

## Unmarked Opinions Activity

### ***Dobbs v. Jackson Women's Health Organization (2022)***

After reading the **background, facts, issue, constitutional provision, state statute, Supreme Court precedents, and arguments**, read Opinion A and Opinion B below. Choose which opinion you agree with and think should be the majority (winning) opinion and circle "Majority." Choose which you disagree with and think should be the dissenting opinion and circle "Dissent." Explain the reasons for your choices. After you have made your decision, compare your answers to those of the Supreme Court by reading the case summary.

#### **Opinion A**

The Court should follow the principle of *stare decisis*. It should not overrule a precedent that has been in place for over a half century and has been reaffirmed in decisions throughout that time. Overruling *Roe* would result in the curtailment of women's rights, and of their status as free and equal citizens.

**Majority**

Furthermore, it would harm the Court's legitimacy. If *Roe* is overruled, many other due process rights are also in jeopardy, such as the rights to contraception, same-sex intimacy, and same-sex marriage.

**Dissent**

#### **Opinion B**

The Constitution does not refer to abortion at all. Some rights not listed in the Constitution are protected by the Due Process Clause, but abortion is not among them because it is not deeply rooted in our nation's history. The issue of abortion should be determined by the people's representatives at the state level.

**Majority**

Although the decisions in *Roe* and *Casey* established a right to an abortion, they should be overruled despite the doctrine of *stare decisis*. *Stare decisis* should not be followed when a previous ruling is grievously (seriously) incorrect as these were. Landmark decisions like *Brown v. Board of Education*, which rejected the "separate but equal" doctrine, overruled the precedent set in *Plessy v. Ferguson*.

**Dissent**

## ***Dobbs v. Jackson Women's Health Organization (2022)***

**Argued:** December 1, 2021

**Decided:** June 24, 2022

### **Background**

Abortion is an extremely controversial issue. It often involves people's strongly held beliefs about religion, morality, life, the role of the government, and the constitutional right to privacy. Even though the words "right to privacy" do not appear in the Constitution, the Supreme Court has long recognized that the Constitution does guarantee Americans some degree of privacy, or freedom from government intervention into their private lives, including a person's right to obtain an abortion in certain instances.

Before the Supreme Court decides a case, it looks to precedents—past Supreme Court decisions about the same topic—to help make the decision. It applies a doctrine called *stare decisis*, literally "let the decision stand." *Stare decisis* means that if the case being decided raises the same legal question as an earlier case decided by the Court, then the legal rule used to decide the earlier case should be used to decide the current case. Lower courts *must* follow U.S. Supreme Court precedent.

Only the U.S. Supreme Court can overrule one of its precedents. Because *stare decisis* promotes important values, such as stability and predictability of the law, the Supreme Court requires a special justification before it will overrule a precedent. Historically, the Supreme Court has considered various factors when deciding whether to overrule a precedent, including: **(1)** the quality of the past decision's reasoning, **(2)** whether the decision is "unworkable" (meaning it has proven too difficult for lower courts to apply), **(3)** changes in relevant facts and society's norms, and **(4)** whether individuals and companies who have come to rely on the decision would be harmed by overruling it.

In *Roe v. Wade* (1973), the Supreme Court ruled that the right to privacy includes a person's right to end a pregnancy. As with most constitutional rights, however, the government may place limits on this right. The government may limit the right to abortion if it can give a very good reason or **"compelling government interest"** for the limitation—for example, protecting a person's health or the life of a viable fetus (a viable fetus is one that can survive outside the womb).

Government interests may outweigh a person's right to privacy in some circumstances. As a pregnancy proceeds, abortions become more dangerous, and, at some point, the developing fetus becomes viable. Therefore, the government may completely prohibit abortions during the end stage of pregnancy unless an abortion is necessary for the health of the pregnant person.

Almost 20 years after *Roe*, in *Casey v. Planned Parenthood* (1992), the Supreme Court found that while a person has a right to an abortion before the fetus is viable as established in *Roe*, states can impose restrictions if they do not impose an **"undue burden"** on a person's ability to obtain an abortion. Laws that place an undue burden on a person's right to an abortion are unconstitutional.

Despite these Supreme Court rulings, the political debate over the right to abortion has continued. Recently, some states have passed laws that further restrict or discourage abortion. Most of these new laws either created outright bans on abortion during the pre-viability stage of pregnancy (meaning before the fetus is viable), or they created new standards for the operation of clinics that provide abortions. This case is about the first type of law, a ban on pre-viability abortions.

## Facts

This case involves a Mississippi law, the Gestational Age Act, which was enacted and became effective on March 19, 2018. The law states:

“Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion” when “the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.”<sup>1</sup>

When passing the law, the Mississippi Legislature identified three state interests concerning abortion: **(1)** protecting the life of the unborn; **(2)** protecting the medical profession; and **(3)** protecting the health of people who are pregnant.

In this case, the petitioners are Thomas Dobbs, M.D., in his official capacity as state health officer of the Mississippi Department of Health, and Kenneth Cleveland, M.D., in his official capacity as executive director of the Mississippi State Board of Medical Licensure. They represent the state of Mississippi and are defending the law. The respondents are Jackson Women’s Health Organization—the only licensed abortion clinic in Mississippi—and the clinic’s medical director, Sacheen Carr-Ellis, M.D. Jackson Women’s Health Organization offers abortion care to people up until their 16<sup>th</sup> week of pregnancy. The abortion clinic challenged the law in the lower courts.

The day Mississippi enacted the 15-week ban, Jackson Women’s Health Organization filed a case in federal court seeking a temporary restraining order against its enforcement and challenged the constitutionality of the law. The U.S. District Court declared Mississippi’s ban on abortion after 15 weeks of pregnancy unconstitutional. The District Court wrote, because of the precedent set by *Casey*, “the ban’s lawfulness hinges on a single question: whether the 15-week mark is before or after viability.” The judge cited evidence showing viability begins between 23 and 24 weeks and ruled Mississippi had “no legitimate state interest strong enough, prior to viability, to justify a ban on abortions.”

Mississippi appealed the decision to the Fifth Circuit Court of Appeals. As usual, the case was heard by a three-judge panel. In December 2019, the Court of Appeals affirmed the District Court’s decision that the law was unconstitutional explaining that under *Casey*, “no state interest can justify a pre-viability abortion ban,” and “states may regulate abortion procedures prior to viability so long as they do not impose an undue burden on the [person’s] right, but they may not ban abortions.”

In January 2020, Mississippi asked the Court of Appeals to rehear the case *en banc* (with all of the judges present), but the request was denied. Mississippi petitioned the U.S. Supreme Court to hear the case, and it was granted.

### **Issue**

Are all pre-viability prohibitions on elective abortions unconstitutional?

### **Constitutional Provision, State Statute, and Supreme Court Precedents**

– **Due Process Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution**

“...nor shall any State deprive any person of life, liberty, or property, without due process of law...”

– **Mississippi’s Gestational Age Act<sup>2</sup>**

- “a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion,” if “the probable gestational age” of the fetus is “greater than fifteen (15) weeks.”
- “gestational age” or “probable gestational age” is calculated from the first day of the last menstrual period of the pregnant person.
- exceptions are made only for a “medical emergency” or a “severe fetal abnormality.”
- “medical emergency” is defined as a physical condition or illness that makes it necessary to perform an abortion to save a person’s life or to prevent “a serious risk of substantial and irreversible impairment of a major bodily function.”
- “severe fetal abnormality” is defined as “a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb.”
- “A physician who intentionally or knowingly violates” the law “commits an act of unprofessional conduct and his or her license to practice medicine in the State of Mississippi shall be suspended or revoked pursuant to action by the Mississippi State Board of Medical Licensure.”

– *Roe v. Wade* (1973)

In a 7-2 decision, the Supreme Court ruled that people had a right to have an abortion as part of their fundamental right to privacy, which was protected by the Due Process Clause of the 14<sup>th</sup> Amendment. The right to privacy meant that people were protected from unreasonable state interference in their marriage, procreation, contraception, family relationships, and child rearing. The government could only restrict this right if there was a compelling government interest. Because these interests became stronger later in pregnancy, the Court said the government could not limit abortion during the first trimester (first 12

weeks) of pregnancy, could impose reasonable restrictions during the second trimester (weeks 13–26), and could completely ban abortion during the third trimester.

- *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)

This case changed the Supreme Court’s analysis for abortion cases. The Court reaffirmed the central holding of *Roe*, that a person has the right to have an abortion without the undue influence of the state, and that states may not ban abortions before fetal viability. For state laws that regulated (rather than banned) abortions, the Court applied the undue burden test. A law posed an undue burden on a person’s right to an abortion if it **(1)** placed a substantial obstacle in their path and **(2)** failed to advance a legitimate state interest. The Court struck down the part of the Pennsylvania law that required a woman to notify her husband before she could get an abortion. The Court stated that this could cause abuse and domestic violence, which constituted a substantial obstacle. The Court also said that other parts of the law, like the informed consent requirement, a 24-hour waiting period, and a one-parent consent requirement for minors, did not present an undue burden.

### **Arguments for Dobbs (petitioner)**

- A state may prohibit abortions before viability because nothing in the Constitution’s text, structure, history, or tradition supports a right to abortion. The Constitution does not protect abortion.
- History does not show a deeply rooted right to abortion. In fact, history shows a long tradition of states restricting abortion.
- A ban on elective abortions is constitutional if the state has a legitimate, compelling governmental interest.
- The Mississippi law prohibits abortions after 15 weeks, with exceptions for medical emergency or severe fetal abnormality. The law furthers the state’s compelling interests in protecting unborn life, the pregnant person’s health, and the medical profession’s integrity.
- *Roe* broke from prior cases by invoking a general “right of privacy” not found in the Constitution. *Casey* repeats *Roe*’s flaws by failing to tie a right to abortion to anything in the Constitution.
- *Stare decisis* should not be followed. *Roe* and *Casey* were decided incorrectly, and they should be overruled.

### **Arguments for Jackson Women's Health Organization (respondent)**

- The fact that the specific words “pregnancy” or “abortion” do not appear in the Constitution’s text is not important. The constitutional question here is whether general principles grounded in the Constitution apply to the specific situation at hand.

- The right to decide whether to continue a pregnancy is grounded in the 14<sup>th</sup> Amendment’s protection against depriving a person of liberty without due process of law. Liberty includes the right to make family decisions and the right to make decisions about one’s own body.
- For nearly 50 years, two generations of people have come to depend on the availability of legal abortion. The right to make reproductive decisions has become critical to gender equality.
- The Court has ruled that before the point of viability, no state interest is strong enough to outweigh a person’s liberty interest in deciding whether to carry their pregnancy to term.
- In *Casey*, the Court carefully considered every argument Mississippi is making in this case for overruling *Roe*. After doing so, the Court reaffirmed that states cannot prohibit abortion before viability.
- *Stare decisis* must be followed. If the Court breaks with precedent, it will be perceived as representing nothing more than the policy preferences of the majority of current justices. It is critical that justices follow precedent except in very limited cases. Overturning *Roe* and *Casey* will undermine respect for the Court, making it appear to be a purely political institution.

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<sup>1</sup> [MS Code § 41-41-191 \(2018\)](#)

<sup>2</sup> See note 1.