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Dobbs's Destructive Originalism

Using "History and Tradition" to Undermine Liberty

I. Introduction

The Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* overruled nearly fifty years of precedent holding that the U.S. Constitution protects a right to abortion. Beyond that, it adopted a retrograde constitutional test to determine what rights the Fourteenth Amendment's liberty clause encompasses. This analysis briefly explains the *Dobbs* majority's approach to determining what liberty interests the Fourteenth Amendment protects. It then considers the ways in which the Supreme Court has previously assessed protected liberty interests in two cases: *Obergefell v. Hodges* (2015), and *Washington v. Glucksberg* (1997). It concludes that in disregarding *Obergefell* and reviving the *Glucksberg* test, *Dobbs* will, if accepted, stymie constitutional protection of reproductive autonomy and a host of rights grounded in bodily autonomy, self-determination, and equality.

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II. *Dobbs*'s History and Tradition Approach: Narrowing Liberty Rights

Dobbs reached the U.S. Supreme Court when the state of Mississippi petitioned to uphold its patently unconstitutional 15-week abortion ban.[1] In an opinion by Justice Samuel Alito, the majority overturned *Roe v. Wade* (1973), holding that the Fourteenth Amendment's liberty guarantee does *not* protect a right to abortion.[2] In reaching its conclusion, the majority stated that rights included in the Fourteenth Amendment's liberty protections must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[3]

The *Dobbs* majority used a crushingly narrow method to survey the nation's history. It spotlights a moment in time—1868, when the Fourteenth Amendment was adopted—to count the number of states with statutes that banned abortion, holding that because "three-quarters of the States had made abortion a crime at all stages of pregnancy,"[4] a right to abortion is not "deeply rooted in this Nation's history and tradition."[5] To buttress this conclusion, the majority looks further back at English and early American common law starting in the 13th century, deciding that based on treatises and a sampling of available court records, abortion was disfavored even in periods when it was not banned.[6] The *Dobbs* analysis elaborates that disfavored practices cannot qualify as "deeply rooted" rights—instead, a practice must have been endorsed or recognized as a positive right throughout the nation's history to be a protected liberty.[7] The *Dobbs* Court did not further analyze the right to abortion under the "implicit in the concept of ordered liberty" prong, another aspect of the *Glucksberg* approach, described below.[8]

Even while stating that history is the touchstone for defining liberty, the opinion does not discuss the history or public meaning of the Fourteenth Amendment at all, in particular how people at the time understood liberty and its relationship to controlling one's body.[9] It also neglects actual lived experiences around abortion, such as whether terminating a pregnancy was historically common or widely accepted.

In fact, as contemporaneous sources demonstrate, ordinary people throughout the second half of the 19th century believed that not all abortions were criminal and that individual women held the power to determine whether to terminate a pregnancy.[10] And critically, while focused on counting formal laws on the books, the opinion refuses to look at ways in which those laws were unequal, cruel, and sometimes rooted in sexist, racist, and nativist impulses.

Dobbs's "history and tradition" test for determining liberty rights poses at least three threats to reproductive autonomy and beyond. First, the test limits the scope of the Constitution's liberty guarantee by tying its interpretation to a time when severe racial, sexual, and gender inequalities meant far fewer freedoms for most people. Second, the test enables judges to reach results-driven outcomes about what rights are legitimate under a pretext of judicial neutrality. Finally, the test threatens other critical liberties: for example, a judge applying the test to same-sex or interracial marriage, physical intimacy, or contraception rights could similarly find a lack of historical support for those fundamental liberty interests.

First, *Dobbs*'s history and tradition test centers principles of a deeply unjust past. To determine which liberty interests the Constitution protects today, the test myopically focuses on laws that unrepresentative bodies adopted when comparatively few people could access formal education, vote, or participate equally in society.[11] As Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan wrote in their joint dissent, "the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens."[12] *Dobbs* thus cements the imbalanced power arrangements of the past in today's constitutional law.[13] In an attempt to paper over the glaring inequities that flow from defining rights based on the status quo in 1868, Justice Alito notes that abortion bans persisted after women gained the constitutional right to vote in 1920.[14] But this does nothing to alter *Dobbs*'s ultimate finding: the history and tradition test explicitly freezes the meaning of liberty based on laws in place when the Fourteenth Amendment was ratified.[15] References to what happened after that serve no purpose other than providing rhetorical cover for a test that builds in deeply rooted inequalities.

Second, the Court claims the test furthers judicial objectivity, but in application **the test allows judges to pick and choose among different representations of history and tradition based on their personal views.** Justice Alito writes: "On occasion, when the Court has ignored the appropriate limits imposed by respect for the teachings of history … it has fallen into [] freewheeling judicial policymaking…."[16] But Justice Alito refuses to acknowledge that it *is* judicial policymaking to selectively interpret the historical record in defense of restricting or taking away constitutional rights. Indeed, Justice Alito takes a cramped snapshot of history and tradition by counting statutes criminalizing abortion in effect in 1868. In a critical omission, he refuses to consider the societal backdrop of sexist, racist, and nativist impulses that converged at that moment behind a 19th century movement to make abortion illegal.[17] As historians of gender, race, and reproductive justice have robustly documented, laws forcing people to continue unwanted pregnancies were and are inextricably tied to efforts to reinforce embedded inequalities,[18] and simply counting abortion bans cannot begin to capture this context.

The majority opinion also chooses to ignore the fact that abortion in early pregnancy was legal and common through much of American history, and rarely punished even when outlawed, which should certainly inform a true-to-reality account of the nation's history and traditions.[19] And even within the confines of an approach focused on formal law, *Dobbs* doesn't look at whether history and tradition support a liberty interest in bodily autonomy, safety, health, reproductive decision-making, or even personal decision-making without government interference.[20] Instead it defines the right at issue exceedingly narrowly—"the right to abortion"—to claim inadequate historical support.

For all of these reasons, ***Dobbs*'s history and tradition test applied in other contexts could lead to the devastating loss of other fundamental rights, among them same-sex marriage, sexual intimacy, and contraception.** There's no guarantee that any of these liberties—although central to autonomy and equality and protected by Supreme Court precedent—pass the *Dobbs* test.[21] In one brief paragraph, the majority claims that nothing in its opinion "should be understood to cast doubt on precedents that do not

concern abortion."[22] Its sole justification is that the right to abortion is "unique" because it involves "potential life."[23] But this reassurance carries no weight. The *Dobbs*'s majority's approach to history and tradition itself does not consider the state's purported interest in enacting a law, or—critically—the social or moral consequences of a right; it offers history and tradition as the *only* way to assess the Constitution's liberty protections.

III. How *Obergefell* Corrected *Glucksberg*: History and Tradition as a Guide, Not a Limit

Dobbs claims that Supreme Court precedent requires its history and tradition approach.[24] But *Dobbs* ignores that just a few years before, the Court shifted decisively away from that test in the seminal opinion *Obergefell v. Hodges* (2015).[25] Recognizing that constitutional liberty includes the right to marry a same-sex partner, *Obergefell* rejected a restrictive, backwards-looking analysis modeled on the Court's earlier opinion in *Washington v. Glucksberg* (1997).

Nearly two decades before *Obergefell*, in *Glucksberg*, the Court analyzed the asserted liberty interest of a terminally ill patient to choose compassionate end-of-life treatment ultimately causing death (also known as "medical aid in dying").[26] Chief Justice Rehnquist wrote for a majority that embraced a narrow history and tradition approach to identifying fundamental rights.[27] First, the Court required a "careful" (*i.e.*, specific or limited) description of the asserted liberty interest. Second, it required the interest to be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[28] Only then would the Court recognize the interest as protected by the Fourteenth Amendment's liberty clause, triggering heightened scrutiny of restrictions.[29] The *Glucksberg* Court justified this two-step analysis in part by claiming it would constrain judges from injecting personal preferences into legal determinations on controversial issues.[30] Ultimately, the Court rejected the descriptions of the right adopted by the Court of Appeals ("determining the time and manner of one's death") and the petitioners ("the right to choose a dignified, humane

"History and tradition guide and discipline this inquiry but do not set its outer boundaries," Justice Kennedy wrote in the *Obergefell* majority opinion. This holistic approach to evaluating a liberty interest better "respects our history and learns from it without allowing the past alone to rule the present." The opinion famously notes, "[t]he nature of injustice is that we may not always see it in our own times."

death"), and declined to find a fundamental right to "commit suicide … includ[ing] a right to assistance in doing so" because states had long banned the practice both at common law and by statute.[31]

The *Obergefell* Court specifically rejected the *Glucksberg* Court's version of the history and tradition test in favor of one that embraced an expansive understanding of liberty.[32] It recognized that *Glucksberg* was inconsistent with the approach the Court "used in discussing other fundamental rights, including marriage and intimacy."[33] Instead, the *Obergefell* Court drew a through-line of cases reaching back to 1961 to outline a more nuanced approach.[34] *Obergefell* expanded the bounds of each of *Glucksberg*'s two central constraints for determining a protected liberty interest—a "history and tradition" emphasis and a requirement that a protected liberty be defined at a very specific level.[35]

Justice Kennedy's majority opinion first explained the orientation a court should adopt when evaluating a liberty interest: "[I]t requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. 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."[36] Justice Kennedy emphasized that such a holistic approach better "respects our history and learns from it without allowing the past alone to rule the present."[37] As the opinion famously notes, "[t]he nature of injustice is that we may not always see it in our own times."[38]

Obergefell's analysis specifically identified four "principles and traditions" leading to the conclusion that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[39] Instead of solely relying on an analysis of historical formal law, the majority opinion looked additionally at the Court's own precedents, and to the social, political, economic, and cultural importance of the right, separate from whether it was legally recognized.[40] First, the Court stated that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[41]

Second, it noted that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[42] Third, it contended that the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." And finally, it maintained that "marriage is a keystone of our social order."[43]

Obergefell jettisoned *Glucksberg*'s insistence that liberty under the Fourteenth Amendment must be defined in a "circumscribed manner" based on "specific historical practices."[44] Cementing that *Obergefell* was the new governing precedent, Chief Justice Roberts stated in his dissent that the opinion essentially meant *Glucksberg* had been overruled.[45] Justice Alito, dissenting separately, also wrote that he would have applied *Glucksberg*'s history and tradition test for liberty to reject a right to marry extending to same-sex couples, but the majority had chosen a different interpretive path that upended decades of restraint.[46]

IV. *Dobbs* Leapfrogs Backwards

Despite *Obergefell*'s status as the Court's most recent articulation of how to assess liberty rights, and its clear break with *Glucksberg*, the *Dobbs* majority adopted *Glucksberg*'s limiting history and tradition approach without acknowledging or attempting to justify that choice. The *Dobbs* majority failed to even address *Obergefell's* method, which not only laid out in detail an expanded rubric for liberty, but also specifically considered marriage and intimacy rights—close cousins of reproductive autonomy rights, including abortion. The *Dobbs* joint dissent picks up on this omission, noting that *Obergefell* rightly rejected *Glucksberg* because the constitutional guarantees of liberty and equality must incorporate "new societal understandings and conditions."[47] As Justice Kennedy observed in *Obergefell*: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach."[48]

But the *Dobbs* court leapfrogged backwards, endorsing an abhorrent

gender hierarchy dating to the 13th century. Mathew Hale, one of the early English theorists that the majority cites, notoriously viewed marital rape as consistent with legal tradition.[49] And future potential applications of a test built on selective history are similarly harrowing. Should cases arise about governments separating families (especially low-income or immigrant parents and their children), or the rights of same-sex or disabled people to have children, the *Dobbs* test could permit states to foreclose rights just based on their historical erasure. Writ large, *Dobbs* could steamroll rights in any other area of life where the law failed to protect (or actively oppressed) people in 1868 or other historical moments, including because of race, disability, sexuality, or marital or immigration status, with completely unacceptable results.

Dobbs's doctrinal repercussions have been swift: both federal and state courts have already employed its history and tradition test to further limit access to abortion and contraception.

At the state level, the Idaho Supreme Court relied heavily on its own version of *Dobbs*'s test to uphold a complete abortion ban in January 2023.[50] The court held that the Idaho Constitution's Inalienable Rights provision, which references rights including life, liberty, and safety, does not provide a fundamental right to abortion.[51] Purporting to follow *Dobbs* and *Glucksberg*, the court announced that "a right is fundamental under the Idaho Constitution if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty."[52] As in *Dobbs*, the court cherry-picked from the historical record to define Idaho's history and tradition, choosing as its "guideposts" the Proceeding and Debates of the 1889 Idaho Constitutional Convention, the "surrounding statutes and common law," and the "history and deeply held traditions of the people in Idaho" at that time and before.[53]

The Idaho Supreme Court echoed *Dobb's* requirement that a practice have the status of a positive right, faulting the ban's challengers for "put[ting] forth no evidence that a *right* to an abortion was any part of the deeply held traditions or history of those who settled Idaho."[54] This version of constitutional reasoning looks no further than formal law of the past, and, as in *Dobbs*, fails to consider the often discriminatory motives behind early abortion bans.

At the federal level, a recent summary judgment decision exemplifies how lower courts can favor select rights by using *Dobbs*'s malleable approach to defining liberty. In a challenge to aspects of the federal Title X program for providing family planning services to low-income people, a trial judge found that a policy prohibiting providers from requiring parental consent or notification when minors sought birth control violated the broad liberty right of a parent to control his children's upbringing.[55] In an analysis relying on generalities about the common law, the court found that "the right of parents to consent to the use of contraceptives is 'deeply rooted in this Nation's history and tradition' . . . ."[56] The court made this logical leap without citing a single statute in effect in 1868, or identifying a historically-recognized parental right to veto a minor's access to contraception. Here is *Dobbs*'s sleight-of-hand at work: while the history and tradition test purports to constrain judges, it can also justify an outcome based on selective reading of history and a strategic definition of the liberty interest at issue.

But alternative possibilities exist. The Massachusetts Supreme Judicial Court (the highest court in the state) recently weighed the U.S. Supreme Court's competing methods and decided that the "comprehensive approach" to determining liberty rights better applies.[57] The case at issue, like *Glucksberg*, involved an asserted right to medical aid in dying, this time under the Massachusetts Constitution's due process protections. The court identified a crossroads in federal precedent: "[A]s a matter of federal law, a fundamental right may be determined either through a narrow view of this nation's history and traditions or through a more comprehensive approach, which uses 'reasoned judgment' to determine whether a right is fundamental, even if it has not been recognized explicitly in the past, guided by history and precedent."[58] Persuaded by *Obergefell*, the Massachusetts high court adopted the latter approach, reasoning in part by comparing the effects of the two tests. "By phrasing the right more broadly, and considering modern precedent alongside history," it wrote, "we are able to cleanse our substantive due process analysis of the bigotry that too often haunts our history, and to ensure that those who were denied rights in the past due to outmoded prejudices are not denied those rights in the future."[59] In a direct response to the rigidity of looking only to history and tradition,

the court proclaimed that even though "something may have been unprotected, or even prohibited, throughout history," new rights may be recognized today, because the Massachusetts Constitution "evolves alongside newly discovered insights about the nature of liberty."[60] Showing that a more expansive test is not always outcome-oriented, the court nevertheless concluded that the Massachusetts Constitution does not protect a right to medical aid in dying.[61] This reasoning is a promising example of how courts can and should reject backward-looking strictures on defining liberty.

V. Conclusion

Determining the definition and scope of constitutionally protected liberty interests is always a difficult task. *Obergefell* correctly grounded the project in both present and historical contexts, accounting for the importance of a right to the people who rely on it, and harms to those who could not. Our understanding of what reproductive freedom demands today is a far cry from *Dobbs*' selective examples dating to the 13th through 19th centuries, when the law permitted shocking bodily violations, including slavery, most often against groups and individuals lacking political power or social status. *Obergefell* provides the framework for courts to recognize past legal wrongs and root them out of evolving constitutional doctrine. But the *Dobbs* majority did its best to stymie and reverse this course. It is now even more important to protect and expand constitutional traditions that map a path toward autonomy, dignity, and inclusion—in our reproductive lives and beyond.

Endnotes

1. See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
2. *Id*.
3. *Id*. at 2242 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).
4. *Id*. at 2248.
5. *Id*. at 2242.
6. *Id*. at 2249–51.
7. *Id*. at 2250–51.
8. *See generally id*. at 2240–85 (majority opinion).
9. For additional insights as to *Dobbs*'s status as an originalist opinion, see Reva Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEXAS L. REV. (2023).
10. *See* Brief of American Historical Association and Organization of American Historians as Amicus Curiae In Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (available online at https://reproductiverights.org/wp-content/uploads/2021/09/Historians-Amicus-Brief.pdf).
11. "[T]he most important historical fact," the majority claimed, was "how the States regulated abortion when the Fourteenth Amendment was adopted." *Dobbs*, 142 S. Ct. at 2267.
12. *Id*. at 2329 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).
13. For additional discussion of this point, including the argument that an account of history and tradition should include information about the socio-political context of the laws if it is to reflect the beliefs and actions of those who lacked authority to make the law, see Siegel, *supra* n.9.
14. *Dobbs*, 142 S. Ct. at 2260 (internal citation omitted).
15. *Id*. at 2267.
16. *Id*. at 2248 (internal quotation marks and citation omitted).
17. *See* Brief of American Historical Association and Organization of American Historians as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (available online at https://reproductiverights.org/wp-content/uploads/2021/09/Historians-Amicus-Brief.pdf).

18. *See* Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (available online at https://reproductiverights.org/wp-content/uploads/2021/09/Equal-Protection-Constitutional-Law-Scholars-Amicus-Brief.pdf); *see also generally* Loretta J. Ross, UNDERSTANDING REPRODUCTIVE JUSTICE, (2006); Dorothy Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997).
19. *See* Brief of American Historical Association and Organization of American Historians as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (available online at https://reproductiverights.org/wp-content/uploads/2021/09/Historians-Amicus-Brief.pdf).
20. *Dobbs*, 142 S. Ct. at 2258 ("These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much . . . Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like.").
21. *See id*. at 2301 (Thomas, J., concurring) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").
22. *Id*. at 2277–78.
23. *Id*. at 2277.
24. *Id*. at 2260.
25. *Obergefell v. Hodges*, 576 U.S. 644 (2015).
26. 521 U.S. 702 (1997).
27. *Id*.
28. *Id*. at 721.
29. *Id*. at 720.
30. *Id*. at 720, 722.
31. 521 U.S. at 712–15, 720–21.
32. *Obergefell*, 576 U.S. at 663-64.
33. *Id*. at 671.
34. *Lawrence v. Texas*, 539 U.S. 558 (2003).
35. See Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 164 (2015).
36. *Obergefell*, 576 U.S. at 663–64.
37. *Id*. at 664.
38. *Id*.

39. *Id*. at 665.
40. See Yoshino, *supra* n.35 at 164.
41. *Id*. at 665.
42. *Id*. at 666.
43. *Id*. at 669 (citation omitted).
44. *Id*. at 671.
45. *Id.* at 702 (Roberts, C.J., dissenting).
46. *Id.* at 737 (Alito, J., dissenting).
47. *Dobbs*, 142 S. Ct. at 2335 (joint dissent).
48. *Obergefell*, 576 U.S. at 671.
49. *See* Amanda Taub, *The 17th-Century Judge at the Heart of Today's Women's Rights Rulings*, THE N.Y. TIMES, (May 19, 2022), https://www.nytimes.com/2022/05/19/world/asia/abortion-lord-matthew-hale.html.
50. *Planned Parenthood Great Northwest v. Idaho*, 522 P.3d 1132 (Idaho 2023).
51. *Id.* at 1148.
52. *Id*. at 1169.
53. *Id*. at 1148.
54. *Id*. at 1176 (emphasis in original).
55. *Deanda v. Becerra*, No. 2:20-CV-092-Z, 2022 WL 17572093, at *17 (N.D. Tex. Dec. 8, 2022).
56. *Id*.
57. See *Kligler v. Att'y Gen.*, 198 N.E.3d 1229, 1251 (Mass. 2022).
58. *Id*. at 1249.
59. *Id.*
60. *Id*. at 1255.
61. *Id*. at 1259.