

# ***Dobbs v. Jackson Women's Health Organization: Origins, Majority Opinion and Main Reasons***

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**Abstract:** Abortion rights has always been the controversial debate in the United States. Such debate is sparked again with the landmark case in 2022 of *Dobbs v. Jackson Women's Health Organization*, which the 50 years of legal precedent in *Roe v. Wade* is overruled. This paper will explore the origins of abortion rights and even the right of privacy in general from previous cases, examine the reasoning in the majority opinion and form some other causes that caused the decision to be made. Ultimately, the paper will draw to a conclusion that there are many factors that contributed to the decision being made and a suggestion that citizens may achieve more success in their political belief when relying on legislative powers rather than the judiciary.

**Keywords:** constitution, supreme court, abortion rights, *Roe v. Wade*

## **1. Introduction**

On March 19, 2018, the *Mississippi Gestational Age Act* (the *Act*) was passed as House Bill 1510. This bill inflamed one of the most conflicting legal debates in American history. This sparks the controversial case of *Dobbs, State Health Officer of the Mississippi Department of Health v. Jackson Women's Health Organization* [1].

The *Act* stated that “[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not perform, induce, or attempt to perform or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks [2].” Miss. Code Ann. §41-41-191. Chief Justice John Roberts has always been a justice hoping that the Supreme Court should have little influence as possible over controversial legal issues. He repeatedly reminded the other justices in his concurring opinion that this should be a small decision only on determining if the *Act* is constitutional. Nevertheless, the question put forward was that: “[w]hether all pre-viability prohibitions on elective abortions are unconstitutional.”

In the opinion of the court, the legal doctrine created by *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* was overturned. Justice Alito, who drafted the majority opinion, criticized that *Roe*'s ruling violated the Fourteenth Amendment. He argued that insufficient due process is presented, which makes the *Roe* decision unconstitutional [3]. His objections towards *Casey* are highlighted by the “undue burden test”, which examines the constitutionality of regulations and legislations around abortion rights.

On March 2, 2022, a draft opinion of *Dobbs*, a highly focused case for both legal scholars and the general public was exposed to the public by non-official sources. This leak was detrimental to US stability. Even today, the aftermath of this case is still deeply affecting the people in America. Abortion, possibly the largest controversies of modern American legal history has become the President Joe Biden has been to a number of rally campaigns, in which he openly criticizes the r overruling of *Roe v. Wade* and supported citizens to rally to claim their right to an abortion. On the other hand, anti-abortion advocates celebrated their victory, an achievement they have been waiting for almost 50 years after the *Roe* decision.

The current situation in the United States is conflicting, where various different states have completely opposite attitudes and policies on abortion. Currently, 12 states ruled that abortion is illegal in all stages after the *Dobbs* verdict, they include states famous for regulating abortion. For example, Alabama, Kentucky and Texas. In fact, after the Supreme Court uphold the *Act*, Mississippi banned abortion at all stages after the decision. The gestational age bans are present in 4 states, with Georgia at the shortest of 6 weeks and Utah at the longest of 18 weeks. Including the two other states where abortion is unavailable, for around 2/5 of the states, abortion is not always available. This essay will seek to examine into the reasons why Justice Alito's opinion was able to overturn the long-standing abortion rights doctrine established in *Roe* and certified by *Casey*, including other social and political reasons.

## 2. Previous Case Summary

Before examining *Dobbs v. Jackson Women's Health Organization* in close, it is important to review some of the previous cases. The right to privacy has been in development for a significantly long period of time. Abortion rights is perhaps the most controversial right that emerged from the numerous rights to privacy. To follow this route, there is no better place to start than *Griswold v. Connecticut*.

### 2.1. *Griswold v. Connecticut*

On June 7, 1965, a statute passed by the state of Connecticut was struck down by the Supreme Court for its unconstitutionality [4]. The statute ruled that "[a]ny person who uses any drug, medical article or instrument for the purpose of conception" can be criminally punished. In fact, this type of ruling was common in the United States, in only Connecticut alone, criminalizing the use of contraception has been in place for about eighty-six years.

The Supreme Court's argument originated from the Ninth Amendment of the Constitution, which reads, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. [5]" The court, for the first time, found that there are certain rights that the state cannot infringe on the people. In particular, a right to privacy regarding sexual or intimate matters. Under Justice Douglas's majority opinion, which found that under the subtext of numerous protections given to the people in the Bill of Rights and the Due Process Clause of the Fourteenth Amendment [6,7]. He also stated that such constitutional guarantees created zones of privacy, which was also guaranteed under the First, Third, Fourth, Fifth, and Ninth Amendments [6].

Justice Black wrote a powerful dissent in *Griswold*, which pointed out the fundamental defects of Justice Douglas's opinion and expressed his concern on the alternation of constitutional definition [6]. Justice Black found that there is no evidence, neither textual nor historical, that backed-up the majority opinion. Here is where the one of the underlying threads of ideas that contributed to *Dobbs*. Another of Justice Black's thought that was carried forwards was that Black argued that if additional rights (rights not explicitly written down in the Constitution) were to be added, the public should go over the democratic and constitutional process of amending the Constitution [6].

## 2.2. *Loving v. Virginia*

The right to privacy is further developed just two years after *Griswold v. Connecticut*, when the court decided that a Virginian statute that criminalizes intertrial marriage is unconstitutional. One of the three “fundamental elements” that the Supreme Court focused on was that anti-miscegenation statute restricted a “preferentially protected relationship [8]”. In a surprisingly short section of only two paragraphs, the Supreme Court established its fundamental ruling of the restriction on marriage. The majority opinions by Chief Justice Warren stated that the Fourteenth Amendment of the Constitution offers protection to marriage, including its fundamental rights [9]. The Fourteenth Amendment reads, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws [10].” It also sets a standard for special constitutional protection, which the event or actions “ha[ve] long been recognized,” and that it must be “essential to the orderly pursuit of happiness by free men.” Some of the criticisms and theories used in *Dobbs* can also be traced back to *Loving v. Virginia* [11].

## 2.3. *Roe v. Wade*

The landmark case of abortion rights in the United States needs no second mentioning. It is without a shadow of a doubt that prior to *Dobbs*, *Roe v. Wade* established a guarantee that abortion rights are constitutional. Throughout the years, although restrictions on abortions were added, women never lost the guaranteed constitutional right to abortion. Strict scrutiny was the method the court adopted to decide whether restrictions on abortion are constitutional.

## 2.4. *Planned Parenthood v. Casey*

Abortion rights in the United States were further clarified in another crucial case in 1992, *Plan Parenthood of Southern Pennsylvania v. Casey*. Unlike *Roe*, the Supreme Court did push the rights to abortion to the greatest extent, but upheld the general verdict of *Roe v. Wade* [12]. From the case, an undue burden test is developed.

From 1988 to 1989, the Pennsylvania Abortion Control Act (1982) was amended, in which multiple restrictions on abortion are imposed. The ruling of the Supreme Court is more conservative-leaning, but nevertheless upheld *Roe* for *stare decisis*. The undue burden test replaced *Roe*’s verdict of a heavily protective method of strict scrutiny. The *Casey* opinions states that “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability [13].” Until *Dobbs*, post-*Casey* cases regarding the constitutionality of abortions utilized the undue burden test.

It seems surprising, that after 50 years of guaranteed constitutional right, the Supreme Court is going to overturn the legal precedent and conclude that such a right is not present. Examining the reasoning of the majority opinion is definitely useful when asking the question of why *Dobbs* was able to overrule *Roe* and *Casey*.

## 3. Main Reasons

### 3.1. Reasoning of *Dobbs* (Majority Opinion)

In the meetings prior to the decision, the Mississippi health officer pointed out that upholding the Mississippi Gestational Age Act will mean overruling previous legal doctrines, including the verdict in *Roe* and *Casey*, and there are “no half-measures [14]”. Chief Justice Roberts repeated mentioned in his concurring opinion that the case should be focused on deciding whether the Mississippi Gestational Age Act is constitutional, rather than making an overall judgement on the larger question

of the constitutionality of abortion. Nevertheless, his suggestion is not adopted and the majority opinion made a broader verdict.

Justice Alito starts off with the different views presented in American society around abortion rights. He claims that until *Roe*, abortion rights is entirely unknown to American law. And even after 1973, the Supreme Court never claimed that the Constitution and common law ever recognized such a right. The following section will re-organize the main arguments and comments of the majority opinion [14].

### 3.2. Reasons to Overrule *Roe v. Wade* and *Planned Parenthood v. Casey*

Justice Alito first criticizes the decision established in *Roe*, by claiming that it is “egregiously wrong from the start” [14]. Alito then argues that the text of the Constitution does not refer to abortion, therefore abortion must be an unenumerated right to make it constitutional. He points out that abortion is different to the rights protected by the Fourteenth Amendment, for example, intimate sexual relations, use of contraception, interracial and same-sex marriages. Although pro-abortion advocates have wished and argued otherwise, *Roe* and *Casey* acknowledged that abortion is different since it involves the termination of life of a non-viable fetus.

*Washington v. Glucksberg* is mentioned in the opinion to support Alito’s argument [15]. *Washington* ruled that it is possible for certain unenumerated right to exist even it is not mentioned in the Constitution. However, two parameters are provided. For an unenumerated right to stand, it must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” Until the latter part of the past century, such a right was completely unfamiliar or even unheard of in American law, which means that there is no clear indication that it is deeply rooted. Although the discussion has continued for many centuries, few cases were brought to court and there were few papers and scholars doing research on the area prior to *Roe*. Alito concludes that the right is not a fundamental to ordered liberty through historical facts. The pre-*Roe* attitude on abortion is very different. When the Due Process Clause was adopted, 38 states criminalized all abortion activities [14]. Since most justices are conservative, they tend to share the original beliefs. Since abortion does not meet the two parameters mentioned above, Alito concludes that abortion is not an unenumerated right, which means that there should not be constitutional guarantee. He also points out that the verdict in *Roe* and *Casey* is incorrect. Ultimately, the *Act* is not unconstitutional.

Close to the end, the majority opinion argues that overturning *Roe* and *Casey* will not provide fundamental problems to the society since abortion is an action that is general unplanned and unexpected [14]. Also, as the states now have the power to adjudicate abortion matters, it gives the people an equal chance to lobby their democratically elected representatives to pass legislation in favor of their belief since Alito has stated multiple times that *Roe* slams the door shut for this opportunity and in effect, struck down every abortion law in America. It is also suggested that since women do have political and electoral powers and that recent ballot registration rates are higher than men, instead of relying on decisions made by the Supreme Court, the public should vote in the democratic system.

### 3.3. Reasons to Not Follow *Stare Decisis*

*Stare decisis* is a judicial doctrine that bond courts to follow its previous decisions and is always based on a rebuttable presumption. In his confirmation hearing, Justice Alito admits the importance of *stare decisis*, claiming that it is “a fundamental part of our legal system.” [16] Nevertheless, he used a long section of the opinion to justify that *stare decisis* does not apply in this context.

This concept of *stare decisis* has been used by many pre-*Casey* cases. 5 years prior to *Casey*,

*Akron v. Akron Center for Reproductive Health* (1983) upheld the ruling the *Roe v. Wade*, while admitting that “the doctrine of *stare decisis* [is] perhaps never entirely persuasive on a constitutional question [17].” Next, in *Thornburgh v. American College of Obstetricians and Gynecologists*, merely three years later, the “general principles” that is set by *Roe* and *Akron* is reaffirmed [18].

It might seem surprising that the Supreme Court stop following this legal doctrine in *Dobbs*. However, Justice Alito explained his reasoning in a fairly long section in the majority opinion [14]. In the end, Alito has proven that there is no necessity to follow the legal doctrine since it is “egregiously wrong”.

## 4. Other Reasons

### 4.1. Conservative Justices

The conservative justices on the court at the time of the *Dobbs v. Jackson Women's Health Organization* case included Chief Justice Roberts, and Justices Thomas, Alito, Gorsuch, Barrett and Kavanaugh. For various different reasons, these justices will be less supportive of abortion rights.

During oral arguments of the case, Justice Clarence Thomas, who is commonly regarded as the most conservative members of the court, asked the lawyers of the abortion clinic why the right to abortion should be considered a fundamental right, given that other fundamental rights, for example the right to equality, is written down in text. In Justice Thomas's concurrence opinion, he even suggested that since abortion is no longer a constitutional right, the Supreme Court should review pervious cases like *Griswold v. Connecticut*. Since the right to privacy is also not written down in the Constitution and came from interpretations of court, it is possible to reverse it as well. Interestingly, Justice Thomas is against same-sex marriage and use of contraception but not interracial marriage, since it will make his own marriage status unconstitutional.

Most of the conservative justices are also textualists, which, when they interpret the Constitution, will focus more on the specific textual details in the written text of the Constitution, rather than trying to interpret the Constitution in a more modern context. When Justice Alito wrote the majority opinion, the text of the Constitution is mentioned repeatedly. These justices tend to deny rights that are not explicitly expressed by the Constitution, which in their opinion, means that such a right was not important to the founding fathers. Therefore, for abortion rights, conservative justices can deny them very easily, and in fact, one major argument was that the lack of textual evidence.

Another common standpoint of these conservative justices is originalism. This is when justices interpret the Constitution in the context that it was written. In their opinion, this type of interpretation can avoid changes to the meanings of the Constitution, which is not desirable for them. However, a common issue is that society has evolved in the centuries, and that the modern United States is very different to when the founding fathers drafted the constitution.

### 4.2. Weakness of *Roe* and *Casey*

There are weaknesses of *Roe v. Wade* that might it easier for it to be reversed. Firstly, as Justice Alito pointed out, abortion is an extremely controversial topic which Americans have very conflicting views. The court's decision in *Casey* was highly controversial and remains so to this day. Some pro-choice advocates argued that the decision weakened the right for women to choose, while some pro-life advocates argued that the decision did not go far enough in protecting the rights of the unborn. One of the main objectives of the justices that decided *Planned Parenthood v. Casey* was that they were trying to end the dispute of the right to abortion once and for all. Unfortunately, nothing like the sort happened. Many scholars viewed *Casey* as increasing the division and controversy.

Many also believed that the original justification in *Roe* was fundamentally weak. [19] Justice



Blackmun admitted in his majority opinion that the textual reference to the Constitution is not present abortion rights and that such a right is “inherently different” to other fundamental rights recognized by the Court. Many scholars have criticized this ruling. Professor Kermit Roosevelt argues that there is a weak basis of Constitutional text to support the right. He writes: “As constitutional argument, *Roe* is barely coherent.[20].” Most legal scholars and commentators agree that there should be relatively non-restrictive access to abortion, although they cannot defend the flawed understanding and interpretation of the Constitution.

## 5. Conclusion

It is undeniable that *Dobbs v. Jackson Women’s Health Organization* will be a game-changer for the United States in abortion situations. On the other hand, it is unlikely that matters will get any worse. The fact that abortion advocates can dictate the. By passing the right to decide onto states, it can be argued that justice is better served since both abortion and anti-abortion advocates have equal legal opportunity to lobby the state they live in and adopt laws that they favor. Travelling between states to receive abortion has not been banned and never should be banned, so it is difficult to argue that abortion is inaccessible for women.

Abortion is an area where the Court can only do so much. If cases are not brought up, legal precedents will stand for decades or even centuries. With the wave of demonstrators observed after the draft opinion is leaked showed that the American population is very much concerned about this right. The separation of powers is there so that the elected legislative branch can pass laws that the people would favor. Since the population is so determined to make their voice heard or to rectify the Supreme Court’s decision, high participation rate in referendums or the ballot box on abortion rights should be expected. Democratic mechanisms should be put into function, the judicial branch should not be pushed forward.

Such controversial areas should not be left to only the Supreme Court. The Constitution has undergone 27 amendments. Instead of arguing the implied right of privacy or right of abortion, amendments should take the job, rather than leaving it to Justices to interpret the Constitution. With a ratified amendment, all lingering doubts or controversies will be removed. The right to an abortion will not be constitutional if such an amendment fails to pass. If the population cannot come up with a universal opinion, given the power to each state will be a satisfactory decision.

From the current point of view, it is a fact that the right to privacy in general is a deduced result from interpreting the Constitution. However, overturning other privacy cases like *Griswold* and *Loving* will be wrong and unjust since both Justice Blackmun and Justice Alito points out in their majority opinion that other intimate matters like interracial marriage and contraception is different to the right to an abortion.

*Roe* and *Dobbs* will perhaps continue to be the most discussed and debated cases in American legal history. Nevertheless, *Dobbs v. Jackson Women’s Health Organization* did overturn a or potential mistake made 50 years ago and made a just decision based on the Constitution.

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