

Signposts in Reproductive Rights: Legal Intersections

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Discussion Questions

1. How is the end of slavery connected to *Roe v. Wade*?
2. Which constitutional rights underlie *Roe v. Wade*?
3. How do courts' balance right to privacy, equal protection, and the state's interest in life?
4. How do different judicial philosophies, e.g., Originalism v. Living Constitution, effect how the Constitution is interpreted?
5. What federal constitutional rights are potentially implicated by the *Dobbs* decision?
6. What does it mean for Congress to "codify *Roe v. Wade*"?
7. What does it mean for Congress to pass a "national abortion ban"?
8. Can state laws in State A prohibit women from traveling to State B to obtain an abortion? Can State A impose penalties on individuals in State B who assist women seeking abortions?
9. How are state laws prohibiting abortion effecting other mental and physical healthcare?
10. What other constitutional rights are at risk after *Dobbs*?

Judicial Philosophies

- "Living Constitutions" refers to a judicial philosophy that holds that the Constitution was intentionally written using broad language and concepts that should evolve as society evolves. Judges believe it allows the fundamental values of the Constitution to keep pace with modern sensibilities. Judges look to text, history, social context, and court legitimacy when making decisions.
- Originalism encourages judges to interpret a constitutional provision referring to the original intent or original public meaning at the time it was created. Judges start with the words of the text and seek a reasonable interpretation of words at the time it was written.

Relevant Constitutional Text

- The decision in *Roe v. Wade* was grounded in substantive due process rights found in the 14th Amendment.
- The 14th Amendment holds: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; 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 law."
- Substantive due process is a theory that precedes from the 14th Amendment's guarantee of liberty. A broad grant of liberty is a substantive font of individual rights, rights that are not necessarily explicitly enumerated in the Constitution but are essential to the idea of liberty, e.g., the right to privacy and the right to travel.
- The 9th Amendment supports the idea of unenumerated rights: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Historical Context

- The Reconstruction Amendments (13th, 14th, & 15th) were intended to eliminate the vestiges of slavery.
- One of slavery's cruelest aspects was the denial of reproductive autonomy. Enslaved women could be raped with impunity (Note: a husband's rape of his wife was not criminalized until the 1970s), enslaved men and women could not marry, and enslaved families could be separated and sold as distinct pieces of property.
- Senator Jacob Howard, one of the drafters of the 14th Amendment, stated: "And what are the attributes of a freeman according to the universal understanding of the American people? Is a freeman to be deprived . . . of the right to of having a family, a wife, children, a home?"¹
- Under this original understanding of the 14th Amendment, "the right to control's one body, establish a family, and have children necessarily safeguard the right to abortion."²
- Since the 1960s, several cases were brought before the Supreme Court that relied on the 14th Amendment including *Griswold v. Conn.* (1965; contraception for married couples); *Loving v. Virginia* (1967; interracial marriage); *Eistenadt v. Baird* (1972; contraception for unmarried couples); *Turner v. Safely* (1987; prisoner's right to marry); *Lawrence v. Texas* (2003; same-sex sexual intimacy); and *Obergefell v. Hodges* (2015; marriage equality).
- These decisions all represent the idea that "liberty" necessarily includes the right for individuals to make decisions regarding their bodies and their families without interference from the state.

Roe's Framing v. Dobbs' Framing

- *Roe* held "that the personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation." The Court concluded that the State's interest in regulation trumped the women's interest in privacy at 24-weeks.
- After *Roe*, states were prohibited from denying woman access to an abortion in the first two trimesters. Anti-abortion advocates slowly whittled away at this right over the next 50 years.
- *Dobbs* held that "the Constitution does not confer a right to abortion. *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives."

Legal Implications

- **Caution:** the law is still very unsettled, and it is evolving.

- Because *Dobbs* “returned to the people and their elected representatives” the authority to regulate abortion, it is essential to include voting rights, voter suppression, and gerrymandering issues prevalent at the state level in the list of legal implications.
- Currently, 15 states have complete bans on abortion; 5 states have bans that are triggered between 6 and 20 weeks of pregnancy, 8 states have bans that have been blocked by court order; 25 states have laws that allow abortion from 24 weeks to no gestational limit.³
- Of the states with bans, fifteen offer no exceptions for rape, incest, or both (Alabama, Arizona, Arkansas, Florida, Kentucky, Louisiana, Michigan, Missouri, Ohio, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin). Seven explicitly allow abortions in cases of rape: Georgia, Idaho, Mississippi, North Dakota, South Carolina, Utah, and Wyoming. Of these seven, all but Mississippi allow abortions in cases of incest.
- Voters in five states—California, Kentucky, Montana, Vermont, and Michigan—will consider abortion initiatives in November.⁴
- States have imposed criminal and civil penalties for women who seek abortions as well as any person who assists a woman seeking an abortion. Assistance has been broadly defined to include performing an abortion, counseling a woman about options, driving a woman to obtain an abortion, paying for travel to obtain an abortion, and even hosting a website that contains information about abortion.
- A synagogue in Palm Beach, Florida challenged the Florida abortion ban arguing it violated the State’s right to privacy and freedom of religion. According to the lawsuit, deeply-rooted Jewish teachings indicate that abortion is permissible—even required—in some circumstances and Florida’s ban interfered with Jewish teachings.⁵
- Abortion bans have raised questions about the legality of IVF treatments and frozen embryos. If the law is written to establish personhood of fertilized egg or an embryo, then discarding an embryo could be considered a criminal act.⁶
- In Alabama, several pregnant women, accused of exposing their fetuses to drugs, were held in jail for months to “protect the fetus.”⁷
- The abortion bans also carry the threat that women will be investigated and prosecuted for pregnancy loss, stillbirths, and miscarriages. Governor Newsom recently signed AB2223, which bans such investigations in California.
- Congress members have floated two very different bills—one to codify the protections offered in *Roe* and one to impose a national ban on abortion. If *Roe* is codified, it means that state laws banning abortion would conflict with federal law. When a conflict occurs, federal law usually prevails. Likewise, if a national ban on abortion is implemented, then even in states like California, there could be limits on access to abortion.
- In his *Dobbs* concurrence, Justice Thomas raised the specter that other Supreme Court precedent should be revisited and perhaps overturned. He cited cases involving contraception, same-sex sexual intimacy, and marriage equality.

- In their dissent in *Dobbs*, Justices Breyer, Kagan, and Sotomayor recognized that these other rights are at risk. They wrote “no one should be confident that this majority is done with its work” because the other rights “are all part of the same constitutional fabric, protecting autonomous decision making over the most personal life decisions.”
- Some state legislatures (e.g., Missouri and Idaho) are targeting contraceptives. States moving in this direction contend that life begins at conception, therefore, emergency contraception such as Plan B, and even IUDs, are deemed abortifacients.⁸

Notes

1. <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=070/llcg070.db&recNum=609>
2. <https://www.theatlantic.com/ideas/archive/2021/11/roe-was-originalist-reading-constitution/620600/>
3. <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>
4. <https://www.cnn.com/2022/09/05/politics/2022-midterm-elections-abortion-ballot-measures>
5. <https://www.nytimes.com/2022/06/16/us/florida-abortion-law-judaism.html>
6. <https://www.nbcnews.com/health/health-news/states-say-abortion-bans-dont-affect-ivf-providers-lawyers-worry-rcna35556>
7. <https://www.al.com/news/2022/09/pregnant-women-held-for-months-in-one-alabama-jail-to-protect-fetuses-from-drugs.html>
8. <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/22/new-research-shows-state-restrictions-reduce-contraception-use>