

Bridging the Resource Gap Lecture

The US Supreme Court, Abortion, and *Dobbs v. Jackson Women's Health* (2022)

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0.00-0.25

Hi everyone. My name is Emma Long and today we're going to be talking about the US Supreme Court. More specifically, we're going to talk about the Court and the issue of abortion and try to understand why in a case called *Dobbs v. Jackson Women's Health* on 24 June 2022 the Court withdrew constitutional protection for abortion access in the US.

0.28-1.18

<image with newspaper headlines about *Dobbs*>

Dobbs involved a Mississippi law which banned abortion access after the 15th week of pregnancy, with very limited exceptions. This law deliberately violated earlier Supreme Court rulings (more on these in a moment) which established that states could not substantially restrict abortion access until after the point at which the foetus can live separately from the parent, known as "foetal viability", and currently placed at around 24 weeks of pregnancy. The aim of those who passed the law was to press the Supreme Court to accept the case and then to argue that the Justices should overturn the earlier rulings. This is what the Court did, the majority arguing (as you can see on the slide) that under the Constitution abortion access was a question for states and not the courts to decide.

<image of the text below/Supreme Court; text link to opinion>

"The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision ... It is time to heed the Constitution and return the issue of

abortion to the people’s elected representatives ... That is what the Constitution and the rule of law demand,” (*Dobbs*, 5-6).¹

1.21-1.46

It is very rare for the Supreme Court to overturn its earlier opinions when it interprets the Constitution. Estimates suggest that it has happened in less than 1% of cases in the Court’s history.² It is also almost unprecedented that the Court should ‘remove’ constitutional protection from a right previously recognised and say it is no longer protected. So how did we get to a point where the Court could make such an unusual decision?

1.49-2.51

<image of *Roe* ruling header; link to opinion; table of trimester framework>

Let’s start with the case that was overturned in *Dobbs*: *Roe v. Wade* (1973). Although often said that *Roe* granted women the right to an abortion, it actually did not. Justice Harry Blackmun’s majority opinion sought to balance the right of a woman to make choices about her pregnancy with the accepted state interest in protecting the life and health of its citizens. In the first trimester, when mortality rates for pregnancy and abortion were similar, the state had few reasons to interfere in a woman’s choice to terminate a pregnancy, the Court argued. In the second semester the state interests increased and laws regulating, but not banning abortion, might be acceptable. And in the third trimester, after the point of foetal viability, states could impose even stricter regulations. This was not an outright grant of a right to choose abortion which is important for understanding the political debate which followed.

¹ *Dobbs v. Jackson Women’s Health*, No. 19–1392, Slip Opinion, 5-6 (https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf).

² <https://theconversation.com/the-supreme-court-has-overturned-precedent-dozens-of-times-including-striking-down-legal-segregation-and-reversing-roe-185941>

2.54-4.58

<image of women's right protests from late 1960s>

Abortion did not become a political issue because of *Roe*: questions of reproductive choice were a big part of the women's rights movement that emerged in the US from the late 1960s. But the debate about abortion was largely at the state level. In the late 1960s and early 1970s, states including California and New York made access to abortion easier, others did not. There was debate and disagreement, although the level was nowhere near what we see today, and about 30 states still restricted abortion access in 1973. One of those states was Texas, which had an exception only to save the life of the mother, when Norma McCorvey,

<image of McCorvey, possibly with Weddington and Coffee>

pregnant with her third child, claimed that she had been made pregnant as a result of rape (later in life she admitted she had not been raped but thought that the claim would strengthen her case). Pro-choice lawyers Sarah Weddington and Linda Coffee saw a chance to challenge the Texas law using McCorvey's case, although in arguments she was known as "Jane Roe" to preserve her anonymity. In *Roe*, the Supreme Court not only struck down the Texas law but all similar laws across the country: they created a national solution to what had, to that point, been state-level debates. Because a constitutional decision by the Court can only be overturned by the Court itself or by a constitutional amendment, once the Court decided *Roe* it effectively stopped all state-level debates about abortion, prevented discussion about how the issue might be approached, and having polarised debate, left few options for either supporters or opponents of abortion rights to work out compromises. Even supporters of abortion access, including former Justice Ruth Bader Ginsburg, have argued that the Court's all-or-nothing approach may have done more harm than good to the broader cause.

5.01-6.11

<President Reagan meeting Jerry Falwell in the Oval Office, 15 March 1983>

The initial reaction against *Roe* came mostly from American Catholics. As the 1970s developed, conservative white Protestants also joined them in opposing *Roe*. They initially sought a constitutional amendment to overturn the ruling. But this was never likely and their strategy changed. One tactic was to get more conservative judges on the courts, especially the Supreme Court, and try to convince them to overturn *Roe*. This fit with the aim of many Republicans during the presidency of Ronald Reagan in the 1980s who wanted more conservatives on the nation's courts to challenge, restrict, and overturn some of the key decisions of the Warren Court era, the period in the late 1950s and early 1960s when the Court massively expanded protections for individual rights against the power of the state, often referred to as the "Rights Revolution." Thus the interests of religious and secular conservatives coincided and opposition to abortion became a potent mix of religious, moral, and political arguments that became part of what we now refer to as the "culture wars".

6.14-7.33

<image of *Casey* opinion header; link to case>

In 1992 in a case called *Planned Parenthood of Southeastern Pennsylvania v. Casey* anti-abortion campaigners thought they finally had a good chance to overturn *Roe*: Presidents Nixon and Reagan had made a number of key appointments to the Court and now there appeared to be a conservative majority which anti-abortion campaigners hoped would support their views. They were disappointed, but *Casey* is nevertheless a hugely important case. *Casey* arose out of campaigners' successes in getting state legislation to control and restrict abortion, a tactic used as well as targeting the courts. The result that most focus on is that the Court explicitly refused to overturn *Roe*, making it appear as a success for the pro-choice movement. However,

equally important, but less emphasised, is that the Justices also rewrote key parts of *Roe*. In *Casey*, the Court argued that laws which placed an “undue burden” on a woman’s access to abortion were unconstitutional: but what exactly was an undue burden as opposed to one which was acceptable? The Court opinion was not at all clear, and laid the foundations for *Dobbs*.

7.36-8.48

Crucially, *Casey* allowed states to pass laws severely restricting abortion access so long as it was not banned outright.

<slides on TRAP laws from Planned Parenthood website and/or newspaper headlines about other types of law>

So called TRAP laws, or targeted regulation of abortion providers, became popular: written in the language of protecting a pregnant person’s health, they primarily aimed to close abortion clinics. Other laws, so called “heartbeat bills” banning abortion after a foetal “heartbeat” could be detected and “personhood laws” holding that life begins at conception embodied the religious underpinnings of much anti-abortion activity. This, along with recognition in *Roe* and *Casey* that states had an interest in protecting potential life, were reflected in one of the key arguments in *Dobbs*. So successful were these laws that even before summer 2022, *Roe* was not a right all pregnant people could access. In Texas, for example, women often had to drive more than 300 miles to access such provisions making it all but impossible for the poor, the disabled, those unable to be absent from work, or those without transportation.

8.51-9.21

<image of reactions/protests after *Dobbs* reported>

So *Casey* opened the door for political anti-abortion activists to push for laws which imposed greater restrictions on abortion and which weakened *Roe*. The Court in *Dobbs* made that formal

and explicit, and pushed things further than before, but it did not come out of nowhere. Decades of legal and political campaigns had already undermined *Roe* even if it wasn't entirely clear until 24 June 2022.

In class activity 1 (discussion):

The majority opinion in *Dobbs v. Jackson Women's Health* argues that because abortion is not mentioned in the Constitution it is not protected by the Constitution. But rights such as the right to privacy and to marriage currently are protected by the Constitution according to previous Supreme Court rulings even though they do not appear in the Constitution either. Do you think that the Supreme Court was right in *Dobbs* to say that only rights clearly included in the Constitution should be protected? Why?

In class activity 2 (campaigns):

In the 2022 midterm elections, abortion access became a major issue, especially for the Democrats. Watch some of the following pro-life and pro-choice campaign ads from around the country and consider:

- How does each candidate represent the issues?
- What links do the ads make to issues other than abortion?
- Are these about informing voters or scaring them?
- How do these ads relate to the issues raised before the Supreme Court?

Possible ads:

Planned Parenthood, “Force of Nature” (pro-choice):

<https://www.youtube.com/watch?v=NIjEHFMFP-0&list=TLGG4H90Doi3UR0yMTEwMjAyMg>

Josh Shapiro (for Pennsylvania), “Big Plans” (pro-choice):

<https://www.youtube.com/watch?v=QPmswvL5tCI>

Women Vote Project, New Hampshire, “Live” (pro-choice):

<https://www.youtube.com/watch?v=AZXoN3alwFI&t=30s>

Tiffany Smiley (for Washington), “She Said” (pro-life):

<https://www.youtube.com/watch?v=t5lAs4l-Sr8>

Katie Britt (for Alabama), “Fight For Life” (pro-life):

<https://www.youtube.com/watch?v=LPVwJRd1j5U>