

Supreme Court Rules No Constitutional Right to Abortion in *Dobbs v. Jackson Women's Health Organization*

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On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, a case challenging the constitutionality of Mississippi's *Gestational Age Act*, which generally prohibits an abortion once a fetus's gestational age is greater than 15 weeks. By a 6-3 decision, the Court upheld the Mississippi law, and a five-Justice majority more broadly overruled the Court's prior decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, determining that the U.S. Constitution does not confer a right to an abortion. By overruling *Roe* and *Casey*, the Court maintained that it was returning the regulation of abortion to the people and their elected representatives. As of the date of this Sidebar, 13 [states](#) have adopted so-called trigger laws that prohibit abortion and take effect once a constitutional right to abortion is no longer recognized. Following *Dobbs*, [other abortion restrictions](#), such as restrictions on the availability of [medication abortion](#), are expected.

Writing for the Court in *Dobbs*, Justice Alito [described](#) *Roe* as “egregiously wrong from the start” because the Constitution makes no reference to abortion and a right to the procedure is not implicitly protected by any constitutional provision. While the Court in *Roe* and *Casey* determined that a right of privacy derived from the Fourteenth Amendment's concept of personal liberty under the [Due Process Clause](#) was broad enough to encompass a right to abortion, the *Dobbs* Court characterized these earlier decisions as “remarkably loose in [their] treatment of the constitutional text” and “hav[ing] enflamed debate and deepened division.”

The majority explained that, in evaluating whether the Constitution confers a right to an abortion, the Due Process Clause can guarantee some rights not explicitly mentioned in the Constitution. It indicated, however, that substantive due process rights such as a right to abortion may be found only when they are deeply rooted in the nation's history and tradition and are implicit in the concept of ordered liberty. Reviewing common law and statutory restrictions on abortion before and after the Fourteenth Amendment's ratification, the majority maintained that the “inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions.” The majority emphasized, for example, that abortion was prohibited in three-quarters of the states when the Fourteenth Amendment was

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adopted, and 30 states still prohibited the procedure when *Roe* was decided. Thus, the Court held that the Fourteenth Amendment does not protect the right to an abortion.

The Court also considered whether a right to obtain an abortion “is part of a broader entrenched right that is supported by other precedents,” holding that such a right does not have a sound basis in precedent because “[a]bortion destroys what [*Roe* and *Casey*] call ‘potential life,’” and none of the precedential decisions cited by *Roe* and *Casey* “involved the critical moral question posed by abortion.” The majority distinguished the Court’s conclusions in these prior decisions as “inapposite.” It explained that its opinion in *Dobbs* would not undermine the prior decisions and emphasized that *Dobbs* should not be understood as “cast[ing] doubt on precedents that do not concern abortion.”

The Court further considered whether the doctrine of [stare decisis](#), which generally directs courts to adhere to precedent, should guide it to uphold *Roe* and *Casey*. Acknowledging that the doctrine promotes even-handed decisionmaking and protects those who have relied on past decisions, the majority nevertheless observed that “in appropriate circumstances [it] must be willing to reconsider and, if necessary, overrule constitutional decisions.” The majority indicated that five factors, derived from its prior cases, strongly favor overruling *Roe* and *Casey*: (1) the nature of their error (i.e., the Court’s erroneous interpretation of the Constitution in those decisions); (2) the quality of their reasoning (i.e., the Court’s reasoning in *Roe* “stood on exceptionally weak grounds”); (3) the “workability” of the rules they imposed on the country (i.e., the unworkability of *Casey*’s undue burden standard for evaluating abortion regulations); (4) their disruptive effect on other areas of the law (i.e., the prior decisions’ distortion of other legal doctrines involving standing, severability, and other principles); and (5) the absence of concrete reliance (i.e., abortions are generally unplanned and reproductive planning can be quickly adjusted). In light of these factors, the majority concluded that, under traditional *stare decisis* factors, continued adherence to *Roe* and *Casey* was inappropriate. This conclusion, the majority observed, should not be affected by concerns that the Court was acting in response to social and political pressure. The majority maintained that the Court cannot exceed the scope of its authority under the Constitution and cannot allow its decisions “to be affected by any extraneous influences such as concern about the public’s reaction[.]”

By overruling *Roe* and *Casey*, the *Dobbs* Court not only held that the Constitution does not guarantee a right to abortion, but it also determined that abortion restrictions will not be subject to the viability and undue burden standards established by those decisions. (Additional information on the viability and undue burden standards is included in CRS Report [Abortion: Judicial History and Legislative Response](#)). If challenged, abortion restrictions will now be evaluated under [rational basis review](#), a judicial review [standard](#) that is generally deferential to lawmakers. The majority explained that under rational basis review, a law regulating abortion “must be sustained if there is a rational basis on which the legislature could have thought it would serve legitimate state interests.” The majority indicated that these interests may include protecting prenatal life, the mitigation of fetal pain, and preserving the medical profession’s integrity. Applying rational basis review, the majority wrote that “[t]hese legitimate interests justify Mississippi’s Gestational Age Act” and provide a rational basis for the law.

Post-*Dobbs* Considerations

The *Dobbs* Court was divided on several points, and those divisions might be relevant to how policymakers and courts understand the consequences of the Court’s decision. A five-Justice majority of the Court (Justices Alito, Thomas, Gorsuch, Kavanaugh, and Barrett) voted to uphold Mississippi’s general ban on abortion once a fetus’s gestational age is greater than 15 weeks, overrule *Roe* and *Casey*, and hold that the Constitution does not confer a right to an abortion. Chief Justice Roberts, who [concurred in the judgment](#) of the Court but did not join the majority opinion, favored exercising judicial restraint by upholding the Mississippi law and narrowing the Court’s reading of *Roe* and *Casey*. He wanted, however, to “leave for another day whether to reject any right to an abortion at all.” Three members of the Court

(Justices Breyer, Sotomayor, and Kagan) [dissented](#) from all of the majority's conclusions. Justice Thomas, in addition to joining the *Dobbs* majority, wrote a [conurrence](#) expressing hope that the Court in a future case would more generally reject reliance on the concept of substantive due process, which he described as an oxymoron and which has provided the basis for Court rulings on matters such as [contraceptive access](#) and [same-sex marriage](#). (The *Dobbs* majority [emphasized](#) that it was not calling these decisions into question, while the dissenting Justices [contended](#) that these decisions were "part of the same constitutional fabric" as *Roe* and *Casey* and were now "under threat.") Justice Kavanaugh, who provided a decisive vote for overturning *Roe* and *Casey*, suggested in a [concurring opinion](#) that not every abortion restriction would withstand constitutional scrutiny, including state laws barring residents from [traveling out of state](#) to have an abortion. While the *Dobbs* decision shows that state abortion restrictions such as Mississippi's Gestational Age Act will likely pass constitutional muster, the outer limits of state authority to regulate abortion remain untested, and it is unclear whether *Dobbs* will have ripple effects on courts' analyses of other constitutional issues.

Still, it is clear that states will have much more discretion to restrict abortion access than they did before *Dobbs*. Abortion restrictions will now be subject to the deferential rational basis standard of review. There may be some questions regarding whether a limited set of abortion restrictions satisfy this standard, such as if a restriction makes no exception allowing abortion when necessary to save the life of the mother. (The Mississippi law upheld by the *Dobbs* Court included a "[medical emergency](#)" exception.) While the majority opinion in *Dobbs* does not identify a particular category of restrictions that would not withstand rational basis review, Justice Kavanaugh's concurrence [references](#) then-Justice Rehnquist's dissent in *Roe*, where the future Chief Justice [wrote](#) that he had "little doubt that ... a statute [prohibiting abortion when the mother's life is in jeopardy] would lack a rational relation to a valid state objective."

Many of the immediate legal questions surrounding abortion regulation will likely concern the constitutional powers of the states and federal government. These questions may include the scope of Congress's power, both direct and indirect, to regulate abortion access, such as through federal laws and policies that [preempt](#) inconsistent state approaches. Other questions may include whether certain state abortion bans or other restrictions are preempted already, such as through [the Food and Drug Administration's regulation of medication abortion drugs](#). Questions might also concern the ability of a state to regulate travel by residents seeking abortions in other jurisdictions, including in another state or on tribal lands (though Justice Kavanaugh's concurrence [suggests](#) that members of the Court may treat the validity of such restrictions with skepticism). Additional legal issues may center on the ability of states to impose criminal and civil liability upon persons who perform or obtain abortions generally as well as in specific contexts, such as at federally operated facilities within the state.

Dobbs could also prompt consideration of federal abortion legislation. Those who oppose the decision and support a right to abortion may promote legislation that would establish such a right in statute. If enacted, the Women's Health Protection Act of 2021 ([H.R. 3755/S. 4132](#)), introduced in the 117th Congress, would guarantee health care providers a statutory right to provide abortion services and preempt any state law that would limit or restrict that right. The bill would also establish a corresponding right for patients to obtain abortion services unimpeded by state law restrictions, such as pre-viability abortion prohibitions. The House passed the bill in September 2021, but the Senate has twice rejected cloture motions to proceed with consideration of the bill. A second bill introduced this Congress, the Reproductive Choice Act ([S. 3713](#)), would codify the "essential holdings" of *Roe* and *Casey* and provides that a state may not impose an undue burden on a woman's ability to have an abortion before fetal viability. If enacted, it appears that the bill would allow abortion restrictions to be evaluated under the standard established by *Casey*. It is possible, as well, that Congress might consider legislation of more limited scope that seeks to protect abortion access in specific circumstances.

Following the Court's decision to overrule *Roe* and *Casey*, Congress could consider legislation that prohibits the performance of abortion at any point during a woman's pregnancy. Bills like Mississippi's

Gestational Age Act have passed the House in the 113th, 114th, and 115th Congresses. The Pain-Capable Unborn Child Protection Act ([H.R. 1080/S. 61](#)), introduced in the 117th Congress, would generally prohibit the performance or attempted performance of an abortion once the probable post-fertilization age of the fetus is 20 weeks or greater. The bill states that it would further a “compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.”

Legal and policy issues raised by the *Dobbs* decision, including considerations that may inform legislative proposals at both the state and federal levels made in response, may be addressed in more depth and specificity by future CRS products.

Author Information

Jon O. Shimabukuro
Legislative Attorney

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