

Contemplating the U.S. Supreme Court's Reversal of 'Roe v. Wade'

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Abstract: The Roe case and Casey case were important moments in the women's liberation movement in the United States, recognizing women's constitutional right to abortion, and a fundamental aspect of their autonomy. In contrast, the recent Dobbs case upended the established Roe precedent, rejecting constitutional recognition of women's right to abortion and reverting "regulation of abortion rights to the people and their elected representatives. To delve deeper into this matter, it's crucial to examine the legal doctrines at play. The Roe decision primarily invoked the Substantive Due Process Clause to protect a woman's privacy and reproductive choices, whereas the Dobbs case highlighted the importance of the democratic process and aligns with originalism in constitutional interpretation. This shift raises questions about the durability of constitutional precedents and the evolving nature of constitutional interpretation. The conflict between these cases underscores the profound implications for women's reproductive rights and the broader women's liberation movement, as the nation grapples with the balance between individual autonomy and democratic decision-making in shaping constitutional rights.

Keywords: Right to abortion, Originalism, Living constitutionalism, Living originalism

1. Introduction

In 1973, the case of *Roe v. Wade* (the Roe case) [1]. It recognized women's right to abortion and restricted state legislation that prohibited abortion. However, nearly half a century later, the U.S. Supreme Court addressed the *Dobbs v. Jackson Women's Health Organization* case (the Dobbs case) [2]. The *Roe v. Wade* verdict was reversed in a 6:3 decision. There are basically two components in these two instances, as well as in the discussion among researchers over the inclusion of abortion rights in the constitutional language. First off, the Roe case ruling applied the Constitution incorrectly since the "Equal Protection Clause" should have served as the textual foundation for abortion rights. Second, the constitutional text and history were misinterpreted in the Dobbs case ruling. The judges' individual political and value preferences impacted the arguments process and judgment outcome. This essay supports the Roe case's ruling, but it disagrees with the textual foundation it was built upon. It also has a poor opinion of the Dobbs case's judgment outcome and rationale.

2. Equal Protection Clause as Textual Basis for Abortion in Roe Case

In 1973, the justices in the Roe case, on the Griswold v. Connecticut case (the Griswold case) [3]. It confirmed that women's right to an abortion is protected by the U.S. Constitution on the basis of the Due Process Clause, which established the right to privacy in the constitutional amendment. The case regarded the right to privacy as a “penumbra”, within which includes citizens' abortion rights and other freedoms. In 1992, the Planned Parenthood v. Casey case (the Casey case) [4]. Once again affirmed the abortion rights established by the Roe case and further argued the legal basis for these rights. The case asserted that the protection of the decision to have an abortion under the Constitution was not only within the realm of privacy but also rooted in the promise of individual liberty within the Due Process Clause. It stated that women possess the autonomy to make decisions regarding their own bodies and should not be subjected to excessive government interference. Both rulings relied on the Substantive Due Process Clause of the Fourteenth Amendment, but they faced criticism within the Dobbs case as well. In the Dobbs case, it was determined that any rights protected by the Substantive Due Process Clause of the Fourteenth Amendment must have a strong foundation in the history and culture of the United States. The court concluded that abortion rights did not meet this criteria. This became a significant reason for the Dobbs case's rejection of the Roe case. According to this article, the outcome of the Roe case was deemed questionable in some aspects due to its emphasis on the "Substantive Due Process Clause" as the basis for abortion rights, while neglecting the potential role of the "Equal Protection Clause" in the legal argumentation. The following sections will provide a detailed discussion of this matter.

2.1. Equal Protection Clause: Abortion Rights Basis

Article 1 of the United States Constitution (Fourteenth Amendment) includes the 'Equal Protection Clause' and the 'Due Process Clause'.

2.1.1. Shortcomings of Substantive Due Process Clause

The U.S. Supreme Court gradually curtailed state authority by applying most of the provisions in the Bill of Rights to the states via the Due Process Clause in a sequence of rulings. Although the Substantive Due Process Clause was not explicitly stated in the Constitution, it evolved as an implicit right. In other words, the Supreme Court does not believe that rights are nonexistent simply because they are not explicitly mentioned in the Constitution. The court maintains that these unexpressed rights must be subject to certain limitations. For instance, in the 1997 case of Washington v. Glucksberg [5], it was argued that unlisted rights must satisfy two conditions to be recognized as constitutional rights: firstly, the court must meticulously define that entitlement within its decision. Secondly, this right must be deemed as "inherent in the idea of a well-structured society" and "substantially ingrained in the historical and traditional fabric of this nation", to the extent that "neither freedom nor fairness would exist if they were disregarded". While there is no disagreement over the first standard for abortion rights, the second standard—whether or not abortion rights are "objectively firmly anchored in our nation's history and tradition" is the subject of current intellectual and legal debate. The judges held that the U.S. Constitution does not mention abortion and does not suggest protection of this right under any constitutional provision, including the Due Process Clause, in the majority opinion of the Dobbs case. While the Due Process Clause safeguards unenumerated rights not expressly stated in the Constitution, these rights must be deeply ingrained in the history and culture of this country and must be inherent in the concept of liberty being created. Most people agree that abortion rights do not fit under this category. Abortion has instead been viewed as a crime for a long time. For instance, a third of the states regarded abortion at any stage of pregnancy as a crime in 1868, the year the Fourteenth Amendment was passed, and the remaining states quickly followed suit.

In addition, the classification of abortion prior to fetal movement (quickening) was still up for debate in accordance with common law history, but abortion following quickening was regarded as a crime. The majority viewpoints made reference to Sir Edward Coke, a well-known English jurist, as well. It was recognized by Edward that an abortion carried out following quickening constituted "manslaughter", which is a terrible crime, if the unborn child was still living at the time. None of these common law precedents supported abortion, despite differences in the harshness of the penalties imposed for abortion at various stages of pregnancy. Until the Roe case's ruling, this broad consensus held. At the time, abortion was still illegal in more than 30 states unless it was absolutely essential to preserve the mother's life. As a result, the history and culture of this country did not have a strong foundation for abortion rights. Contrarily, the history of banning abortion lasted from the early days of common law until the Roe case's 1973 ruling.

In response to this, Justice Elena Kagan dissented and rebutted the majority opinion [5]. First, Elena adopted a different level of generality approach than the majority on the same issue, aligning with the perspective proposed by Professors Akhil Reed Amar and Reva B [6]. Sie (level of generality). She argued that the abortion issue fundamentally revolves around personal control over one's body and control over the most intimate and personal of relationships. These are undoubtedly core constitutional values deeply rooted in the hearts of every American, and therefore, abortion rights are not as lacking in "objective deeply rootedness in this nation's history and tradition" as the majority opinion suggests. Conversely, she contended that abolishing abortion rights represents a concentrated form of government interference with personal bodily autonomy, contradicting American history. Furthermore, Elena argued that the majority opinion engaged in circular reasoning. It extensively listed various states' attitudes towards abortion in the 19th century but overlooked the fact that during that era, women had lower status, and 'the people' did not include women. Women were considered "second-class citizens". The Fourteenth Amendment cited by the majority was also ratified by 'men' as women did not have the right to vote at the time. Thus, the majority opinion sought answers to contemporary issues from an era lacking consideration for women's rights. At the same time, Justice Elena Kagan's dissent points out the inconsistency of relying on the "liberty" within the Substantive Due Process Clause of the Fourteenth Amendment as the constitutional foundation for women's abortion rights in the Roe and Casey cases. The recognition of unenumerated rights through substantive due process predominantly hinges on the precedent's requirement that these rights must possess a strong historical and traditional foundation. This poses a substantial challenge for the argument supporting abortion rights. Therefore, turning to the Equal Protection Clause, also found within the Fourteenth Amendment, could potentially serve as an alternative approach.

2.1.2. The Rationality of the Equal Protection Clause

As the rulings in Roe and Casey did not primarily rely on the Equal Protection Clause, and the majority opinion in Dobbs did not extensively refute this, as it mainly considered abortion disputes as health and safety issues rather than gender equality problems, this article disagrees with this viewpoint. The reason being that restricting women's access to abortion effectively compels them to become mothers, imposing traditional gender stereotypes. The primary affected group is women, while the impact on or the interest of men is minimal or non-existent because men cannot become pregnant. Therefore, the abortion dispute constitutes a gender equality issue rather than a mere reconciliation of potential "life interests", such as fetal interests, and women's health and physical well-being. As expressed by Justice Blackmun in the joint opinion of Casey, government limitations on abortion coerce women into carrying pregnancies that they might otherwise choose to terminate. By restricting the right to end pregnancies, the government exercises control over women's bodies, compelling them to endure the responsibilities of childbirth and the burdens of nurturing and caring for children for many years. Women are not adequately compensated by the government for their

contributions. Instead, they are expected to fulfill this responsibility without any form of compensation. This assumption that women can be compelled to embrace their "natural" role and the experience of motherhood is rooted in traditional gender roles and raises concerns under the Equal Protection Clause.

This explanation simplifies the legal arguments and clarifies the idea that restricting access to abortion can be seen as a violation of gender equality. Because it places a burden primarily on women and forces them into traditional roles. One can interpret the relationship between the Substantive Due Process Clause and the Equal Protection Clause as the former focusing on the past, while the latter concentrates on the future. The renowned constitutional scholar Cass Sunstein provides a concise summary: "Rights protected by substantive due process are often deeply rooted in the nation's history and tradition, while equal protection is about shielding marginalized groups from discrimination, even if that marginalization has deep historical roots" [7]. Cass also wrote in another book, "As people have come to see, the Equal Protection Clause has a corrective function; the Due Process Clause generally, at least, has a conserving function. The Equal Protection Clause sets up an ideal standard against which existing practices can be criticized; the Due Process Clause defends long-established rights within the Anglo-American legal tradition" [8].

From this perspective, the roles of history and tradition are different in these two clauses. In the Substantive Due Process Clause, if a constitutional unenumerated right lacks historical and traditional basis, it cannot be established due to the absence of necessary elements. In contrast, under the Equal Protection Clause, if a right lacks historical and traditional basis, it indirectly demonstrates that minority or marginalized groups under that right have long been neglected and underscores the urgency of establishing that right. As a result, the Equal Protection Clause can potentially address the weakness in *Roe*, which heavily relied on the "history and tradition of the nation" to establish abortion rights through the Substantive Due Process Clause.

Imagine if the *Roe* case had been based on the Equal Protection Clause, it would have been challenging for the *Dobbs* case to overturn it by listing the historical practices of various states. Constitutional law expert Laurence Tribe suggested that the Equal Protection Clause and the Substantive Due Process Clause intertwine like a "double helix structure" while interpreting Justice Kennedy's majority opinion in *Lawrence v. Texas* [9]. Justice Kennedy's opposition to criminalizing consensual same-sex acts in *Lawrence v. Texas* was upheld by invoking not only the Substantive Due Process Clause but also principles of equality and non-discrimination. He held that same-sex and opposite-sex partners engage in sexual activity equally. If such precedents were to be overturned in the future, relying solely on historical narratives would not suffice. The reason why principles of equality and non-discrimination can be used to protect rights under the Equal Protection Clause is that they do not necessarily rely on a long-standing history and tradition [10].

3. Critical Review of How Judges Interpreted the Constitution and Its History in the Dobbs Case

Laws are only as good as how they are applied and interpreted, and transforming "laws on paper" into "laws in action" requires a solid legal interpretation. But in the *Dobbs* case, a scientific method of interpretation was not used, which infuriated the public and drew criticism from academics

3.1. Interpretation of Constitutional Text

The first significant issue in the *Dobbs* case, which overturned the *Roe* case, was how judges should interpret the Constitution. Justice Alito, in the majority opinion he wrote, pointed out that "the U.S. Constitution does not explicitly mention abortion, and no clause of the Constitution implicitly recognizes this right. Therefore, it is necessary to reexamine the Constitution and leave the matter of

abortion to representatives elected by the people." In fact, the conservative camp, represented by Justice Alito, employed "originalism" to interpret the constitutional text in the Dobbs case, while the liberal camp, opposing conservatives, advocated for interpreting the constitutional text using "living constitutionalism" in the Roe case.

In this context, both "originalism" and "living constitutionalism" have their inherent shortcomings or deficiencies in both theoretical frameworks and practical applications. Faced with this dilemma, is there a third path for judges to choose from? The following discussion will analyze "originalism" and "living constitutionalism" and explore a "third path" for interpreting constitutional text.

3.1.1. Originalism

Originalism is based on the principle that the President, Congress, and the Courts are all required to follow the original intent of the U.S. Constitution, except through the formal amendment procedures as outlined in Article V and are not permitted to alter its original meaning. Nevertheless, defining what qualifies as original intent or meaning has been a highly contentious issue among conservatives and between conservatives and liberals alike. Ultimately, original intent has been defined as the "shared understanding of the American people at the time of the Constitution's ratification". Specifically, when it comes to judges interpreting the Constitution, originalism emphasizes that judges should interpret the Constitution within the literal meaning of its language and determine the meaning of constitutional language based on grammar, syntax, and what is within the word's range of meaning.

However, conservatives did not always practice what they preached. The originalism advocated in the majority opinion of the Dobbs case is not the same as the strict textual originalism mentioned earlier. To argue against the protection of the right to abortion under the Due Process Clause of the Fourteenth Amendment, the conservative majority opinion referred to the fact that during the ratification of the Fourteenth Amendment, a significant majority of states had already criminalized abortion throughout all stages of pregnancy. This prevailing consensus persisted until the Roe case decision. Conservative justices contend that it is challenging to interpret the right to abortion within the constitutional text, whether through legislative intent or the shared understanding of the American people at the time of the Fourteenth Amendment's ratification. Consequently, they seek to undermine the textual foundation for the Roe and Casey decisions. It can be observed that the originalism expressed in this context represents an older version of originalism centered around the "original intent of the Constitution's framers" and the "shared understanding of the American people at the time of the Constitution's adoption." This form of originalism carries inherent theoretical flaws and has been abandoned by conservatives during the debates between liberals and conservatives.

Why do originalists in cases like the Dobbs case not adhere to the kind of originalism they now advocate in theory, which follows the text of the Constitution? The reason is that if originalism strays from the intent of the framers and ratifiers of the Constitution and follows the text of the Constitution in interpreting it, it would essentially be no different from other theories of legal interpretation and would have no practical utility. It might even evolve into a form of living constitutionalism, as Professor Ding Xiaodong pointed out [11].

3.1.2. Living Constitutionalism

Living constitutionalism stands in contrast to originalism. Living constitutionalism advocates that constitutional interpretation should evolve with the times and should not be bound by the original intent. If the Dobbs case represents originalism, then the Griswold case illustrates "living constitutionalism" vividly. In the Griswold case, there was no direct provision in the U.S. Constitution that explicitly protected privacy rights. In contrast, Justice Douglas contended in the majority opinion

that "certain specific guarantees within the Bill of Rights have an intrinsic nature that implies a right to privacy, which is formed by various emanations from those guarantees and helps to give them life and substance." This reasoning established the right to privacy for American citizens through precedent, protecting personal areas from unwarranted government interference.

However, this article argues that to some extent, this approach goes beyond the text of the Constitution when interpreting the Constitution. The constitutional provisions cited actually pertain to a range of liberties, including the freedoms of religion, speech, press, and assembly (First Amendment); limitations on the quartering of soldiers (Third Amendment); safeguards against unreasonable searches and seizures (Fourth Amendment); due process and protection against self-incrimination (Fifth Amendment); and recognition of the inherent rights of the people (Ninth Amendment). Among these, the freedom directly related to this case is the Fifth Amendment's concept of liberty, but in the case of Connecticut, there was no violation of relevant procedural due process during the plaintiff's trial. Therefore, the Supreme Court justices in this case seemed to be exercising their judicial discretion excessively, interpreting the Constitution's freedom broadly, more like exercising the legislative powers of bodies such as parliaments, which is an overreach. Justice Stewart, who wrote a dissenting opinion in this case, expressed it in this manner: However, I cannot locate any explicit right of privacy in the Bill of Rights or elsewhere within the Constitution. Decisions by this Court in prior cases also fail to establish such a right. Therefore, if such a right is deemed to exist and be protected by the Fourteenth Amendment's Due Process Clause, it can only be because that clause extends broadly enough to encompass it. I can only conclude that the Ninth Amendment offers no support for the Connecticut law."

The Roe case, based on the establishment of the right to privacy from the Griswold case, followed a similar line of reasoning, and this has become a point of contention for the justices in the Dobbs case. As mentioned in the second part of this article, the overreliance on privacy as a basis for the Roe and Casey case's decisions is one of the reasons this article opposes them. In conclusion, the weakness of the living constitutionalism approach lies in its susceptibility to judges interpreting the Constitution beyond its explicit text, thus promoting "judicial activism", which contradicts the fundamental principle of checks and balances enshrined in the U.S. Constitution.

3.1.3. Living Originalism

Renowned constitutional scholar Professor Jack Balkin had proposed a new method of constitutional interpretation known as "living originalism". This approach necessitates that judges adhere unwaveringly to the original intent of the Constitution, particularly in relation to the regulations, principles, and criteria articulated within the text of the Constitution. In essence, it categorizes the expressions found in the Constitution's text into three types: "rules", "principles" and "standards".

For expressions classified as "rules" judges are expected to strictly follow them because they have clear, specific meanings and target applications. In contrast, for expressions categorized as "principles" and "standards", which inherently possess vagueness and generality, judges are not bound to adhere rigidly to the intent of the framers and ratifiers, as required by traditional originalism. Instead, they should consider contemporary realities and use their own discretion within the semantic boundaries of the Constitution's text when interpreting these "principles" and "standards". As Professor Balkin puts it, "standards" or "principles" are meant to guide political decisions rather than dictate them [12]. The framers of the Constitution and the ratifiers couldn't foresee all future societal developments. The Constitution, being the fundamental law of the nation, cannot be subject to frequent amendments to accommodate evolving circumstances. Therefore, the framers and ratifiers of the Constitution could only provide future generations with a broad legal framework, and it's up to subsequent generations to build upon this foundation.

In the context of the ongoing debate over abortion rights, although we may not find explicit "rules" in the Constitution's text or in the text of amendments that unequivocally support women's right to abortion, we can extract the principle of opposing "hierarchical legislation" from the amendment text. Then, we can apply this overarching framework to the context of the time, emphasizing gender equality, and argue for the protection of women's abortion rights within the spirit of the Constitution to ensure its vitality and relevance.

3.2. Interpretation of Constitutional History

As mentioned above, the justices in the Dobbs case employed originalism, focusing on the intent of the framers and the understanding of the ratifiers to interpret the Constitution, which implies extensive discussions of constitutional history. Leaving aside the inherent flaws in this theory, as discussed earlier, the justices in the Dobbs case, in fact, committed a serious historical fallacy by selectively using history. This led to conclusions opposite to those of most historians studying the 19th century.

Examining the history of early abortion regulation in the United States, it is a fact that during the colonial and early founding periods, the U.S. did not outright ban abortion but rather adhered to the "quickening" principle. Moreover, the regulations primarily targeted those who assisted with abortions rather than pregnant women themselves. In addition, due to the use of jury trials in the United States, jurors were lenient toward the supposed regulatory targets, and even when penalties were imposed on pregnant women, they were not severe. In fact, it wasn't until the mid-to-late 19th century that the U.S. began to see legislative efforts to strictly regulate abortion, as mentioned in the majority opinion of the Dobbs case. The reasons behind this shift were driven by professional doctors seeking profit, who, by promoting restrictive abortion legislation, aimed to monopolize the abortion market and eliminate competition from amateur abortion providers [13].

In summary, it is not accurate to argue that many Supreme Court justices in the Roe case made erroneous decisions by deviating from what is "firmly established in the history and tradition of the nation." Instead, it was the history and legislation of the mid-to-late 19th century that went against earlier American history and traditions. Therefore, the majority opinion in the Dobbs case, when interpreting the history of abortion in the United States and constitutional provisions, may be perceived as subjective and may reflect the personal values and selective interpretation of American abortion history by the justices.

4. Conclusion

As a result of the Roe case, women now have the legal right to an abortion under the United States Constitution, which is a major development for both the women's liberation movement and the law. The Dobbs case, which overturned this precedent, sparked critical discussions about the proper proportion between personal freedom and civic duty. Additionally, it cleared the path for more stringent state-level restrictions on abortion, as evidenced by Texas' "heartbeat bill", and because it exposes them to the dangers of unsafe and illegal abortions, this choice has disproportionately affected marginalized women, aggravating already-existing societal disparities. Beyond these particular legal conclusions, though, there is a more significant problem: how to understand constitutional texts, their background, and how they apply to a society that is changing quickly. It emphasizes how subjective court judgement are, and how a judge's personal values can have a small but significant impact on their interpretations. The development of the law is a dynamic and interrelated process that calls for a more extensive social conversation and independent critical thought. Promoting communication and understanding is essential while navigating the complexities of personal freedoms and social obligations, especially when dealing with touchy subjects like abortion. The way forward necessitates the active participation of legislators, judges, and stakeholders,

encourage ongoing discussion and reflection. Learning from past mistakes and advancing the rule of law through this process.

Authors Contribution

All the authors contributed equally and their names were listed in alphabetical order.

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