

Roe v. Wade / Precedent and Stare Decisis

Instructions: The following four parts comprise this activity. Complete each part, as instructed by your teacher.

- Part One: Personal Reflection and Class Discussion
 - Part Two: Background: Precedent and *Stare Decisis*
 - Part Three: Overruling Precedents – Historical Examples
 - Part Four: Criteria for Overruling Precedents
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Part One: Personal Reflection and Class Discussion

Personal Reflection: Reflect on these questions alone or discuss them with a partner.

1. Think of a time when a parent, guardian, or teacher decided something based on a decision made in a similar situation in the past. Do you think that decision was fair? Why or why not?
2. Think about a time when a parent, guardian, or teacher seemed to ignore their own previous decision. Did that seem fair? Why or why not?
3. Think of a time when you believed your parent, guardian, or teacher should not have applied a past decision to a new but similar situation. Why should they have made a different decision in this instance?

Class Discussion: Answer these questions with other students in your class:

4. What are the benefits and risks of applying the same rules every time a similar situation comes up?
5. What are the benefits and risks of changing the rules for new situations?

Part Two: Background: Precedent and Stare Decisis

When the Supreme Court decides a case, it clarifies the law for that case and serves as guidance for how similar cases should be decided in the future. Before the Supreme Court makes a decision, it considers **precedents**—past Supreme Court decisions about a very similar case—to help make the decision.

When a lower court considers a case similar to one the U.S. Supreme Court has decided, a principle called **stare decisis** (literally “let the decision stand”) requires that the precedent be followed. Lower courts *must* follow U.S. Supreme Court precedent (sometimes called vertical *stare decisis*). In this case, we say the earlier case is a “binding precedent.”

In the Supreme Court, if the case being decided is legally identical to a past decision, then the Supreme Court should decide the matter the same way (sometimes called horizontal *stare decisis*). However, the Supreme Court considers *stare decisis* to be a principle, not a hard and fast rule, that guides but does not bind justices. The Supreme Court can, and sometimes does, overturn their own precedents.

Cases that make it to the Supreme Court are typically not completely identical to past cases, and justices must consider the similarities and differences when deciding a case. The process of comparing past decisions to new cases is called **applying precedent**. Lawyers often argue for their side by showing how previous decisions would support the Supreme Court deciding in their favor. This might mean showing how a previous decision that supports their side is **analogous** (similar) to the case at hand. It can also involve showing that a previous decision that does not support their side is **distinguishable** (different) from the case they are arguing.

Lower appeals courts at the state and federal (national) level like state supreme courts and federal circuit courts of appeals also establish precedents. However, those precedents are only binding in their jurisdiction.

1. What is a precedent? Which courts create them? Which courts must follow them?

2. What is the principle of *stare decisis*?

3. What might be the benefits and costs of a legal system based on precedent?

Benefits	Costs

Part Three: Overruling Precedents – Historical Examples

The Supreme Court has overruled several notable decisions. Match each precedent below with the letter of the case that overruled it (listed in random order in column 3).

Precedents	Which case overruled it?	Cases that overruled precedents
1. <i>Plessy v. Ferguson</i> (1896): Racial segregation laws did not violate the U.S. Constitution if the facilities for each race were equal in quality. This doctrine became known as “separate but equal.”		a. <i>Citizens United v. Federal Elections Commission</i> (2010): banning the political speech of corporations is an unconstitutional violation of the First Amendment’s free speech clause.
2. <i>Minersville School District v. Gobitis</i> (1940): A state legislature could require students to salute the flag and say the pledge of allegiance without violating First Amendment speech or religious rights.		b. <i>Brown v. Board of Education of Topeka, Kansas</i> (1954): racial segregation in public schools is an unconstitutional violation the 14 th Amendment, which guarantees that no one is denied “equal protection of the laws.”
3. <i>Baker v. Nelson</i> (1972): Exclusion of same-sex couples from state marriage laws did not present a substantial federal question.		c. <i>West Virginia v. Barnette</i> (1943): compelling public-school students to salute the flag is an unconstitutional violation of the students’ First Amendment rights.

4. <i>Austin v. Michigan State Chamber of Commerce</i> (1990): Prohibition on corporations from making independent campaign expenditures did not violate First Amendment.		d. <i>Dobbs v. Jackson Women's Health</i> (2022): the Constitution does not protect the right to have an abortion.
5. <i>Roe v. Wade</i> (1973): People have a right to have an abortion as part of their fundamental right to privacy, which is protected by the Due Process Clause of the 14th Amendment. <i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> (1992): reaffirmed that a person has the right to an abortion before fetal viability without undue influence of the state.		e. <i>Obergefell v. Hodges</i> (2015): states denial of marriage to a same-sex couples is an unconstitutional violation of the 14th Amendment, which guarantees that no one is denied "equal protection of the laws."

Questions to Consider

1. Why do you think the Supreme Court overruled these precedents?
2. What do you think made them exceptions to the principle of *stare decisis*?
3. Do you think the Supreme Court was right to overrule these precedents? For all of them? For only some of them? Explain.

Part Four: Criteria for Overruling Precedents

Stare decisis promotes stability and predictability. Because adhering to precedent is the norm, “to overrule a constitutional precedent, the Court requires something over and above the belief that the precedent was wrongly decided.”¹ Historically, when deciding whether to overrule a precedent, the Supreme Court has considered various factors, including:

- the quality of the past decision’s reasoning,
- whether the past decision is “unworkable” (meaning it has proven too difficult for lower courts to apply),
- changes in relevant facts and societal norms, and
- reliance or whether individuals and companies who have come to rely on the decision would be harmed by overruling it.

In 2022, *Dobbs v. Jackson Women’s Health Organization* overruled several prior decisions, including *Roe v. Wade* (1973), that had established a constitutional right to abortion. In the majority opinion² of *Dobbs v. Jackson Women’s Health Organization* (2022), Justice Samuel Alito wrote the following about the importance of *stare decisis* and listed five factors that should be considered:

The doctrine of *stare decisis* does not counsel continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role and protects the interests of those who have taken action in reliance on a past decision. It “reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation [taking a case to court more than one time].”... It “contributes to the actual and perceived integrity of the judicial process.” ... And it restrains judicial hubris by respecting the judgment of those who grappled with important questions in the past. But *stare decisis* is not an inexorable command... and “is at its weakest when [the Court] interpret[s] the Constitution,”... Some of the Court’s most important constitutional decisions have overruled prior precedents. See, e.g., *Brown v. Board of Education*... overruling the infamous decision in *Plessy v. Ferguson*...

The Court’s cases have identified factors that should be considered in deciding when a precedent should be overruled. ...

Five factors discussed below weigh strongly in favor of overruling *Roe*...

(1) The nature of the Court’s error. Like the infamous decision in *Plessy v. Ferguson*, *Roe* was also egregiously wrong and on a collision course with the Constitution from the day it was decided. ... The Court short-circuited the democratic process by closing it to the large number of Americans who disagreed with *Roe*.

(2) The quality of the reasoning. Without any grounding in the constitutional text, history, or precedent, *Roe* imposed on the entire country a detailed set of rules

for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation. ...

(3) Workability. Deciding whether a precedent should be overruled depends in part on whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner.

(4) Effect on other areas of law. *Roe* [has] led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions.

(5) Reliance interests. Overruling *Roe*... will not upend concrete reliance interests like those that develop in “cases involving property and contract rights.”

Questions to Consider

1. Which of the above criteria do you think the Supreme Court should use when they consider whether to overrule a precedent?
2. Which additional criteria do you think the Supreme Court should use when they consider whether to overrule a precedent?
3. Are there any instances when the Supreme Court should never consider overruling precedent? Explain.

¹ *Ramos v. Louisiana*, 590 U.S. ____ (2020), quoted in *Students for Fair Admissions Inc. v. University of North Carolina*, No. 21-707, Brief by University Respondents, July 25, 2022, https://www.supremecourt.gov/DocketPDF/21/21-707/230779/20220725144111091_21-707_Response%20brief.pdf.

² *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ____ (2022), No. 19-1392, Opinion of the Court, June 24, 2022, https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.