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An Originalist Victory

J. Joel Alicea
The Catholic University of America, Columbus School of Law

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The Supreme Court's *Dobbs* ruling is a tremendous success for the constitutional theory around which conservatives rallied for nearly half a century.

J. Joel Alicea
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Roe v. *Wade* and *Planned Parenthood* v. *Casey* are no more. Like *Plessy* v. *Ferguson* before them, *Roe* and *Casey* were constitutionally and morally indefensible from the day they were decided, yet they endured for generations, becoming the foundation of a mass political movement that did all it could to prevent their overruling. Thus, like the overruling of *Plessy*, the overruling of *Roe* and *Casey* was by no means inevitable; it was the result of a half-century of disciplined, persistent, and prudent political, legal, and religious effort. The victory in *Dobbs* v. *Jackson Women's Health Organization* was earned by the coalition of teachers and students, priests and parishioners, lawyers and politicians, who, through efforts as humble as parish potlucks and as prominent as federal litigation, brought about the most important legal and human rights achievement in America since *Brown* v. *Board of Education*.

To acknowledge this achievement is to acknowledge the constitutional theory around which the coalition that brought it about rallied for a half-century: originalism. It was originalism that the pro-life movement adopted after *Roe* and supported through the confirmation defeat of Robert Bork; the attempted defeats of Clarence Thomas, Samuel Alito, and Brett Kavanaugh; and the setback of *Casey*. The goal of overruling *Roe* and *Casey* bound the conservative political movement to the conservative legal movement, and originalism was their common constitutional theory. *Dobbs* thus had the potential—as I argued in an earlier essay—to exacerbate the tensions over originalism within the conservative legal movement. It would be viewed as the acid test of originalism's ability to translate theory into practice, and there would be no avoiding the stakes for the conservative legal movement in the case: "complete victory or crisis-inducing defeat," as

I put it. We now know that it was a complete victory, and it was, in large part, originalism's victory.

Yet over the last few months, two arguments have been made by some within the conservative legal movement calling that conclusion into question: one from originalism's critics, the other from originalists themselves. The first argument is that *Dobbs* is not much of a victory since it returned the issue of abortion to the political process rather than outlawing abortion altogether. The second is that the *Dobbs* majority opinion is not, in fact, originalist in its methodology, with the implication that, even if *Dobbs* is a victory, it is not a victory for originalism. Both critiques, explicitly or implicitly, deny that *Dobbs* represents a triumph for originalism.

Both critiques are mistaken. *Dobbs* is, without question, a triumph for originalism and a vindication of the support given to originalism by the conservative legal and political movements since *Roe* was decided almost half a century ago.

The first critique comes from what I called in my previous essay the moral critics of originalism, those within the broader conservative legal movement who reject originalism as lacking a sufficiently compelling moral justification. These critics, Adrian Vermeule foremost among them, would dispense with originalism and have judges interpret the Constitution in light of substantive moral principles drawn from the natural law tradition. They criticize originalism for not ensuring that its "resulting outputs"—the outcomes to which originalism would lead in cases—accord with the natural law. And because they believe that the natural law requires abortion to be prohibited throughout the country, they argue that *Dobbs* is "quite a limited" victory, since the result is to permit abortions to continue to occur in large numbers in much of the United States. If this is the result originalism delivers, the critics say, then it is proof-positive that originalism is morally deficient.

In an exchange with Vermeule and his sometime coauthor, Conor Casey, I have explained why Vermeule's view is mistaken and why the natural law requires originalism in the American constitutional context. As I argue, their results-driven jurisprudence overlooks moral limitations imposed on judicial power in the United States and is, therefore, repugnant to the natural law tradition. So I would reject the notion that the morality of a constitutional theory is to be judged by the results it produces in cases rather than by antecedent moral considerations. Certainly, a constitution can and should be judged by the results it produces in legal disputes, but that is different from choosing a theory of how to resolve cases under that constitution

based on the results one hopes to obtain. The latter approach ignores foundational principles of the natural law tradition.

But let us set these points aside and focus on the main thrust of the critique: that the overruling of *Roe* and *Casey* is not a momentous victory because it leaves abortion to be decided on a state-by-state basis. This description of what *Dobbs* had to achieve to qualify as a momentous victory represents a change from what the moral critics were saying a little more than a year ago. Before the Supreme Court granted review in *Dobbs*, Vermeule argued that the *Dobbs* petition was "a crucial experiment available to test competing views" regarding "the conservative legal movement's strategy with respect to abortion." Referencing the "originalist establishment," Vermeule asserted that "if a supermajority of GOP-appointed Justices are unwilling even to consider the issue, something has gone very wrong." At the time of that post, the *Dobbs* petition had been pending at the Court for almost a year, and if past practice were any guide, it was unlikely that the Court would grant review. But then it did.

In the lead-up to the oral argument in *Dobbs*, Vermeule stated in a since-deleted tweet that if "Roe (not merely Casey) survives in any form without being overturned [in *Dobbs*], it will represent a shattering crisis for the conservative legal movement." After the oral argument in *Dobbs*, when conventional wisdom began to move toward seeing the overruling of *Roe* and *Casey* as the likely outcome, Vermeule's blog posted an editorial arguing: "Should *Roe* not be overturned, originalism will have been a colossal failure. . . . But should *Dobbs* overturn *Roe* and *Casey*, originalism is *not* thereby vindicated." One reason given was that an originalism-based decision in *Dobbs* would likely return the abortion issue to the states rather than prohibiting abortion nationally. Echoing this argument, supporters of Vermeule went even further: "[A]n originalist decision in *Dobbs* will, so far from answering in a definitive way the moral critique of originalism, confirm that critique once and for all." *Dobbs* was no longer "a crucial experiment" that would "test competing views"; it was only a test of originalism. And the test for originalism was no longer the overruling of *Roe* and *Casey*; it was the banning of abortion by judicial decision.

This combination of goalpost-shifting and heads-I-win-tails-you-lose argumentation is as obvious as it is unconvincing. By any objective standard, for almost 50 years, the goal that has united all wings of the conservative legal movement—and has bound the conservative political movement to the conservative legal movement—was the overruling of *Roe* and *Casey*, a necessary first step toward any broader pro-life goal. By the moral critics' own account, originalism was at the heart of that coalition's effort. To

pretend that the coalition's goal was the complete prohibition of abortion by judicial decision, or to concede that the coalition achieved its goal and yet claim that its victory does not belong in large part to originalism, is to ask that we forget the last half-century of American legal and political history.

Nor do the moral critics apply the right standard for judging *Dobbs*'s significance. John M. Finnis and Robert P. George submitted an amicus brief in *Dobbs* arguing that the Fourteenth Amendment protects unborn babies and therefore forbids states to allow abortion—precisely the position advocated by the moral critics—yet George rightly has said that overruling *Roe* is "an enormous achievement." To say that the overruling of *Roe* and *Casey* is not a monumental moral achievement because it did not ban abortion is like saying that the Thirteenth Amendment was not a monumental moral achievement because it did not guarantee full civil and political equality to black people. No doubt the efforts of the pro-life movement have only just begun, just as the efforts of those who sought to guarantee full civil and political equality for black people had only just begun with the Thirteenth Amendment's ratification. But to diminish the importance of the crucial first step in light of the ultimate destination of our journey is as unsound morally as it is practically.

Whether our political process should prohibit all or the vast majority of abortions is the question that will now confront the coalition that brought about the overruling of *Roe* and *Casey*. That question might very well create serious new tensions within the coalition. But nothing about that good-faith disagreement diminishes the importance of the victory in *Dobbs*—or in any way calls into question that originalism deserves a significant share of the credit for that victory.

The second critique comes from within originalism's ranks and argues that Justice Alito's majority opinion in *Dobbs* is not originalist in methodology. Though this critique was made of the leaked, draft majority opinion, the official majority opinion is not substantively different from the draft in any way relevant to this view, so I will assume that these critics would make the same assessment of the official opinion. This analysis has the implication, sometimes stated by these critics and sometimes not, that *Dobbs* is not much of a triumph for originalism.

Before delving into this critique, it is important to understand that, for the reasons just discussed, *Dobbs* is a tremendous victory for originalism, even if the *Dobbs* opinion could be characterized as non-originalist in its methodology. For one thing, as Lee Strang has pointed out, as originalism has become the dominant theory at the Court, it

has influenced how the justices approach decisions that are clearly at odds with originalism, such as *Roe* and *Casey*: "[O]riginalism exerts a gravitational effect that pulls errant doctrine back toward the original meaning." Relatedly, originalism is the theory that made obvious to lawyers, judges, and the general public that the *Roe* and *Casey* decisions were insupportable as a matter of constitutional law, and it is the theory that formed the legal views of the justices who voted to overrule those decisions. Neither conventional conservative non-originalism nor common-good constitutionalism achieved any of those things.

The argument that *Dobbs* is a non-originalist opinion has been advanced by several commentators. The most sophisticated version of the critique comes from Lawrence Solum, widely considered one of the leading theorists of originalism. His views on any question like this must be taken seriously. Solum has not argued that, because he sees *Dobbs* as a non-originalist opinion, originalism does not deserve credit for the result. But since others have drawn that implication from critiques like his, it is worth addressing on its own terms.

Solum points out that *Dobbs* does not identify the original meaning of the three constitutional provisions (all contained in Section 1 of the Fourteenth Amendment) invoked by defenders of *Roe* and *Casey*: the Privileges or Immunities Clause ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"), the Due Process Clause ("nor shall any State deprive any person of life, liberty, or property, without due process of law"), and the Equal Protection Clause ("nor deny to any person within its jurisdiction the equal protection of the laws"). Instead, Justice Alito's majority opinion rejects the equal-protection arguments based on precedent and proceeds to analyze the due-process and privileges-or-immunities arguments based on whether a right to abortion is "deeply rooted in [our] history and tradition" and "whether it is essential to our Nation's scheme of ordered liberty."

The quoted test is associated with the Court's decision in *Washington* v. *Glucksberg* (1997), which held that the Fourteenth Amendment does not protect a right to assisted suicide. *Glucksberg*'s test is not based on the original meaning of any particular constitutional provision. Rather, the test is used when analyzing so-called "substantive due process" claims. Substantive due process, as understood in Supreme Court precedent, is a doctrine holding that the Due Process Clause protects certain rights—including rights not listed in the Constitution—through the word "liberty."

The extent to which the Fourteenth Amendment protects unenumerated rights is disputed among originalists, but the prevailing view is that such rights would be protected (if at all) primarily through the Privileges or Immunities Clause, rather than through the Due Process Clause. Indeed, the overwhelming majority of originalists believe—as Justice Thomas argued in his concurring opinion in *Dobbs*—that the Due Process Clause does not protect substantive rights: it simply requires "due process of law" before "life, liberty, or property" can be taken away. (Even under this view the Due Process Clause is "substantive" in the sense that it ensures a separation of powers by, for example, requiring the executive to show a basis in law before depriving someone of life, liberty, or property.) The point is that the *Glucksberg* test is not based on the original meaning of the Due Process Clause; nor was it derived from the original meaning of the Privileges or Immunities Clause. Thus, according to Solum, because *Dobbs* accepts a non-originalist substantive-due-process framework and uses the non-originalist *Glucksberg* test to analyze whether there is a right to abortion under that framework, it is a non-originalist opinion.

But that conclusion fails to account for several important points. First, for the Court to have brushed aside substantive due process and instead relied on the original meaning of the Privileges or Immunities Clause or the Due Process Clause would have required repudiating over a century of precedent. *Glucksberg*'s test is precedent on the reigning interpretation of the Due Process Clause, and a separate, much-derided precedent—*The Slaughterhouse Cases* (1873)—essentially read the Privileges or Immunities Clause out of the Constitution. While some originalists (such as Justice Thomas) believe that the original meaning of the Constitution cannot be reconciled with adhering to demonstrably erroneous precedent, his is a minority view. The majority of originalists believe that the original meaning of the Constitution permits judges to apply erroneous precedent in some circumstances (e.g., when society's reliance interests on that precedent are very high), and perhaps the most common reason given for this view is that the original meaning of "the judicial Power" vested in the federal courts by Article III, Section 1 of the Constitution included the idea that judges would, as Hamilton said in *Federalist* 78, "be bound down by strict rules and precedents." That is not to say that this is the best or correct view of what originalism requires, but it is the prevailing view. So, as Strang has also noted, under the dominant understanding of originalism, the Court's reliance on *Glucksberg* in *Dobbs* was consistent with the original meaning of the judicial power, and thus consistent with originalism overall, not a deviation from it.

Of course, no originalist believes that the Court must unflinchingly follow precedent. The Court can and should overrule demonstrably erroneous precedents when

appropriate. And if one of the parties had asked the Court to cashier substantive-due-process doctrine and return to the original meaning of the Due Process Clause, the originalist criticism of the Court for adhering to the non-originalist *Glucksberg* test would have much more force. But no party asked the Court to repudiate substantive due process, overrule *Glucksberg*, overrule *The Slaughterhouse Cases*, or do any number of the things that originalist scholars (including those who adhere to the Finnis-George position) might prefer the Court had done in *Dobbs*. Indeed, as Justice Thomas explained in his concurring opinion in *Dobbs*, that is why—even with his much-less-deferential approach to *stare decisis*—he joined the majority opinion applying *Glucksberg*.

And that leads to a second point that Solum's conclusion does not take into account: that the original meaning of "the judicial Power" may include within it limitations on the kinds of arguments federal courts can invoke in any given case. One such limitation is adversarial presentation. Both at the Founding and today, the American judicial system has presupposed that the parties, not the judges, will generally decide what arguments are before the court. If a party does not ask a court to consider an argument, the court is generally under no obligation to do so, though there are some exceptions (such as certain jurisdictional arguments). Thus, if "the judicial Power" incorporates background assumptions about the nature of adjudication that were well-established at the Founding—as originalists generally think it does—then "the judicial Power" could be said to include the strictures of argumentation that stem from our adversarial system. To condemn *Dobbs* for operating within the adversarial system on originalist grounds, then, one would have to believe that the original meaning of "the judicial Power" or some other provision of the Constitution required the Court to consider overruling precedent even when no party has asked the Court to do so. Perhaps that view is right, but it certainly is not the prevailing view among originalists. It would be odd to call *Dobbs* non-originalist for adhering to a widely held view among originalists.

Unlike others who have leveled similar critiques, Solum, to his credit, acknowledges the role of precedent and the adversarial system in shaping the Court's analysis in *Dobbs*. Yet, he offers no persuasive reason why, despite those considerations, the *Dobbs* draft is inconsistent with originalism.

Perhaps what Solum means is that, regardless of whether the *Dobbs* majority opinion is consistent with originalism in some broader sense that accounts for precedent and the adversarial system, the analysis of the majority opinion, considered on its own terms and apart from any larger theoretical context, is not originalist insofar as it relies on the non-originalist *Glucksberg* test. That is a more plausible argument, but even here, it is

mistaken to call the majority opinion's analysis non-originalist, if by that we mean inconsistent with originalism.

Consider: the opinion devotes page after page to a detailed historical analysis of how abortion was treated by American law up through the ratification of the Fourteenth Amendment—precisely what one would expect in an originalist opinion. Though that analysis is presented as showing that a right to abortion is not "deeply rooted in [our] history and tradition" (rather than as showing that it is not part of the original meaning of the Fourteenth Amendment), in the context of this case, it serves the same function as demonstrating that a right to abortion is not supported by the original meaning of the Fourteenth Amendment. Indeed, the opinion's staid refusal to affirmatively endorse substantive-due-process doctrine and its footnote pointing out that its *Glucksberg* analysis would carry over to an originalist analysis under the Privileges or Immunities Clause shows that the Court was thinking of its *Glucksberg* analysis as serving the same function as an originalist analysis. And the Court's self-understanding of its analysis is right: the fact that abortion was so widely prohibited in the lead-up to and during the ratification of the Fourteenth Amendment should—given the range of potential original meanings of the amendment put forward in the scholarly literature—conclusively establish that abortion is not protected by any provision of the Fourteenth Amendment as originally understood.

That is a controversial methodological assertion, so consider the two counterarguments that immediately come to mind. First, one might argue that the prohibitions on abortion around the time of the Fourteenth Amendment's ratification show only how those who ratified the amendment thought the amendment would apply to abortion. Their expectations of how the amendment would apply to abortion, this argument would maintain, are not binding on us—only the meaning of the actual text they ratified is. But while originalists would generally agree that we are bound by the text's original meaning, not the ratifiers' expectations about how the text would apply, "some of the best evidence of that meaning would be the expected applications, especially when widely held," as John McGinnis and Michael Rappaport have argued. That is particularly true where the text adopts a general principle rather than an easily applied specific rule, as with the three provisions of Section 1 of the Fourteenth Amendment.

For example, the First Amendment protects "the freedom of speech," but there exist many different versions of the principle that could be called "the freedom of speech," some of which are more expansive than others. We need to know which version of that

principle was adopted by the people when they ratified the First Amendment, and the best evidence of that are the laws and practices of the people at the time. It was commonplace at the Founding for state law to prohibit defamation, libel, and conspiracy, so whatever version of the "the freedom of speech" the people understood that language to communicate, it is likely a version that allows for laws against defamation, libel, and conspiracy (with the complicating factor that the First Amendment originally applied only against the federal government, not the states). That is why original expected applications can be powerful—and sometimes dispositive—evidence of the original meaning of a constitutional provision.

The second counterargument would grant that original expected applications can be powerful evidence of original meaning but point out that they are not always dispositive, even in the case of provisions that adopt a general principle, like Section 1 of the Fourteenth Amendment. To know whether they are dispositive, we have to know what the various candidates are for the original meaning of the various provisions at issue, which the *Dobbs* majority never identifies. That is, while one might concede that original expected applications can help us choose among possible original meanings, we still have to know what those possible original meanings are. It is conceivable that one of those meanings is clear enough to override the original expected applications.

But with respect to the Fourteenth Amendment, it is simply not the case that any of the candidates for the original meanings of the Privileges or Immunities Clause, the Equal Protection Clause, or the Due Process Clause are specific enough to override such widespread original expected applications about abortion. Rather, all the possible original meanings of Section 1 of the Fourteenth Amendment revealed by the scholarly literature that could even potentially protect a right to abortion would do so only because they embody a general principle that comes in different versions, and a defender of abortion might choose a version of the principle that leads to a right to abortion. For example, a judge might say that the original meaning of the Fourteenth Amendment adopted a general principle meant to prevent a caste system and—here is the crucial step—select a version of that anti-caste principle that condemns pro-life legislation for treating women as a lower caste of citizen.

But as noted, original expected applications help us determine which version of the principle the Constitution adopted. In the case of abortion, the widespread prohibition of abortion around the time of the Fourteenth Amendment's ratification tells us that, regardless of how the Fourteenth Amendment is interpreted, no version of any general principle can plausibly yield a right to abortion in light of the contemporaneous

treatment of abortion in American law. As Justice Thomas observed in his *Dobbs* concurrence with respect to the original meaning of the Privileges or Immunities Clause: "[E]ven if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach." At worst, the majority opinion's decision not to present a survey of the various potential original meanings of the Fourteenth Amendment would be an instance of incomplete analysis (and it is not even that). It would not be an instance of a non-originalist analysis, especially considering the limitations on the range of argumentation imposed by precedent and the adversarial system.

Originalists generally accept that it is consistent with the original meaning of the Constitution to follow non-originalist precedent when no party has asked the Court to overrule that precedent. A sound understanding of originalist methodology permits the Court to conclude, based on a mountain of historical evidence about how the Fourteenth Amendment's ratifiers and their predecessors treated abortion in law, that no plausible original understanding of the Fourteenth Amendment protects a right to abortion. Put another way, originalism did not require the *Dobbs* majority to ignore the adversarial process, overrule over a century of precedent without having been asked, survey the myriad proposed original meanings of the Fourteenth Amendment put forward by originalist scholars, and determine which meaning was uniquely correct in order to conclude what has been obvious since 1973: the Constitution does not contain a right to abortion.

R*oe* and *Casey* are no more, and one important consequence is the vindication of the conservative legal movement's half-century-long championing of originalism. It was originalism that provided the intellectual framework that has kept the conservative legal movement together since 1973, and it was originalism that imbued the justices of the *Dobbs* majority with theoretical commitments about law that were antithetical to *Roe* and *Casey*. There may very well be setbacks ahead for the conservative legal movement and for originalism under the newly reconstituted Roberts Court, but nothing can take away this victory, one of the most significant legal victories in American history.

***J. Joel Alicea** is an assistant professor of law at the Catholic University of America, Columbus School of Law.*