DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION (2022): A CASE COMMENT

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ABSTRACT

In June 2022, the US Supreme Court, in *Dobbs v. Jackson* with a 6:3 majority, overruled *Roe* and *Casey* and took away the constitutional right to abortion. The right was implicitly based on, among other things, the *Liberty* interest protected by the Fourteenth Amendment's Due Process Clause. In denying the right, the Supreme Court reasoned that to bring a new component of right into liberty, one must show that it was reasonably accepted as a right when the Fourteenth Amendment was adopted and ratified. Any other interpretation, the court held, would not be faithful to the constitutional text. In this commentary, it is argued that the court's historical analysis is a rudimentary method for interpreting abstract concepts like liberty which was envisaged for eternity. The case comment demonstrates that historically chained understanding of the constitutional text, especially its rights, is not instance best way to show fidelity to the constitutional text. The difference between "original meaning" and "original expected application" is significant. The comment further shows the judgment's possible unintended—but still cruel—consequence. Finally, it is concluded with a proposed alternative method of Reflective Equilibrium with an aspiration of visualising a seamless web of the components of the liberty principle.

On June 24, 2022, the Supreme Court of the United States (hereinafter, either the SCOTUS or the Court) in *Dobbs v. Jackson Women's Health Organisation*[1] overruled *Roe v. Wade*[2], thereby taking away women's abortion right—a constitutional right recognised since 1973. The US Constitution does not explicitly mention abortion rights. Therefore, most of the controversy is spiralling around the interpretation of the Constitution, especially the *Liberty* interest protected by the Fourteenth Amendment's Due Process Clause.

This paper is divided into three parts. *Part I* rigorously analyses the *Dobbs* method for determining the scope and ambit of liberty. This critical analysis is followed, in *Part II*, by a systematic analysis of the arguments and counter-argument—between the majority and the dissenting judges. Finally, in concluding remarks, a more rigorous method would be proposed to interpret abstract concepts like liberty—instead of the historical analysis, a method adopted by the majority in *Dobbs*.

Part I

Since the US Constitution does not explicitly mention abortion rights, one must ideally show its implicit location within the Constitution to justify it as a constitutional right. In *Roe*, the Court held that the abortion right springs from the *First*, *Fourth*, *Fifth*, *Ninth*, and *Fourteenth* Amendments. The Court expressed that the Fourteenth Amendment did the work. However, the majority in *Dobbs* found that *Roe's* message suggests that the abortion right could be found somewhere in the Constitution—for instance, the Ninth Amendment's reservation of rights to the people—and specifying its exact location was not of paramount importance.[3] The *Casey* Court, on the other hand, "did not defend this unfocused analysis and instead grounded its decision solely on […] "liberty" protected by the Fourteenth Amendment's Due Process Clause."[4]

In Dobbs, the Court reconsidered whether the Constitution conferred a right to obtain an abortion. The Court inspected whether the abortion right is rooted in US Nation's history to answer this question. They also consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents."[5]However, the historical analysis remained the bedrock of this judgment, and this comment will majorly focus on it.

[1] *Dobbs vs Jackson Women's Health Organisation*, 597 U. S. 13 (2022)
[2] Roe v. Wade, 410 U.S. 113 (1973)
[3] 597 U. S. 9 (2022)
[4] 597 U. S. 10 (2022)
[5] 597 U. S. 8-9 (2022)

The Court noted that the burden of proof of whether any particular right is protected under the "liberty" principle lies on those who claim them, and they "must show that the right is somehow implicit in the constitutional text."[6] However, the term *liberty* and its amorphous nature as a concept provide little guidance. Therefore, the Court stated that historical inquiries are essential whenever it is asked to recognize a new component of *liberty*.[7] As per the Court, the meaning and understanding of *liberty* and whether it protects certain rights should be ascertained from the Nation's standpoint—at the juncture of its inclusion. In other words, the Nation's understanding of liberty in 1868, when the fourteenth amendment was ratified, would be the *sole* parameter to determine whether any particular liberty is protected or not.

The Court's historical analysis found that abortion was never considered a right, neither in 1868 nor any time before or after. In fact, abortion was illegal, at least post quickening, under common law, and this fact remained undisputed even by dissenting judges. Moreover, in 1868 over three-quarters of the States had statutes criminalizing abortion, and every state had such a law till 1973.[8] Based upon this analysis, the Court cautioned that while "interpreting […] "liberty," we must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with our ardent views about the liberty that Americans should enjoy."[9]

The Court's reasoning is problematic on at least two levels. First, the Court inversed the relationship between ordinary and constitutional law. The constitutional law, or in our case, a constitutional right, is the standard through which any ordinary law is (in)validated.[10] All ordinary laws are interpreted within the constitutional framework. The Court would read down or even strike down the laws violating constitutional provisions.

Let's take an example to substantiate this argument. Imagine if the US constitution had *explicitly* mentioned the right to abortion. Would it matter if three-quarters—or even all—of the States had criminalized abortion at that time? Indisputably, the Court would have called all these acts unconstitutional and void. It's trite to say that the validity of any ordinary legislation is reviewed based on constitutional provisions. Interestingly, while interpreting the extent of "liberty" from the standpoint of the then criminal laws, the Court made the classic error of

[6] 597 U. S. 9 (2022)
[7] 597 U. S. 2 (2022)
[8] 597 U. S. 29 (2022)
[9] *Id* at 14
[10] For instance, Article 13(1) of the Constitution of India tests all pre-constitutional laws with respect to the Fundamental Rights.

putting the horse behind the cart. Although the term "liberty" must be interpreted as per the "original meaning"; nevertheless, it should be kept independent of any influence of ordinary laws enforced at that time.

The second flaw in the Court's reasoning lies in its inability to differentiate between "original meaning" and "original expected application."[11] An example can contrast the difference. Imagine a constituent assembly in the 19th century contemplating an anti-discrimination principle. They put a constitutional right proscribing discrimination using specific terms to prevent that discrimination. After a long discourse, the assembly formulated the anti-discrimination principle, prohibiting discrimination based on race, caste, class, sex, place of birth, and religion. The term "sex" was initially omitted from the text. However, there were a handful of women members in the assembly. These members—especially women—enunciated that they had been discriminated against in the past based on sex. And they asserted that this discrimination would persist if they were left unprotected. Resultingly, the constituent assembly incorporated it within the Constitution.

Although, the primary reason for incorporating "sex" within the anti-discrimination principle was the unflinching determination of the women members. The constituent assembly members, nonetheless, were aware of the deeper justification for the same. They understood that any arbitrary classification or class legislation without any reasonable nexus to the objective of the legislation is discriminatory. Therefore, the different treatment merely based upon sex is also discrimination. Considering the gender binary nature of debate in the constituent assembly, the interpretation through "original expected application" would suggest that there should not be any discrimination between *men* and *women*. The "original meaning" would instead proscribe discrimination among people based on *sex*, giving protection to the LGBTQ+ community as well, despite not being expected by the constituent assembly members.

Another example could be the US Constitution's Eighth Amendment prohibiting "cruel and unusual punishments." The cruelty and unusualness should be adjudged from the contemporary application of these concepts and not by how people in 1791 would have applied them. The task of interpretation, therefore, is to look to the original meaning and decide how best to apply them in current circumstances.[12]

[11] Jack M. Balkin, Abortion and Original Meaning, 24 Const. COMMENT. 291, (2007)
[12] Jack M. Balkin, Abortion and Original Meaning, 24 Const. COMMENT. 291, 293 (2007)

Many unenumerated rights had a status similar to abortion; nonetheless, they are recognized as constitutional rights under the Due Process Clause. For instance, there is no mention of marriage in the US Constitution, and interracial marriage was illegal in most States in the 19th century. However, the Court still held it to be an aspect of liberty, protected against state interference by the Due Process Clause.[13] The Constitution does not mention *contraception*, nor was there any historic right to it. On the contrary, the "American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices."[14] Still, the right to use contraception has been a constitutional right since 1965.[15]

The SCOTUS ingrained the meaning and scope of *liberty* to a particular time in history, making it immutable for eternity. As the dissenting opinion in Dobbs remarked,

> *"Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command."*[16]

A logical conclusion of the Court's reasoning suggests that a constitutional amendment is required to make the right to abortion a constitutional right. Interestingly, replacing the term "liberty" with "liberty" would be sufficient as presently, most states are not criminalising abortion, at least not till "viability." By confining liberty to the *expected application* of a specific historical period, the Court has shackled it with the regressive policies and prejudices of the past. Liberty has been imprisoned by the very mindsets and practices it endeavoured to eliminate. It's time to liberate *liberty* from historical manacles; however, that alone would not be sufficient as the challenge of how to interpret *liberty* persists.

When *liberty* is liberated from the specific historical timestamp, it becomes a free-floating principle. This free-floating principle could be seen from at least two perspectives. The first perspective resembles *Brownian motion*, where particles move randomly without any path or

[13] Loving v. Virginia, 388 U.S. 1 (1967). See also Planned Parenthood v. Casey, 505 U. S. 833 (1992) at 847 and 848
[14] See BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting, 597 U. S. 28 (2022)
[15] Griswold v. Connecticut, 381 U.S. 479 (1965)
[16] Breyer, *supra* 14 at, 29

ultimate goal. This perspective suggests that liberty could mean anything at any given time, whereas in reality, it would be nothing more than the judges' "own ardent views" about it.[17]

Balkin argues that the *original meaning* allows each generation to make "the Constitution their Constitution by calling upon its text and its principles and arguing about what they mean in their own time. Interpreting the Constitution's text and principles is how each generation connects back to the past and forward to the future."[18] He added that though the constitutional text and principles do not change without subsequent amendment, their application and implementation can. The weakness of this perspective lies in its randomness. This method advocates the *Brownian motion,* as each generation could interpret the text differently without any direction or ultimate purpose. However, the Supreme Court of India states that the "argument does not lie in the fact that the concepts underlying these rights change with the changing times but the changing times illustrate and illuminate the concepts underlying the said rights."[19] Balkin's *original meaning* seems to belong to the first perspective, whereas the Indian Supreme Court adopts the second perspective.

The second perspective concedes that abstract concepts like liberty cannot be understood in their totality. The primary reason for its mysteriousness is that liberty is not simply *absolute liberty*. This limited nature of liberty makes it a puzzle by design—a puzzle for ages, a puzzle forever. Justice is often believed to be an amorphous concept with no definite shape. However, the possibility of an exact shape lying in some *metaphysical world* waiting to be discovered—cannot be discarded. We can only come closer to realising the entire worth of liberty by peeling one layer of coating at a time. Indeed, the fact that adopters—and later the US Congress and ratifying states—chose a text that features general and abstract concepts is the best evidence that they sought that the scope of the principles of constitutional law would have to be fleshed out by the later generations.[20]

Part II

We have already analysed the majority's "deeply rooted in the history" argument. The dissenting opinion of Breyer, Sotomayor, And Kagan, JJ., in *Dobbs* responds to this historical analysis in the following way:

[17] 597 U. S. 14 (2022)
[18] Jack, *supra* note 11, at 302
[19] Navtej Singh Johar v UOI, AIR 2018 SC 4321
[20] Jack, *supra* note 11, at 305

> *"According to the majority, no liberty interest is present— because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in Lawrence and Obergefell to same-sex intimacy and marriage. It did not protect the right recognized in Loving to marry across racial lines. It did not protect the right recognized in Griswold to contraceptive use. For that matter, it did not protect the right recognized in Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535 (1942), not to be sterilized without consent. So, if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too— whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even "undermine"—any number of other constitutional rights."*

In response to this argument, the majority first clarified that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[21] The majority opinion further stated, "what sharply distinguishes the abortion right from the rights recognized in the cases on which Roe and Casey rely is [that the] Abortion destroys ["potential life," i.e.,] the life of an "unborn human being."[22] The minority responded by reminding the majority of Casey's opinion that, "Reasonable people […] could also oppose contraception; and indeed, they could believe that some forms of contraception similarly implicate a concern with potential life. (Internal quotation marks omitted)." [23]

It is submitted that the "potential life" argument is too simplistic to justify the Court's renouncement of a constitutional right that people have depended upon for the past 50 years. Statistically, an American woman is 14 times more likely to die by carrying a pregnancy to term than having an abortion. See Whole Woman's Health v. Hellerstedt, 579 U. S. 582, 618 (2016). So, if "potential life" is a good enough reason to ban abortion since inception, why "potential death" is not good enough to recognize the right to abortion?

[21] 597 U. S. 66 (2022)
[22] *Id* at 32
[23] *Id* at

To be sure, no one is demanding an absolute right to abortion.[24] Just like most rights, abortion, too, is not supposed to be an absolute right. The courts must balance the rights of the women and the foetus. *Roe* tried to strike this balance with the *viability* line. However, in *Dobbs,* no attempt was made to reach any reasonable equilibrium. On top of that, Kavanaugh J. tried to gloss this thoughtlessness with neutrality. This decision is anything but neutral.

The viability line could fairly be called arbitrary and unreasonable and might require correction. Robert C.J., in his partially concurring and partially dissenting opinion, agreed that the viability line should be discarded under the stare decisis analysis as it never made sense. However, following the fundamental principle of judicial restraint, he suggested against rejecting the right to abortion."[25]

The Court's decision in Dobbs did not try to be reasonable. The decision is extreme and would have cruel consequences. The Court disregarded that "the inability to provide […care] is a cruelty to the child and an anguish to the parent."[26] The impact of *Dobbs* is already visible as "[States, already,] have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's—no matter if doing so will destroy her life."[27]

It is the state's responsibility to prevent crimes such as rape. Yet, if rape happens, the Court does not think forced childbirth implicates a woman's rights to equality and freedom. Moreover, some "states may compel women to carry to term a fe[o]tus with severe physical anomalies—for instance, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. [In future] States may even argue that a prohibition on abortion needs no provision for protecting a woman from [the] risk of death or physical harm."

Part III

In *Dobbs,* the Court averted the responsibility to further "illustrate and illuminate" the concept underlying liberty using its not "deeply rooted in history" argument. As already argued, historical analysis is not the most enriching and meaningful method for interpreting liberty. To get a more comprehensive understanding of liberty and to further test whether the abortion

[24] Roberts C.J. concurring in judgment noted that "Roe did not declare an unqualified constitutional right to an abortion, but instead protected the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (internal quotation marks omitted)
[25] 597 U. S. 1 (2022)
[26] Planned Parenthood v. Casey, 505 U. S. 833 (1992), 853
[27] Breyer, *supra* 14 at, 2

right finds its place under *liberty* interest, we need a more robust method. Such a method should seek (in)coherence between the impugned abortion right on the one hand and every other undisputed constitutional right acknowledged by the SCOTUS. The methodology for seeking harmony and coherence between these rights could be similar to the method of Reflective Equilibrium—a term coined and popularised by John Rawls.

This methodology is superior and more sincere than the historical analysis adopted by the Court for reasons like it is devoid of any prejudice of the historical society—Justice should not be the mirror of society but its critic. Moreover, this method does not merely seek harmony, i.e., lack of contradiction between different components—which is a minimum requirement. It also ensures that each component must support and strengthen each other. In other words, no component of liberty is an island in itself; instead, they create a seamless web. If we can visualise that web—instead of randomly adding one component after the other—it would indeed be a great leap towards justice. This seamless web would be as valuable to the political and legal philosopher as the periodic table is to the scientists.