willingness to override *stare decisis*.)
- Anyone hoping to establish a not-yet-recognized right as fundamental would be wise to hew closely to *Glucksberg* test
  - Technological development, combined with new scientific learning, may offer opportunity to test this…

Question 1: Do you think the *Glucksberg* test will stick, or will "reasoned judgment" make a comeback for substantive due process?

A. Yes, the majority was clear.

B. No, different majorities seem to adopt different substantive due process tests over the years.

Part 2: Addiction and Liberty

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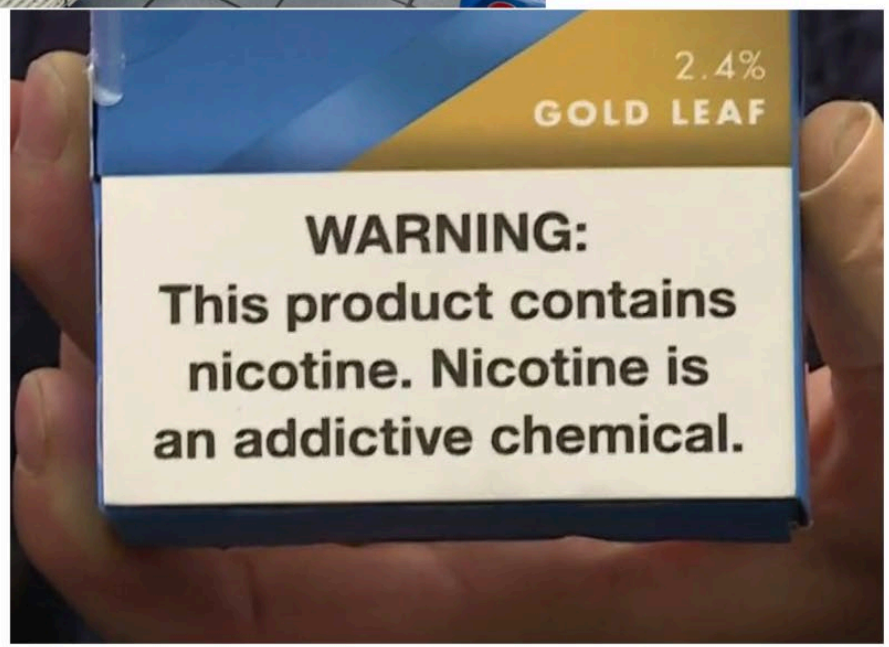
smartwater
pepsi


INCREASING THE BET INCREASES THE CHANCES OF WINNING THE JACKPOT!
All Games
OCEAN Magio
LITTLE GREEN MEN
SPHINX
PLAY RESPONSIBLY


2.4%
GOLD LEAF
WARNING:
This product contains nicotine. Nicotine is an addictive chemical.

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A BILL

To prohibit social media companies from using practices that exploit human psychology or brain physiology to substantially impede freedom of choice, to require social media companies to take measures to mitigate the risks of internet addiction and psychological exploitation, and for other purposes.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DONNA DAWLEY, individually and Personal Representative of the ESTATE OF CHRISTOPHER J. DAWLEY Plaintiffs, v. META PLATFORMS, INC., formerly known as FACEBOOK, INC.; SNAP, INC. Defendants.	NO. COMPLAINT FOR WRONGFUL DEATH AND SURVIVORSHIP JURY DEMAND

I. INTRODUCTION

1. This product liability action seeks to hold Defendants' products responsible for causing and contributing to burgeoning mental health crisis perpetrated upon the children and teenagers in the United States by Defendants and, specifically, for the death by suicide of Christopher J. Dawley on January 4, 2015, caused by his addictive use of Defendants' unreasonably dangerous and defective social media products.

Allegedly addictive design

- "Operant conditioning" research, B.F. Skinner
- "Near misses"
- Intermittent reinforcement, variable reward
- Pull to refresh/delayed refresh

Could state's use of addictive design, if successful, trigger constitutional claim?

Glucksberg: What is history and tradition, and how would you define right?

History and tradition—"Freedom of thought"

- Justice Cardozo, writing for the Court in *Palko v. Connecticut* in 1937: "[F]reedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom."

- Justice Marshall, writing for the Court in *Stanley v. Georgia* in 1969: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

History and tradition—"Freedom of thought"

- Justice Kennedy, writing for the Court in *Ashcroft v. Free Speech Coalition* in 2002: "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."

- Justice Kennedy, writing for the Court in *Lawrence v. Texas* in 2003: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."

History and tradition—Lotteries

- In 19th century, **almost every state had a constitutional prohibitions on state lottery.** (2/3 of states at ratification of the 14th Amendment)
- Constitutional prohibitions on state lotteries were not repealed until 20th century
- Began with New Hampshire in 1964 (way to raise revenue without taxing wealth).
- New Hampshire started run of legalization in 1970s and 1980s.

History and tradition—Addiction

- Alcohol is first major substance recognized as addictive (Benjamin Rush's founding-era tract presented addiction model).

- Alcohol has been subject to extraordinary regulation throughout nation's history, state power to ban/regulate has never been questioned.

- "**Gambling** implicates no constitutionally protected right . . . rather, [gambling] falls into a category of 'vice' activity that could be, and frequently has been, banned altogether." United States v. Edge Broadcasting, 509 U.S. 418, 426 (1993).

- **Drug use** has also been subject to extraordinary regulation and Supreme Court finds deterring in children a "substantial, even compelling" government interest that can justify restricting speech. *Morse v. Frederick*, 551 U.S. 393 (2007)

How should right be defined?

- **Broadest:** "Freedom of thought"

Would prove too much—advertising, persuasion, music on municipal buses?

Cf. Public Utility Commission of D.C. v. Pollak, 343 U.S. 451 (1952)—**Does playing radio on trolley violate freedom of thought?**

Majority (Burton): No, you choose to enter public space.
Dissent (Douglas): Yes, freedom to "think as one chooses"
Abstention (Frankfurter): Biased "as a victim of the practice in question."

How should right be defined?

- **Broadest:** “Freedom of thought”

Will prove too much—advertising, persuasion, music on municipal buses?

- **Focus on cause of effect:** “Freedom from state lottery,” ”freedom from alcohol,” “freedom from gambling,” “freedom from nicotine,” ”freedom from Facebook,” etc.

- **Focus on effect on individual:** ”Freedom from addiction”

Freedom from addiction = freedom from persistent, repetitive thoughts to engage in harmful behavior

- Natural
- Coherent
- Manageable
- Objective
- Essential
- Historically grounded
- Adaptable
- Rationalizes doctrine

Applications and limits

These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. *Casey*, 505 U. S., at 851. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. See *Compassion in Dying* v. *Washington*, 85 F. 3d 1440, 1444 (CA9 1996) (O'Scannlain, J., dissenting from denial of rehearing en banc). None of these rights has any claim to being deeply rooted in history. *Id.*, at 1440, 1445.

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Applications and limits

- **Government-caused addiction.** Government action that foreseeably causes addiction deprives victims of constitutional liberty interest. *E.g. state lottery gambling machines, apps.*
- **Addiction treatment restrictions.** Government restriction on access to addiction treatment deprives victims of constitutional liberty interest. *E.g. methadone access restrictions.*
- **Private action.** State has compelling interest in protecting residents from being addicted without their knowledge. *E.g., constitutionality of regulation of operant conditioning features in twitter, facebook.*
- **Limitations**
  - Advertising (not persistent, aimed at behavior)
  - Persuasion (not harmful, or aimed at behavior)

Question 2

Assuming a plaintiff could show they became addicted playing one of the slot machines placed by a state in a convenience store near their house, do you think there is a plausible case under *Glucksberg* (history and tradition) for recognition?

A: Yes!

B: No, the test is just too restrictive.

C: No, because a person's choice to play a slot machine is an intervening cause (even if the machine is state sanctioned and lacks even a warning that playing can be addictive).

D: Maybe, I would need to learn more.

Recap initial legal argument

- **History and tradition**
  - Freedom of thought is old, ways of interfering with it are new
  - State lottery bans in state constitutions
  - History of extraordinary regulation of gambling, alcohol, tobacco, etc.
  - Government knowingly causing addiction shocks the conscience, lacks precedent
- **Definition**
  - Freedom from addiction = freedom from persistent, repetitive thought to engage in harmful behavior
  - Natural, coherent, manageable, objective, essential, historically grounded, adaptable, rationalizes doctrine

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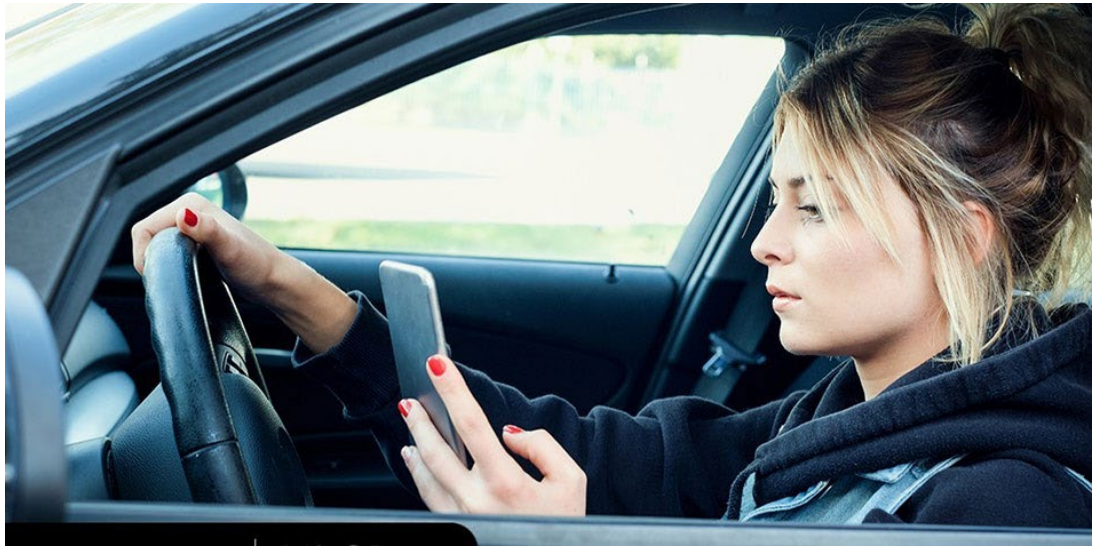
"Politics"

- "New scientific learning" (Alito, *Dobbs*). *Cf.* Jones, Carpenter (locational privacy, GPS), Thomas on platforms.
- Category creates broad coalition
- (Popular constitutionalism) *Abigail Alliance*/"right to try"



Question 3

Question: Overall, do you think there is any hope for the right to freedom from addiction?

A. No, don't bet on it. Sorry.

B. Maybe someday, if we learn more about addiction and the technological threats get even greater.

C. Maybe today you could convince a brave state or federal judge or two.

D. Yes, could get broad buy-in from the courts.

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Q&A

See "Addiction and Liberty," Forthcoming, Cornell L. Rev.:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4113570

Questions?

Comments?

Matthew.Lawrence@emory.edu

@mjblawrence