

## Dobbs v. Jackson Women's Health Organization 142 S. Ct. 2228 (2022)

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**Dobbs v. Jackson Women’s Health Organization**  
**142 S. Ct. 2228 (2022)**

I. INTRODUCTION

Abortion has long been one of the most controversial subjects in the United States, both morally and politically.<sup>1</sup> Many Americans feel abortion ends innocent human life and should be banned, no matter the circumstances.<sup>2</sup> On the other hand, many Americans feel as though abortion regulation infringes on the right of a woman to control her body.<sup>3</sup> In addition, a third group of Americans believe that abortion should be permitted, but only under certain circumstances.<sup>4</sup> For over a century after the adoption of the United States Constitution, states were free to regulate abortion however their citizens saw fit.<sup>5</sup> However, in January of 1973, the Supreme Court of the United States decided the case of *Roe v. Wade* and held the right to an abortion was a constitutional right conferred by the Fourteenth Amendment’s Due Process Clause and could not be infringed upon by state regulations.<sup>6</sup> In 1992, the Court’s decision in *Roe* was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>7</sup> For decades, the Court’s decisions in *Roe* and *Casey* have been linked to other issues brought before the Court in a variety of cases, such as those involving bodily integrity, procreation, and the right obtain and use contraception.<sup>8</sup>

In March of 2018, the State of Mississippi enacted one of the most restrictive abortion laws in the country, the Gestational Age Act.<sup>9</sup> Mississippi’s Gestational Age Act sparked a lawsuit that enabled the Supreme Court to reconsider whether the Constitution conferred the right to obtain an abortion, *Dobbs v. Jackson Women’s Health Organization*.<sup>10</sup> In *Dobbs*, the Supreme Court overruled the decisions of *Roe* and *Casey* and held the right to obtain an abortion is not conferred by the Constitution of the United States and provided a new standard of review to be used when

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1. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240 (2022).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Dobbs*, 142 S. Ct. at 2240; *see Roe v. Wade*, 410 U.S. 113 (1973) (holding that a Texas abortion statute violated the Due Process Clause of the Fourteenth Amendment).

7. *Dobbs*, 142 S. Ct. at 2241.

8. *Id.* at 2319 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

9. *Dobbs v. Jackson Women’s Health Org.*, 945 F.3d. 265, 296 (5th Cir. 2019).

10. *Dobbs*, 142 S. Ct. at 2242.

determining whether a state abortion regulation may be upheld under the United States Constitution.<sup>11</sup>

## II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On March 19, 2018, the State of Mississippi signed the Gestational Age Act, House Bill (“H.B.”) 1510, into law.<sup>12</sup> Mississippi’s Gestational Age Act prohibits a woman from receiving an abortion after fifteen weeks of pregnancy, except in the case of a medical emergency or a severe fetal abnormality.<sup>13</sup> On the same day H.B. 1510 was enacted, Respondent Jackson Women’s Health Organization, the only facility licensed to perform abortions in the state of Mississippi, and a doctor employed by Respondent filed a lawsuit challenging the constitutionality of the Gestational Age Act, claiming it was an unconstitutional ban on pre-viability abortions under the Court’s decision in *Roe*.<sup>14</sup>

The District Court for the Southern District of Mississippi granted Respondent’s motion for summary judgment and permanently enjoined the enforcement of Mississippi’s Gestational Age Act, holding a gestational age of fifteen weeks was prior to viability.<sup>15</sup> The United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court.<sup>16</sup> The United States Supreme Court granted certiorari.<sup>17</sup>

## III. COURT’S DECISION AND RATIONALE

Justice Alito delivered the opinion of the Court and was joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett.<sup>18</sup> Justices Thomas and Kavanaugh wrote separate, concurring opinions.<sup>19</sup> Chief Justice Roberts wrote a separate opinion, concurring only in the judgment.<sup>20</sup> Justices Breyer, Sotomayor, and Kagan wrote a dissenting opinion.<sup>21</sup>

### A. Majority Opinion by Justice Alito

In the case at bar, the majority held the Constitution does not confer the right to obtain an abortion, overruling nearly fifty years of case precedent,

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11. *Id.* at 2283-84.

12. *Dobbs*, 945 F.3d. at 269.

13. *Dobbs*, 142 S. Ct. at 2243; MISS. CODE ANN. § 41-41-191 (2018).

14. *Dobbs*, 142 S. Ct. at 2244.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 2239.

19. *Dobbs*, 142 S. Ct. at 2239.

20. *Id.*

21. *Id.*

including the landmark cases of *Roe* and *Casey*.<sup>22</sup> Here, the Court addressed the question of whether “all pre-viability prohibitions on elective abortions are unconstitutional.”<sup>23</sup> In order to answer the aforementioned question, the Court provided a brief description of the Court’s holdings in *Roe* and *Casey* and examined three primary issues: (1) whether the Constitution of the United States conferred the right to an abortion; (2) whether the doctrine of *stare decisis* required the Court to uphold the decisions of *Roe* and *Casey*; and (3) whether the preservation of the American public’s opinion of the Court required the Court to uphold *Roe* and *Casey*.<sup>24</sup> As a result of their analyses, the Court held the Constitution does not provide the right to an abortion, it overruled *Roe* and *Casey*, returned the authority to regulate abortion to the people and their elected, state or Congressional officials, and provided a new standard of review for state abortion regulations.<sup>25</sup>

*i. History of the Right to an Abortion: Roe and Casey*

To begin, the Court provided a brief description of the Court’s decisions in the cases of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>26</sup> In 1973, the Court decided, in the case of *Roe*, the Constitution conferred a broad right for a woman to obtain an abortion at any time before the fetus had developed to the point of “viability,” or the point in which it could survive outside the woman’s womb.<sup>27</sup> Under *Roe*, each trimester of pregnancy was to be regulated differently, with the harshest line drawn at the end of the second trimester, which generally corresponded with the time in which a fetus was expected to achieve viability.<sup>28</sup> In 1992, the Court decided the case of *Casey*.<sup>29</sup> In *Casey*, the Court upheld *Roe*’s central holding, but overruled *Roe*’s rigid rules regarding viability and held that states could not regulate pre-viability abortion in any manner that posed an “undue burden” on the woman’s right to obtain an abortion.<sup>30</sup> The *Casey* Court hoped their decision would “end [the] national division” and provide the final answer to the question of whether the Constitution conferred the right to an abortion.<sup>31</sup> However, *Casey* provided no clear guidance on what constitutes an undue burden and ultimately failed to remedy the nation’s

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22. *Id.* at 2279.

23. *Id.* at 2244.

24. *Dobbs*, 142 S. Ct. at 2240-42, 2244, 2261, 2278.

25. *Id.* at 2239, 2283.

26. *Id.* at 2240-42.

27. *Id.* at 2240-41.

28. *Id.* at 2241.

29. *Dobbs*, 142 S. Ct. at 2241.

30. *Id.* at 2241-42.

31. *Id.* at 2242 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

widely conflicting views on abortion and ultimately left the door open for the Court to readdress the issue of whether the Constitution confers the right to obtain an abortion.<sup>32</sup>

*ii. Constitutional Analysis*

Next, the Court considered the question of whether the Constitution protects the right of a woman to obtain an abortion.<sup>33</sup> To answer this question, the Court considered whether the right to obtain an abortion was explicitly mentioned in the Constitution, or if the right to obtain an abortion was implied by a part of the Constitution's text.<sup>34</sup> Ultimately, the Court held the United States Constitution does not explicitly, or impliedly confer the right to obtain an abortion.<sup>35</sup>

To begin their constitutional analysis, the Court considered the exact language of the Constitution and found the right to an abortion was not explicitly referenced in the text of the Constitution.<sup>36</sup> Since the right to an abortion was not explicitly mentioned in the text, the Court stated it was necessary for the right to an abortion to be implicit in some part of the Constitution's text for it to be protected.<sup>37</sup> To determine if the right to an abortion was implicit in part of the Constitution's text, the Court turned to the Fourteenth Amendment's Due Process Clause, which was formerly relied on in *Roe*.<sup>38</sup>

The Court explained the Due Process Clause of the Fourteenth Amendment protects two types of substantive rights: those guaranteed by the first eight Amendments of the Constitution and a list of select fundamental rights that are not found explicitly in the text of the Constitution.<sup>39</sup> The Court stated a right may be considered fundamental and protected by the Fourteenth Amendment if it is deeply rooted in the nation's history and tradition.<sup>40</sup> First, the Court considered the history of abortion laws in the United States and found that abortion has long been found to be a crime in every state.<sup>41</sup> Next, the Court considered the history of abortion under the common law and explained abortion had also long been a crime under the common law, both before and after the fetus had reached the point of viability.<sup>42</sup> Then, the Court

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32. *Id.*

33. *Id.* at 2244.

34. *Dobbs*, 142 S. Ct. at 2244-45.

35. *Id.* at 2245, 2248.

36. *Id.* at 2245.

37. *Id.*

38. *Id.*

39. *Dobbs*, 142 S. Ct. at 2246.

40. *Id.*

41. *Id.* at 2248.

42. *Id.*

explained that at the time of the ratification of the Fourteenth Amendment, three-quarters of the states had enacted laws that made pre-viability abortions a crime.<sup>43</sup> Based on the above, the Court came to the conclusion that the right to an abortion is not rooted in the nation's history and tradition and is not protected by the Due Process Clause of the Fourteenth Amendment.<sup>44</sup>

The Court also explained a right may be protected by the Fourteenth Amendment's Due Process Clause if it essential to the nation's "scheme of ordered liberty."<sup>45</sup> The Court stated that "ordered liberty" works to define limits and boundaries between the competing interests of different parties, or individuals.<sup>46</sup> First, the Court explained that *Roe* and *Casey* sought to create a balance between the interests of the woman seeking an abortion and the interests of the State in the potential life of the fetus.<sup>47</sup> However, after determining that various States will evaluate these separate interests differently, the Court found the principle of ordered liberty does not prevent elected officials from regulating access to an abortion.<sup>48</sup> Therefore, the Court determined that the right to obtain an abortion is not a part of an ordered liberty and is not protected under the Due Process Clause of the Fourteenth Amendment.<sup>49</sup>

In addition, the Court found the right to obtain an abortion is not soundly rooted in any legal precedent.<sup>50</sup> The Court considered many of the precedents relied on by the *Casey* Court, including precedents involving the right to interracial marriage, the right to obtain contraceptives, and the right to not be sterilized without consent, all of which are rooted in the Fourteenth Amendment's Due Process Clause.<sup>51</sup> The Court also considered post-*Casey* precedents rooted in the Due Process Clause, such as the right to same-sex marriage.<sup>52</sup> However, despite these considerations, the Court found all of the aforementioned precedents are drastically different from cases involving abortion because, unlike abortion cases, none of the aforementioned cases dealt with the destruction of "potential life."<sup>53</sup> The Court held this stark difference prevents the aforementioned precedents from adequately supporting the right to obtain an abortion because the aforementioned cases

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43. *Id.* at 2252-53.

44. *Dobbs*, 142 S. Ct. at 2253.

45. *Id.* at 2246 (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019); *McDonald v. City of Chicago*, 561 U.S. 742, 764, 767 (2010); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

46. *Id.* at 2257.

47. *Id.*

48. *Id.*

49. *Dobbs*, 142 S. Ct. at 2257.

50. *Id.*

51. *Id.*

52. *Id.* at 2258.

53. *Id.*

do not pose the same critical moral question.<sup>54</sup> Therefore, the Court found the right to an abortion is not soundly based in other legal precedents and cannot be rooted in the Fourteenth Amendment's Due Process Clause.<sup>55</sup>

Lastly, the Court made brief mention of the argument that changes in American society required the Court to recognize a constitutional right for a woman to obtain an abortion.<sup>56</sup> The Court noted both those in favor and those in opposition of abortion have made important policy arguments.<sup>57</sup> However, they found that those in favor of the right to obtain an abortion failed to show the Court has the authority to weigh policy arguments in order to decide how abortion access should be regulated.<sup>58</sup> Therefore, the Court held that the States themselves have the power to weigh policy arguments and regulate abortion access as they see fit.<sup>59</sup>

Based on the above constitutional analysis and for the aforementioned reasons, the Court found the Constitution does not confer the right to an abortion, neither explicitly in its text nor impliedly under the Due Process Clause of the Fourteenth Amendment.<sup>60</sup>

### *iii. Doctrine of Stare Decisis Analysis*

Following the Court's constitutional analysis, the Court moved on to discuss whether the doctrine of *stare decisis* required the Court to uphold their decisions in both *Roe* and *Casey* and find the Constitution does, in fact, confer a broad right to obtain an abortion.<sup>61</sup> The doctrine of *stare decisis* is intended to prevent the Court from overruling a precedential decision without a significant justification and to promote stability in the law.<sup>62</sup> The Court considered five factors to determine whether the decisions of *Roe* and *Casey* should be overruled, including: "the nature of [the] error, the quality of [the] reasoning, the "workability" of the rules . . . imposed on the country, [the] disruptive effect on other areas of the law, and the absence of concrete reliance."<sup>63</sup> Ultimately, the Court determined that the none of the factors listed above weighed in favor of upholding the decisions of *Roe* and *Casey*.<sup>64</sup>

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54. *Dobbs*, 142 S. Ct. at 2258.

55. *Id.* at 2257.

56. *Id.* at 2258.

57. *Id.* at 2259.

58. *Id.*

59. *Dobbs*, 142 S. Ct. at 2259.

60. *Id.* at 2248.

61. *Id.* at 2261.

62. *Id.* at 2333-34.

63. *Id.* at 2265.

64. *Dobbs*, 142 S. Ct. at 2278.

First, the Court considered the nature of the error in deciding *Roe* and *Casey*.<sup>65</sup> The Court determined *Roe*’s decision was “egregiously wrong and deeply damaging.”<sup>66</sup> The Court stated the Court’s decision in *Roe* was outside the bounds of any reasonable interpretation of the United States Constitution and the decision improperly removed the issue of abortion access and regulation from the democratic process.<sup>67</sup>

Second, the Court considered the quality of the reasoning provided in the decisions of *Roe* and *Casey*.<sup>68</sup> The Court found *Roe* failed to properly support its decision in the text of the Constitution, the history of abortion laws, or the legal precedent set forth prior to deciding *Roe*.<sup>69</sup> In addition, the Court stated the weaknesses in *Roe*’s reasoning are well-known, seeing as the reasoning was largely abandoned in the *Casey* decision and was criticized even by those in support of its holding.<sup>70</sup>

Third, the Court discussed the workability of the decision in *Casey* and whether the “undue burden” test set forth by *Casey* is able to be applied in a consistent and predictable way.<sup>71</sup> The Court held *Casey*’s “undue burden” test unworkable because the test is riddled with ambiguous and vague terms and could have different impacts on different women for a large variety of reasons.<sup>72</sup> Additionally, the Court noted the “undue burden” test has resulted in many conflicts among the Circuit courts, further evidencing the test’s inability to be applied easily and consistently.<sup>73</sup>

Fourth, the Court addressed the effect the decisions in *Roe* and *Casey* have had on other areas of the law.<sup>74</sup> The Court stated *Roe* and *Casey* have worked to distort many legal doctrines and have led to the dilution of the standard for constitutional challenges.<sup>75</sup> In addition, the Court stated abortion cases, such as *Roe* and *Casey*, have led to the dilution of the third-party standing doctrine, traditional *res judicata* principles, traditional rules on the severability of unconstitutional provisions, and First Amendment doctrines and principles.<sup>76</sup>

Fifth, the Court addressed whether the reliance interests of the public will be disturbed by the overruling of *Roe* and *Casey*.<sup>77</sup> The Court explained

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65. *Id.* at 2265.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Dobbs*, 142 S. Ct. at 2266.

70. *Id.* at 2266, 2270.

71. *Id.* at 2272.

72. *Id.* at 2272-74.

73. *Id.* at 2274-75.

74. *Dobbs*, 142 S. Ct. at 2275.

75. *Id.*

76. *Id.* at 2275-76.

77. *Id.* at 2276.



reliance interests arise when advance planning by those affected is a necessity.<sup>78</sup> The Court further explained the *Casey* Court was unable to rely on traditional reliance interests and instead turned to a more intangible type of reliance, believing people made choices in their intimate relationships in reliance on the availability of an abortion.<sup>79</sup> The Court found this form of reliance interest unpersuasive and held it is not for the courts to decide the effect the reliance on the right to an abortion may have on women, but rather the duty of the legislature.<sup>80</sup> Therefore, the Court determined their decision to overrule *Roe* and *Casey* would not disturb the reliance interests of those affected, but would rather return the duty to decide how a particular regulation will affect individuals to the proper institutions – the legislatures.<sup>81</sup>

Based on the Court's consideration of each of the five aforementioned factors, the Court found the traditional factors used to determine if a precedential decision should be upheld did not support the upholding of *Roe* and *Casey*.<sup>82</sup> Therefore, the doctrine of *stare decisis* did not prevent the Court from overruling the decisions of *Roe* and *Casey*.<sup>83</sup>

#### *iv. Preservation of Public Approval Analysis*

Finally, the Court addressed whether it would tarnish the American people's respect for the law and the Court if they felt the Court reached a decision based on social and political pressures, rather than judicial precedent and principles.<sup>84</sup> The Court acknowledged the danger that may come with overruling controversial decisions for unprincipled reasons.<sup>85</sup> However, the Court ultimately decided the decision in *Roe* "inflamed" the national division of opinions and controversy surrounding the right to abortion and their decision in *Casey* exceeded the scope of the Court's authority.<sup>86</sup> Therefore, the Court found they are unable to allow their decision to be influenced by the way in which the American public may react and must stay within the bounds of their authority by interpreting the law as it is written and applying longstanding judicial principles.<sup>87</sup>

Based on the three above analyses performed, the Court ultimately held the decisions of *Roe* and *Casey* could not stand and must be overruled.<sup>88</sup> The

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78. *Id.*

79. *Dobbs*, 142 S. Ct. at 2276.

80. *Id.* at 2277.

81. *Id.*

82. *Id.* at 2278.

83. *Id.* at 2279.

84. *Dobbs*, 142 S. Ct. at 2278.

85. *Id.*

86. *Id.* at 2279.

87. *Id.*

88. *Id.*

Court found the Constitution does not confer the right to obtain an abortion, the doctrine of *stare decisis* did not require the Court to uphold the decisions of *Roe* and *Casey*, and the preservation of public opinion was not a consideration the Court needed to address in making their decision in the case at bar.<sup>89</sup> In so doing, the Court returned the authority to regulate abortion to the States and their respective legislative bodies.<sup>90</sup>

*v. New Standard of Review*

Following the performance of the above analyses, the Court offered a new standard of review to be used when determining whether a state abortion regulation can withstand a constitutional challenge.<sup>91</sup> The Court decided, based on precedents, the rational-basis standard of review is the appropriate standard for Constitutional challenges of state abortion regulations.<sup>92</sup> The rational-basis standard of review will allow the state to enact any abortion regulation, so long as there is a rational basis on which the legislature would believe the regulation would further a legitimate state interest.<sup>93</sup> The Court provided examples of state interests that may be legitimate in terms of abortion regulations which include, respect for and preservation of fetal life, reduction of fetal pain, “protection of maternal health and safety; [and] preservation of the integrity of the medical profession.”<sup>94</sup>

Under this newly announced standard of review, the Court held the Mississippi Gestational Age Act may stand.<sup>95</sup> The Court explained the Mississippi legislature’s interests in enacting the regulation were legitimate and provided a rational basis for the enactment of the regulation.<sup>96</sup> Therefore, under this new standard, the Court held the constitutional challenge of the Gestational Age Act must fail.<sup>97</sup>

*B. Concurring Opinion by Justice Thomas*

In his concurring opinion, Justice Thomas found an even more fundamental justification for overruling the decisions in *Roe* and *Casey*.<sup>98</sup> Justice Thomas argued the Due Process Clause of the Fourteenth Amendment guarantees only process – not substantive rights or liberties – and, therefore,

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89. *Dobbs*, 142 S. Ct. at 2248, 2278, 2279.

90. *Id.* at 2279.

91. *Id.* at 2283.

92. *Id.*

93. *Id.* at 2284.

94. *Dobbs*, 142 S. Ct. at 2284.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 2300 (Thomas, J., concurring).

cannot be used to protect the right to obtain an abortion, or any other substantive right.<sup>99</sup>

Justice Thomas provided three reasons in favor of abandoning the doctrine of substantive due process entirely.<sup>100</sup> First, he expressed the identification of the rights protected by substantive due process ultimately involves policy making, rather than a neutral, legal analysis.<sup>101</sup> Second, he stated the doctrine of substantive due process distorts other areas of constitutional law by requiring more justification from legislative bodies seeking to regulate the rights preferred by people, while requiring less justification for regulation of other rights.<sup>102</sup> Lastly, he argued substantive due process can lead to devastating consequences.<sup>103</sup>

To conclude, Justice Thomas stated it is his belief the Court correctly overruled *Roe* and *Casey* and he called upon the Court to eliminate the doctrine of substantive due process at its earliest opportunity.<sup>104</sup>

### C. Concurring Opinion by Justice Kavanaugh

In his concurring opinion, Justice Kavanaugh explained his views as to why *Roe* was wrongly decided and should be overturned.<sup>105</sup> Justice Kavanaugh stated it is his belief the Constitution takes a neutral position on the right to obtain an abortion, as it neither expressly allows nor expressly prohibits the obtainment of an abortion.<sup>106</sup> Justice Kavanaugh stated the Court's decision in *Roe* inappropriately took a position on the right to obtain an abortion and explained the Court's decision in the case at bar simply returned the Court and the Constitution to a neutral position by returning the authority to regulate abortion to the legislative bodies of the states and Congress.<sup>107</sup>

Additionally, Justice Kavanaugh explained he believes the doctrine of *stare decisis* does not prevent the Court from overruling the cases of *Roe* and *Casey*.<sup>108</sup> Justice Kavanaugh stated the Court should overrule a constitutional precedent when the precedential decision is egregiously wrong, has caused significant negative consequences, and when overruling the decision would not result in an upset of legitimate reliance interests.<sup>109</sup> He stated the decision

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99. *Dobbs*, 142 S. Ct. at 2301.

100. *Id.* at 2302.

101. *Id.*

102. *Id.* at 2303.

103. *Id.*

104. *Dobbs*, 142 S. Ct. at 2304.

105. *Id.* (Kavanaugh, J., concurring).

106. *Id.* at 2305.

107. *Id.*

108. *Id.* at 2307.

109. *Dobbs*, 142 S. Ct. at 2307.

in *Roe* was egregiously wrong because the Court overstepped their authority in order to take a position on an important policy issue.<sup>110</sup> Justice Kavanaugh argued the holding in *Roe* created significant negative consequences because it distorted the nation’s understanding of the Court’s role and harmed the state’s interest in protecting fetal life.<sup>111</sup> Therefore, Justice Kavanaugh agreed with the Court majority, believing that when the *stare decisis* factors are applied, *Roe* and *Casey* should be overruled.<sup>112</sup>

To conclude his concurring opinion, Justice Kavanaugh addressed concerns about how the decision in the case at bar may impact other precedents, as well as future decisions to be rendered by the Court.<sup>113</sup> Justice Kavanaugh assured the Court’s decision would not affect other precedents involving the right to obtain contraception, rights regarding marriage, or the ability of a woman to travel to another state to obtain an abortion.<sup>114</sup>

#### *D. Concurring Opinion by Chief Justice Roberts*

Chief Justice Roberts wrote a separate opinion, concurring only in the judgment.<sup>115</sup> In this separate opinion, Chief Justice Roberts expressed his agreement with the Court majority’s decision to discard the viability rule set forth by *Roe* under the doctrine of *stare decisis*.<sup>116</sup> Under a traditional *stare decisis* analysis, like the one performed by the Court majority, Chief Justice Roberts also found the viability rule created by the *Roe* Court to be unreasoned and unworkable, as well as that it failed to take the state’s legitimate interests in fetal life into account.<sup>117</sup>

While Chief Justice Roberts concurred in the Court’s decision to abandon *Roe*’s viability rule, he believed the principle of judicial restraint should have prevented the Court from overruling *Roe*.<sup>118</sup> Chief Justice Roberts explained the principle of judicial restraint requires the Court to first use the narrowest basis for a decision before considering the use of a broader basis for the same decision.<sup>119</sup> Citing Petitioner’s brief, Chief Justice Roberts explained the Court was not required to overrule the decisions of *Roe* and *Casey* to decide the issue of whether all pre-viability prohibitions on abortion are unconstitutional under *Roe*.<sup>120</sup> Chief Justice Roberts argued that in overruling

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110. *Id.*

111. *Id.*

112. *Id.* at 2308.

113. *Id.* at 2309.

114. *Dobbs*, 142 S. Ct. at 2309.

115. *Id.* at 2310 (Roberts, C.J., concurring).

116. *Id.*

117. *Id.* at 2312.

118. *Id.* at 2313.

119. *Dobbs*, 142 S. Ct. at 2313.

120. *Id.*

*Roe* the Court majority failed to exercise judicial restraint by using a broader basis for deciding the aforementioned issue when a narrower basis could have sufficiently answered the issue presented by Petitioner in their application for certiorari.<sup>121</sup>

To conclude his separate opinion, Chief Justice Roberts stated the Court's decision to overrule *Roe* and *Casey* created a "serious jolt to the legal system" and he believed the shock to the legal system would have been less drastic had the Court abandoned only *Roe*'s viability rule and allowed the basic right to obtain an abortion to stand.<sup>122</sup>

*E. Dissenting Opinion by Justice Breyer, Justice Sotomayor, and Justice Kagan*

Justices Breyer, Sotomayor, and Kagan authored a dissenting opinion.<sup>123</sup> In their separate opinion, the dissenting Justices criticized the Court majority's constitutional analysis, comparison of the right to obtain an abortion to other rights rooted in the Fourteenth Amendment, and *stare decisis* analysis.<sup>124</sup>

To begin, the dissenting Justices noted the majority considered whether the right to an abortion was recognized at the time the Fourteenth Amendment was ratified.<sup>125</sup> The dissenting Justices criticized this timeframe, pointing to the fact that even early common-law authorities did not find abortion to be a crime if the abortion occurred before the fetus had "quickened" or reached viability.<sup>126</sup> In addition, the dissenting Justices stated the majority's contention that the Fourteenth Amendment must be read today as it was read when it was ratified is flawed because women were not perceived as equals to men at the time the Fourteenth Amendment had been ratified.<sup>127</sup> To this point, the dissenting Justices quoted Chief Justice John Marshall, stating the Constitution is meant to "endure for ages to come" and it must adapt to the future, no matter if it's writers were able to envision such a future.<sup>128</sup> The dissenting Justices argued the text of the Fourteenth Amendment's Due Process Clause could evolve, while still remaining grounded in the principles and history of the Constitution and it is their belief the Court majority was incorrect to hold otherwise.<sup>129</sup>

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121. *Id.* at 2315-16.

122. *Id.* at 2316.

123. *Id.* at 2317 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

124. *Dobbs*, 142 S. Ct. at 2323, 2330-31, 2347.

125. *Id.* at 2323.

126. *Id.* at 2324.

127. *Id.* at 2325.

128. *Id.*

129. *Dobbs*, 142 S. Ct. at 2326.

Next, the dissenting Justices criticized the Court majority's comparison of the right to obtain an abortion to other rights rooted in the Fourteenth Amendment's Due Process Clause.<sup>130</sup>

The dissenting Justices noted the Court majority's assurance that the rights relied on in *Roe* and *Casey*, and the rights found subsequent to their decisions, would not be undermined.<sup>131</sup> However, pointing specifically to the concurrence authored by Justice Thomas, the dissenting Justices fear the Court majority's requirement that the Fourteenth Amendment be read to consider only those rights available at the time of its ratification may be used to undermine and overrule other rights rooted in the Fourteenth Amendment's Due Process Clause.<sup>132</sup>

Lastly, the dissenting Justices explained their disagreement with the Court majority's *stare decisis* analysis.<sup>133</sup> First, the Justices believe there is nothing unworkable about the undue burden standard established in *Casey*.<sup>134</sup> The dissenting Justices explained the undue burden standard applied to abortion regulations is similar to that applied in a variety of legal contexts and gives rise to no unusual complications.<sup>135</sup> Second, the dissenting Justices explained they believe there is no legal or factual change that has occurred since *Roe* or *Casey* that would undermine their holdings.<sup>136</sup> In fact, the dissenting Justices believe recent legal developments have only reinforced and strengthened *Roe* and *Casey* and their holdings.<sup>137</sup> The dissenting Justices found that no significant legal changes have undermined the *Roe* and *Casey* holdings because the Court has continued to rely on both decisions when deciding whether to recognize substantive rights under the Fourteenth Amendment in a wide variety of circumstances.<sup>138</sup> In addition, the dissenting Justices stated there are no factual developments that would undermine the decisions in *Roe* and *Casey*, seeing as women still experience the same physical, social, and economic consequences that come with pregnancy, whether the pregnancy be planned or unplanned.<sup>139</sup> Third, the dissenting Justices found *Roe* and *Casey* created significant reliance interests and the disruption of those interests would be overwhelming, as women have made significant life choices in their reliance on the protections conferred by *Roe* and *Casey* and the destruction of those rights will undoubtedly affect women

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130. *Id.* at 2330-31.

131. *Id.* at 2330.

132. *Id.* at 2331-32.

133. *Id.* at 2333.

134. *Dobbs*, 142 S. Ct. at 2335.

135. *Id.*

136. *Id.* at 2338.

137. *Id.*

138. *Id.*

139. *Dobbs*, 142 S. Ct. at 2335.

throughout the nation.<sup>140</sup> Lastly, the dissenting Justices stated the doctrine of *stare decisis* should have prevented the Court majority from overruling *Roe* and *Casey* and accused the Court majority of weakening the doctrine of *stare decisis* by departing from it for no legitimate reason, ultimately threatening the nation with legal instability.<sup>141</sup>

To conclude, the dissenting Justices expressed their fear that the decision rendered by the Court majority in the case at bar has done little but work to undermine the legitimacy of the nation's highest Court.<sup>142</sup> Therefore, Justices Breyer, Sotomayor, and Kagan, respectfully dissented with "sorrow for the millions of American women" who, because of the Court's decision, have lost a fundamental constitutional right.<sup>143</sup>

#### IV. ANALYSIS

##### A. Introduction

Abortion has long been one of the most contentious issues in the United States, both morally and politically, and it had long been the authority of the states to regulate access to abortion procedures.<sup>144</sup> However, in January of 1973, the Supreme Court decided the case of *Roe v. Wade* and held the right to an abortion was rooted in the Due Process Clause of the Fourteenth Amendment of the United States Constitution, stripping the states of their authority to regulate access to abortion as they saw fit.<sup>145</sup> Then, in 1992, the Court upheld the holding in *Roe* and reaffirmed that the Constitution's Fourteenth Amendment does confer the fundamental right to obtain an abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>146</sup> For nearly five decades, the Court has relied on *Roe* and *Casey* to review issues regarding abortion regulations.<sup>147</sup> Not only, however, has the Court relied on *Roe* and *Casey* to review State abortion regulations, the Court has relied on these decisions to find support for other fundamental rights rooted in the Fourteenth Amendment's Due Process Clause, such as the right to same-sex marriage.<sup>148</sup>

Despite this consistent reliance, the Court used the case of *Dobbs v. Jackson Women's Health Organization* to overrule the precedential decisions of *Roe* and *Casey*, which have stood for nearly fifty and thirty years,

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140. *Id.* at 2343.

141. *Id.* at 2348.

142. *Id.* at 2350.

143. *Id.*

144. *Dobbs*, 142 S. Ct. at 2240 (majority opinion).

145. *Id.* at 2240, 2242.

146. *Id.* at 2241, 2242.

147. *Id.* at 2319 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

148. *Id.*

respectively.<sup>149</sup> In *Dobbs*, the Court held the right to obtain an abortion is, in fact, not conferred by the Due Process Clause of the Fourteenth Amendment and the authority to regulate abortion, at any point in pregnancy, was returned to the states.<sup>150</sup>

The Court's decision to overturn *Roe* and *Casey* is likely to have devastating consequences, not only for the women of the United States, but for the many others who enjoy the multitude of fundamental rights rooted within the Due Process Clause of the Fourteenth Amendment. Therefore, this analysis will argue the majority holding in *Dobbs*: (1) failed to remedy the national division it criticized *Roe* for creating; and (2) poses a significant threat to other rights rooted in the Fourteenth Amendment's Due Process Clause.

*B. The Majority in Dobbs Failed to Remedy the National Division it Criticized Roe v. Wade for Creating.*

The decision the Court reached in *Dobbs* has failed to remedy the very national division it criticized *Roe* for creating. *Roe* was a landmark decision that found the right to an abortion was conferred by the Constitution and held any pre-viability abortion regulation would be found unconstitutional, which was later reaffirmed by the Court in *Casey*.<sup>151</sup> The decisions in *Roe* and *Casey* sought to strike a balance between the states' interests in protecting the unborn fetus and the rights of women to obtain an abortion.<sup>152</sup> While the Court's attempt to strike a balance between these aforementioned interests in *Roe*, and later *Casey*, did not prove to be entirely successful, these decisions ended much of the debate surrounding how much authority the states had to regulate a woman's access to abortion by providing a constitutionally protected right to pre-viability abortions.<sup>153</sup> However, with the decisions of *Roe* and *Casey* overruled by the Court's decision in *Dobbs*, the states are once again free to regulate abortion as they see fit.<sup>154</sup>

In the short amount of time since the Court rendered their decision to overrule *Roe* and *Casey*, a vast number of the states have scurried to either statutorily ban, or statutorily protect, the right to obtain an abortion.<sup>155</sup> In less than two months from the date the *Dobbs* decision was released, seventeen

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149. *Dobbs*, 142 S. Ct. at 2284.

150. *Id.*

151. *Id.* at 2241 (majority opinion).

152. *Id.* at 2317 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

153. *Id.*

154. *See Dobbs*, 142 S. Ct. at 2284 (majority opinion).

155. *See Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (last updated Aug. 17, 2022, 7:45 PM) [hereinafter *Tracking*].



states have enacted statutory abortion bans.<sup>156</sup> Out of these seventeen states, eight have enacted outright bans on abortion, with no exceptions for circumstances involving rape or incest.<sup>157</sup> In addition, nine states have either attempted to pass abortion bans, or have passed abortion bans that have yet to go into effect.<sup>158</sup> In contrast, fifteen states have enacted statutes protecting the right to an abortion, at least until the point of fetal viability.<sup>159</sup> Additionally, nine states and the District of Columbia have enacted statutes protecting the right to an abortion, but they have placed varying restrictions on abortion access.<sup>160</sup> While the Court may criticize *Roe* and *Casey* for failing at their attempt to end the national division surrounding abortion, the aforementioned information clearly indicates the *Dobbs* Court has also failed to ameliorate the controversy.

*C. The Holding in Dobbs Poses a Significant Threat to Other Rights Rooted in the Fourteenth Amendment's Due Process Clause.*

The Court majority's holding in *Dobbs* poses a significant threat to other rights that have found their footing in the Due Process Clause of the Fourteenth Amendment. The right to obtain an abortion is not the only right rooted in the Due Process Clause, or more specifically, in the doctrine of substantive due process.<sup>161</sup> In fact many of the rights so many Americans feel are fundamental to them are rooted in the Due Process Clause and doctrine of substantive due process, such as the right to interracial marriage, the right to same-sex marriage, the right to obtain and use contraception, and even the right to engage in private sexual intimacy.<sup>162</sup> However, despite the fact the Due Process Clause is home to rights so many of us hold dear, the doctrine of substantive due process and the rights secured by it are under attack.<sup>163</sup>

Traditionally, we have understood the Due Process Clause and the doctrine of substantive due process to prohibit the government from depriving a person of life, liberty, or property, without a sufficient right to do so.<sup>164</sup> However, some argue the doctrine of substantive due process has no

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Tracking, supra* note 155.

161. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257-58 (2022).

162. *See Loving v. Virginia*, 388 U.S. 1 (1967) (holding the right to interracial marriage is protected by the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding the right to obtain contraceptives is protected by the Constitution); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding the right to same-sex marriage is protected by the Constitution); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding the right to private, consensual acts is protected by the Fourteenth Amendment).

163. *See Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

164. *Substantive Due Process*, BLACK'S LAW DICTIONARY (11th ed. 2019).

place within the Due Process Clause of the Fourteenth Amendment.<sup>165</sup> Most concerning, Justice Thomas, a member of the *Dobbs* majority, believes the doctrine of substantive due process should be eradicated and the Court's other due process precedents should be reconsidered at the Court's "earliest opportunity."<sup>166</sup> Among the precedents Justice Thomas believes should be reconsidered are the precedents providing for the right to obtain contraceptives, the right to engage in private and consensual sexual actions, and the right to same-sex marriage.<sup>167</sup> The Court majority goes out of their way to assure their decision in *Dobbs* will not affect, threaten, undermine, or cast doubt on other precedents that confer constitutional rights through the Fourteenth Amendment's Due Process Clause.<sup>168</sup> Nonetheless, it is hard to have confidence in this assurance when a sitting member of the Court has voiced his intentions to use the holding in *Dobbs* to dismantle other constitutional rights one by one, decision by decision.<sup>169</sup>

In addition to the doctrine of substantive due process being threatened by this decision, the Court majority's decision to interpret the Fourteenth Amendment only to include the rights existing at the time of its ratification presents its own threats to the rights secured by the Due Process Clause.<sup>170</sup> As the dissent argued, if the Court can only interpret the Due Process Clause as including rights existing at the time of its ratification, then suddenly a significant quantity of rights are no longer protected by the Fourteenth Amendment and the Due Process Clause.<sup>171</sup> If the right to abortion, as the majority has found, cannot be protected by the Fourteenth Amendment because it was not protected at the time of the Amendment's ratification, then what is the Court to say about the right to interracial marriage?<sup>172</sup> What about the right to contraceptives?<sup>173</sup> Or, the right to same-sex marriage?<sup>174</sup> If the Court is to continue to interpret the Fourteenth Amendment as it did in *Dobbs*, none of these aforementioned rights are safe from attack, not even behind the shield of the United States Constitution.

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165. See *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

166. *Id.* at 2304.

167. *Id.* at 2301.

168. *Id.* at 2258 (majority opinion), 2309 (Kavanaugh, J., concurring).

169. See *id.* at 2304 (Thomas, J., concurring).

170. See *Dobbs*, 142 S. Ct. at 2332-33 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

171. *Id.*

172. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding the right to interracial marriage is protected by the Fourteenth Amendment).

173. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding the right to obtain contraceptives is protected by the Constitution).

174. See *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding the right to same-sex marriage is protected by the Constitution).

## V. CONCLUSION

In *Dobbs*, the Court overruled the precedent's set forth in *Roe* and *Casey* and held the Constitution does not protect the right to obtain an abortion, overruling nearly five decades of legal precedent.<sup>175</sup> In so holding, the Court returned the authority to regulate abortion to the states, allowing state legislatures to enact abortion regulations as they see fit.<sup>176</sup> The Court's decision in *Dobbs* is dangerous, as it fails to remedy the national division it criticizes *Roe* for creating while posing significant risks to the other fundamental rights rooted within the Due Process Clause of the Fourteenth Amendment.

The Court majority emphasized its decision in *Dobbs* will not undermine or cast doubt upon the other rights protected by the Fourteenth Amendment, so long as they are unrelated to abortion.<sup>177</sup> Do not be mistaken, as this assurance is at odds with the Court's reasoning, the decision to overrule *Roe* and *Casey* may not only affect women who desire to obtain an abortion, but has the potential to affect all of those who desire to enjoy the fundamental freedoms granted to them under the Due Process Clause of the Fourteenth Amendment.

ISABELLE G. HORN

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175. *Dobbs*, 142 S. Ct. at 2279 (majority opinion).

176. *Id.*

177. *Id.* at 2258 (majority opinion), 2309 (Kavanaugh, J., concurring).