
ANALYSING *ROE V. WADE* AND ITS OVERTURN THROUGH DWORKIN AND BARAK'S LENS OF STATUTORY INTERPRETATION

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ABSTRACT

This paper critically analyses the United States Supreme Court decision of *Roe v. Wade*¹ and its 2022 overturning in the case of *Dobbs v. Jackson Women's Health Organisation*², particularly through Dworkin's and Barak's methods of statutory interpretation. It also looks at the concurring and dissenting opinions in the latter case through an interpretative lens to further understand how the Justices have arrived at the decision that has overturned decades' worth of progress in the reproductive rights of pregnant persons.

Statutory Interpretation of Roe v. Wade

It is crucial to understand what the source of the Constitutional right to abortion is in the United States. It is essentially a right that falls under the general right to privacy which grants the citizens the right to make personal, intimate decisions without undue State intrusion.³ This right to privacy is an 'unenumerated right' in the United States' Constitution, a concept that Dworkin has outrightly rejected.⁴ It can be inferred that at the time of drafting it, the Legislators were well aware that by setting out a list of some of the rights that a citizen could conceivably claim, and not all, future governments might deny the citizens these rights that the Drafters believed to be fundamental.⁵ In the years leading up to *Roe v. Wade*, the Supreme Court fleshed out these unenumerated rights through cases like *Griswold v. Connecticut*⁶ which voided a statute that

¹ 410 U.S. 113 (1973)

² 597 U.S. 215 (2022)

³ *Right to Privacy*, Legal Information Institute, Cornell Law School
https://www.law.cornell.edu/wex/right_to_privacy

⁴ Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled* 382, University of Chicago Law Review (1992)

⁵ Michael Levy, *Ninth Amendment*, Encyclopedia Britannica, Dec 27, 2022
<https://www.britannica.com/topic/Ninth-Amendment>.

⁶ 381 U.S. 479 (1965)

made it illegal for married persons to buy contraception. Through this, the Court essentially interpreted that the right to privacy was ‘implied’ by the Drafters in the First Amendment. Continuing in a line of cases, *Roe v. Wade* established a constitutional right to an abortion through the Fifth Amendment in 1973, which states that no person shall be deprived of the right to life, liberty and property, without ‘*due process of law*’.⁷

The Court tries to understand the true interpretation of the word ‘*person*’ as used in the Constitution and whether it extended to the unborn, finally concluding that it did not.⁸ It held that the Fourteenth Amendment’s concept of ‘personal liberty’ included a right of privacy which includes whether a women terminates a pregnancy or not.⁹ This was the primary theoretical disagreement, where the Justices went into what is ‘intended to be in the Statute’ and what the law ‘ought to be’, rather than what the law is. In doing this, they examined the right to privacy to include the right to obtain an abortion and attributed this to the intent of the Legislators, while trying to arrive at the best possible interpretation. This partially aligns with Dworkin’s *Aesthetic Hypothesis* where he discourages the search for the author’s intent, at the same time stating that it is not so in all cases, especially in a case like *Roe v. Wade*, where it can be said that the question of interpretation of law is itself about the author’s intent.¹⁰ This was affirmed in cases like *Planned Parenthood v. Casey*¹¹ that added their own facets of interpretation. Dworkin calls for a distinction between what someone *means* to say, and what he *expects* will be the consequence for the law of his saying it, to which he also gives clarity through an example of the interpretation of ‘due process’- many Drafters might have had differing opinions about its true meaning, and this would differ from what anyone today would understand from it, but it is not necessary that they *meant* to say anything different from what anyone today would interpret as the meaning of ‘due process’.¹² This is the approach that the majority has also adopted in deciding *Roe v. Wade* in trying to figure out what the Drafters *meant* by ‘liberty’ and ‘privacy’.

According to Dworkin’s *Aesthetic Hypothesis*, every time a case like this is judged, the gives validity to what was previously said by reinterpreting the law, perhaps because it continues to

⁷ *Constitution Annotated*, Library of Congress <https://constitution.congress.gov/constitution/amendment-5/>

⁸ 93 S.Ct. 705 (1973) pp. 717

⁹ *Id.*

¹⁰ 9 Ronald Dworkin, *Law as Interpretation* 182 (1982)

¹¹ 505 U.S. 833 (1992)

¹² Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled* 386, University of Chicago Law Review (1992)

be the best possible interpretation and thus, the author's intent keeps evolving.¹³ In deciding such a sensitive, and at the same time hard case, Dworkin expresses the importance of taking morality into account, since according to him, the interpreter's understanding evolves with each case, and that morality is shaped by simply existing in the world and experiencing everything that goes on around one.¹⁴ The Judges, in line with this ideology, did not stick to existing laws and sought to decide the case on personal views and morality. Where this diverges from Dworkin's view is his lack of regard for judicial discretion, which, according to him, does not really exist and that every legal problem has a single legal solution.¹⁵ But, as Barak notes, Dworkin also agrees that instead of a single legal solution, there might be a few reasonable and legal alternatives within a range of 'reasonableness'.¹⁶

Here, Barak's understanding that purposive interpretation recognises the need of judicial discretion, is also reflected.¹⁷ At this point, I find it imperative to distinguish between 'intent' and the 'purposive interpretation' that Barak talks about. In this case, the decision that the Judges arrived at can be said to be a result of the subjective, as well as the objective elements of purposive interpretation. They try to fill in the gaps to understand the real intent of the Legislators by keeping in mind the fundamental values of the present legal system, very much reflecting a social-objective intention. While doing this, they remain within the constraints of language and interpret the Constitutional Amendments accordingly, which is something Barak strongly advocated as being a part of purposive interpretation. By interpreting the meaning of crucial phrases like 'person', 'due process' and 'the right to privacy', while applying judicial discretion, the Judges have tried to uncover the purpose that lies at the core of the Legislation, which according to Barak, is the function that the text is designed to fulfil.¹⁸ An important point of convergence for both Dworkin and Barak is the understanding that the most crucial aspect of deciding a hard case is doing justice. Where Dworkin talks of *Elmer's case*¹⁹ (the Judges choosing to fill the gap that existed in the law in order to do justice rather than give into this gap, as the minority opinion preferred), Barak advises the Judges to do, and to aspire for justice in a hard case—justice for the parties before the Judge and justice in law itself.²⁰ This is finally

¹³ 9 Ronald Dworkin, *Law as Interpretation* 187 (1982)

¹⁴ *Id.* at 199

¹⁵ Ronald Dworkin, *Judicial Discretion* 60 (1963)

¹⁶ Aharon Barak & Sari Bashi, *Purposive Interpretation in Law* 209 (2005)

¹⁷ Aharon Barak & Sari Bashi, *Purposive Interpretation in Law* 91-92 (2005)

¹⁸ *Id.* at 88

¹⁹ Ronald Dworkin, *Law's Empire* 15-20 (1986)

²⁰ Aharon Barak & Sari Bashi, *Purposive Interpretation in Law* 95 (2005)

the approach that the Judges seem to have adopted in deciding the 1973 case, which is especially seen in their attempt to balance the State's interests and privacy rights and their effort to interpret 'liberty' as not being a series of isolated points but a rational continuum which includes a freedom from all substantial arbitrary impositions and purposeless restraints and that concepts like 'liberty' were purposely left open to interpret with experience.²¹ Dworkin believes that the Bill of Rights, which is also a matter of much debate in *Roe v. Wade*, sets out a network of Principles which commands equality and liberty. These become the source of claims of individual rights and it seems highly unlikely that anyone who believes that free and equal citizens would be guaranteed a particular individual right will not also think that the Constitution already contains that right, unless history has decisively rejected it. According to him, this Bill of Rights gives the Justices incredible power and the last word about the proper interpretation of the Constitution.²² This would mean that since the text simply states that the government should show equal concern and respect for basic liberties, without specifying in detail what that means or requires, it becomes the duty of the judges to decipher what equal concern really does and what the basic liberties are.

Post *Roe v. Wade*

In the years that followed *Roe v. Wade*, cases that revised, upheld, and invalidated abortion rights emerged but one thing never changed- the Supreme Court's original ruling that the right to privacy included the right to a legal abortion. This was abruptly altered in the recent case of *Dobbs v. Jackson Women's Health Organisation*.²³ This case sought to challenge the constitutionality of Mississippi's Gestational Age Act, which restricted the right to avail an abortion after fifteen weeks of gestation, unless due to a medical emergency or in case of fetal abnormality.²⁴ In 2022, in a surprising majority decision of five to four, the Supreme Court decided to overrule the decision in *Roe* and *Casey* from the roots and allow each State to decide for itself whether there is a right to abortion or not.²⁵ The majority opined that abortion presented a profound issue in morality and made that the basis for their reasoning. In giving his opinion, Justice Alito mentions that the Constitution's text does not refer to abortion, and that not all rights recognised by the Court have to be mentioned in the Constitution's text. He

²¹ *Roe v. Wade*, 410 U.S. 113 (1973) at 169

²² Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled* 383, University of Chicago Law Review (1992)

²³ *Supra*

²⁴ Mississippi Code § 41-41-191 (2019)

²⁵ 597 U.S. 215 (2022) at 4

goes on to mention that the ‘due process’ clause protects the right to interracial marriage, use of contraception and same-sex marriage, but does not extend to the right to abortion, and infers its scope to be limited.²⁶ According to the majority, the test for unenumerated rights is whether the right is deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty, and therefore, they went into a complete different interpretation of these terms than what was done in *Roe v. Wade*, by holding that they were, in fact, not a part of American tradition and that liberty did not encompass a right to abortion. I believe that by adjudicating upon what the law is and restricting itself to just that instead of looking at what the law ought to be, the majority has failed to expand the law and Dworkin would agree, their interpretation appears to be stuck in time. While the *Roe* decision said that the right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon State action, or in the Ninth Amendment’s preservation of rights to the people, it is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. Criticising this, Justice Alito states that the Judges who decided *Roe v. Wade* made the decision purely based on feelings and they couldn’t actually put a finger on the nature of the rights, not having been specifically and explicitly mentioned by the Founders in the Constitution.²⁷ A critique of this, in line with what Dworkin has explained in his piece, is that this form of interpretation is extremely limiting and only believing that there is one literal way of interpreting is not the way to go about statutory interpretation. This goes against the notion that one should not drift too far away from the author’s intent so as to wholly discredit what the author intended in the first place, as the majority seems to have done in the case of *Dobbs v. Jackson Women’s Health Organisation*. Although Dworkin’s ‘novel chain theory’ proposes that Judges are not bound by precedent in the sense that they do not have to follow it strictly, and that they interpret it in the best possible light, I refuse to attribute this explanation to the majority decision in this case, since there might be multiple ways of interpretation, but not multiple *right* interpretations, and this seems far from the best possible option. Similarly, it goes against the ‘purpose’ of the text and, according to Barak, when there is a conflict between the subjective and the objective purpose, which seems to be the case here, the end goal is to do justice, which, as I have put forth, does not happen here.²⁸ My reason for saying this is multi-faceted; firstly, the Court has refused to follow the doctrine of *stare decises* in not adhering to precedent without having given a good reason not to and only holding the *Roe* judgement to be ‘egregiously wrong’.

²⁶ 597 U.S. 215 (2022) at 77

²⁷ *Id.* at 10

²⁸ Aharon Barak & Sari Bashi, *Purposive Interpretation in Law* 88 (2005)

Secondly, Justice Alito's statement that overturning *Roe v. Wade* would not hurt women because there is no evidence that women rely upon the right to abortion in living their lives.²⁹ This obviously is not in line with the legal system's fundamental values of equality and liberty. Thirdly, I disagree with Justice Alito's insistence that the right to abortion is deeply rooted in the history of the nation. While there was no nationwide right to end a pregnancy at the time of the Fourteenth Amendment, there is simply no use of asking what was in the minds of the people who ratified the Amendment in 1868 since people did not ratify it, *men* did. So it can be inferred that they were not perfectly attuned to the importance of reproductive rights for women's liberty and equality. Thus, this reasoning goes against the factors of interpretation given by Barak as the standard objective values that all judges are expected to follow (including history, language and the legal system's fundamental values), hinting that any decision flowing from a lack of these standards cannot be the best possible answer.³⁰

While the concurring opinions like that of Justice Kavanaugh could clearly anticipate the outcome of overturning *Roe v. Wade* in impending outcomes like States banning residents from availing abortion in another State, or retrospectively punishing those who have availed abortions, they failed to balance these conflicting values that arose at the highest level of abstraction and failed to uphold the objective purpose of the Legislation which enshrines the right to equality and liberty.³¹ Employing wisdom to do justice in such a case of conflict is the job of the Judge, according to Barak, which the majority has failed to do.³² Finally, the minority opinion delivered by Justices Breyer, Sotomayor and Kagan critiqued the majority in a very similar manner in which Dworkin has talked about the *McLoughlin case*³³, stating that majoritarian justice is a dangerous path and interpreted the Constitution in a manner that puts issues like these off limits to majority rule.³⁴ They disagree with the statement made by Justice Alito that this was not a hard case after all by clarifying that in a case like this, a woman's freedom and equality were involved, which was also stated in *Roe* and *Casey*. Basing their argument on this, they relied upon the concept of 'balancing' the countervailing interests as proposed by Barak and previously stated, which the majority refused to do.³⁵

²⁹ 597 U.S. 215 (2022) at 32

³⁰ Aharon Barak & Sari Bashi, *Purposive Interpretation in Law* 111 (2005)

³¹ 597 U.S. 215 (2022) at 10

³² Aharon Barak & Sari Bashi, *Purposive Interpretation in Law* 95 (2005)

³³ Ronald Dworkin, *Law's Empire* 23-29 (1986)

³⁴ 597 U.S. 215 (2022) at 7

³⁵ *Id.* at 12

The majority opinion in *Dobbs v. Jackson Women's Health Organisation* which effectively overturned the judgement given in *Roe v. Wade*, has failed to do justice to the fundamental values of the legal system by refusing to follow an interdisciplinary approach, disregarding history, morality and authorial intent, completely misusing judicial discretion and heavily relying on outdated sources that are of no relevance in today's legal system. It has, thus, opened floodgates to chaos and unambiguity in the legal landscape of the United States for the years to follow.