

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

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DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION (2022)

View the case on the National Constitution Center's website [here](#).

SUMMARY

Dobbs v. Jackson Women's Health Organization was a landmark decision addressing whether the Constitution protects the right to an abortion. In *Dobbs*, the Supreme Court reviewed the constitutionality of Mississippi's Gestational Age Act—a law banning most abortions after 15 weeks of pregnancy with exceptions for medical emergencies and fetal abnormalities. In a divided opinion, the Court upheld the Mississippi law and overturned *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992)—concluding that the Constitution does not protect the right to an abortion. As a result, the Court's decision returned the issue of abortion regulation to the elected branches. In an opinion concurring in the judgment, Chief Justice Roberts agreed to uphold the Mississippi law, but chided the majority for reaching out to decide the broader question of whether to overrule *Roe* and *Casey*. He would have left that important constitutional question to a future case. Finally, in a rare joint dissent, Justices Breyer, Kagan, and Sotomayor criticized the Court for unsettling nearly five decades of precedent and undermining the Constitution's promise of freedom and equality for women.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Justice Alito

Until 1973, states were free to set their own abortion policies; *Roe* changed that. For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey ranged from the constitutionally irrelevant (e.g., its discussion of abortion in antiquity) to the plainly incorrect (e.g., its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

***Roe* set out a framework for analyzing constitutional challenges to abortion regulations; fetal viability was a key dividing line.** Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

trimester, which, at the time, corresponded to the point in which a fetus was thought to achieve “viability,” i.e., the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting “potential life,” it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend Roe’s reasoning.

Roe set a national rule that ran afoul of every state law in the nation. At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State.

In *Casey*, the Court upheld *Roe* because it was a well-established precedent. Eventually, in *Planned Parenthood v. Casey*, the Court revisited *Roe* The opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*’s “central holding”—that a State may not constitutionally protect fetal life before “viability”—even if that holding was wrong.

***Casey* created a new “undue burden” standard for analyzing constitutional challenges to abortion regulations; the three Justices who wrote the controlling opinion hoped to offer a final settlement for the nation on the issue of abortion.** *Casey* threw out *Roe*’s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an ‘undue burden’ on a woman’s right to have an abortion. . . . The three Justices who authored the controlling opinion “call[ed] for the contending sides of a national controversy to end their national division” by treating the Court’s decision as the final settlement of the question of the constitutional right to abortion.

***Casey* failed to settle the national debate over abortion; many states continue to pass laws that challenge *Roe* and *Casey*; and 26 states have asked us to overrule those cases now.** As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stage of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

This case involves a constitutional challenge to a Mississippi law that runs afoul of *Roe* and *Casey*. Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as “viable” outside the womb. In defending this law, the State’s primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

the other side, respondents and the Solicitor General ask us to reaffirm *Roe* and *Casey*, and they contend that the Mississippi law cannot stand if we do so.

Today, we overrule *Roe* and *Casey*; the Constitution’s text doesn’t mention abortion; and abortion rights can’t be implied from any other constitutional provision; under the doctrine of substantive due process, we may only recognize such a right if it is deeply rooted in our nation’s history and tradition. We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”

Abortion rights are not deeply rooted in our nation’s history and tradition; when the Fourteenth Amendment was ratified, three quarters of the states criminalized abortion; such a right was unknown in American law until the late twentieth century; and the abortion right is different from the other rights recognized under the Fourteenth Amendment because it ends fetal life. The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment’s protection of “liberty.” *Roe*’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called “fetal life” and what the law now before us describes as an “unborn human being.”

Even though *Roe* is an old case, we need not stand by that precedent; *Roe* was wrong the day it was decided; it was poorly reasoned; it has had bad consequences; and it has further deepened divisions over abortion. *Stare decisis*, the doctrine on which *Casey*’s controlling opinion was based, does not compel unending adherence to *Roe*’s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

We are returning the issue of abortion to the elected branches. It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives. . . .

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

Excerpt: Concurrence, Justice Kavanaugh

There are powerful arguments on both sides of the abortion issue. Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests of protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.

The Constitution is neutral on the issue of abortion, so we must send the issue back to the elected branches. The issue before this Court . . . is not the policy or morality of abortion. The issue before the Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. . . . On the question of abortion, the Constitution is . . . neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address. . . .

I will now address some of the constitutional issues that may arise after this case. After today's decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. . . . But the parties' arguments have raised other related questions, and I address some of them here.

Today's decision will not upset other constitutional liberties recognized under the Fourteenth Amendment through the doctrine of substantive due process. *First*, is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut* . . . , *Eisenstadt v. Baird* . . . , *Loving v. Virginia* . . . , and *Obergefell v. Hodges* I emphasize what the Court today states: Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.

Justice Kavanaugh addresses a couple of other constitutional issues that may arise in future cases. *Second*, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the Due Process Clause or the *Ex Post Facto Clause*.

Excerpt: Concurrence, Justice Thomas

The Fourteenth Amendment's Due Process Clause protects procedural rights (e.g., the right to a fair process), not substantive rights like the right to an abortion. I write separately to emphasize a . . . more fundamental reason why there is no abortion right

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that “due process of law” merely requires executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. . . . [T]he Due Process Clause at most guarantees process. It does not, as the Court’s substantive due process cases suppose, “forbi[d] the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided.” . . .

Today, we overrule one line of substantive due process precedent; in future cases, we should reexamine the others. [I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold* [*v. Connecticut*], *Lawrence* [*v. Texas*], and *Obergefell* [*v. Hodges*]. Because any substantive due process decision is “demonstrably erroneous” . . . , we have a duty to “correct the error” established in those precedents After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court’s substantive due process cases are “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment.

Substantive due process empowers judges to impose their own policy views on everyone else. Substantive due process exalts judges at the expense of the People from whom they derive their authority. . . . In practice, the Court’s approach for identifying those fundamental rights unquestionably involves policymaking rather than neutral legal analysis. The Court divines new rights in line with its own, extra-constitutional value preferences and nullifies state laws that do not align with the judicially created rights.

We should get rid of substantive due process. Substantive due process . . . has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

Excerpt: Concurrence in the Judgment, Chief Justice Roberts

I agree with the Court that we should get rid of the viability line from *Roe* and *Casey*; we should uphold the Mississippi law because it gives women a reasonable amount of time to decide whether to choose an abortion. I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward stare decisis analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman’s right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further— certainly not all the way to viability. Mississippi’s law allows a woman three months to obtain an abortion, well be-yond the point at which it is considered “late” to discover a pregnancy... I see no sound basis for questioning the adequacy of that opportunity.

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

But the majority goes too far in overruling *Roe* and *Casey*; it is not necessary to overrule those cases to decide this case, so I wouldn't; the Court should have pursued a more restrained course. But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of stare decisis. The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us. . . .

I would leave the question of whether to overrule *Roe* and *Casey* to another day. Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. . . .

Evidence suggests that 15 weeks is enough time for women to learn about their pregnancy and decide whether to end it. Almost all know [about a pregnancy] by the end of the first trimester. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman to decide for herself whether to terminate her pregnancy. . . .

The majority's rule unsettles the law. The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case. . . .

I do not share the certitude of the majority and the dissent. Both the Court's opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks. . . . I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

Excerpt: Joint Dissent, Justices Breyer, Kagan, and Sotomayor

Roe and Casey are well-settled law; they have protected the liberty and equality of women. For half a century, *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and Casey offered a balanced approach to a complicated and contested issue. The Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions until after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life.

Today, the Court upsets that balance. Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. . . .

Women now have fewer rights than before and have become second-class citizens. [O]ne result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." . . . But no longer.

States are now free to curtail abortion rights; this will have terrible consequences for women. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

Next, the Court may attack other related rights like the right to contraception and the right to same-sex marriage; they are all part of the same line of substantive due process precedent. And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. . . . In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. . . . They are all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions. . . .

The Court has no good reason to overturn *Roe* and *Casey*. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. . . .

The only reason the Court overruled *Roe* and *Casey* is that the composition of the Court has changed; Justice Kavanaugh replaced Justice Kennedy, and Justice Barrett replaced Justice Ginsburg. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, contributes to the actual and perceived integrity of the judicial process by ensuring that decisions are founded in the law rather than in the proclivities of individuals. Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent. . . .

The Court's analysis turns on the status of abortion law at the time that the Fourteenth Amendment was ratified. The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified?" . . . The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no one thought that the Fourteenth Amendment provided one. . . .

The Court binds us to the views of the ratifying generation. The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. . . . If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

But women couldn't vote when the amendment was ratified. As an initial matter, note a mistake in the just preceding sentence. We referred to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. . . . **So, how should we interpret the Constitution?** So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? . . . **Traditionally, the Court has interpreted the Constitution more broadly than the majority does today.** The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. . . . [I]n the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. . . . That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions. . . .

The majority abandons the Court's usual approach to precedent. [Finally,] [b]y overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. [In previous cases overturning precedent,] the Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. . . . None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.

The majority makes it too easy to change the path of the law; the majority gets rid of *Roe* and *Casey* because the Justices in the majority have always hated those decisions and now have the votes to get rid of them. [The Court's decision] makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

The majority has moved as quickly as possible to overrule *Roe* and *Casey*. Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. It eliminates a 50-year-old constitutional right that safeguards women's freedom and equal station. It breaches a core rule-

CONSTITUTION 101

Module 14: Battles for Freedom and Equality: Modern Battles

14.4 Primary Source

of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court's legitimacy. . . .

We dissent. With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**

