

Supreme Court and Dobbs – Accompanying Notes

Slide 1

Welcome everyone, to term one, week ten of Politics of the USA. This week we'll be looking at the role of the Supreme Court, with a specific focus on the recent overturning of *Roe v. Wade*.

Just a note to say that within this lecture, there will be mentions of abortion, and also discussions around segregation and racial discrimination.

Slide 2

So, in more detail, today we will be looking at the following areas of the Supreme Court. By the end of the session, we will have covered the powers of the Supreme Court, the current makeup of the Supreme Court and some momentous decisions that the Court has made over time. We will then look at how the Court goes about making decisions, and how it came to overturn *Roe v. Wade* in June.

Slide 3

There are two sources of power for the Supreme Court. The first is the Constitution, where the power is vested in the Court from Article III. Here is section one, which says that the SC should act as the final court in the land, like a final court of appeal that other cases are referred to, and that it sits above the other courts of the land. It states that Justices have to abide by 'good behaviour'.

The second source of power is a 'discovered' one, found in the ruling of *Marbury v Madison*. This is the power of judicial review, whereby laws created by Congress, or in individual states, can be checked for their constitutionality and struck down if the Court finds that they are unconstitutional. This can also apply to executive actions.

One thing to note here, is that the Court does not have the power to enforce decisions, this falls to the executive branch of government. We will see where that can cause problems.

Slide 4

So here is the most recent official picture of the Supreme Court justices, with nine justices. As of a week ago, this is now out of date, as Justice Breyer has retired – the fourth justice on the front row – and been replaced by Justice Ketanji Brown Jackson.

So, there are now five men and four women on the Court. Three have been appointed by Democratic presidents, and six by Republican presidents.

Justices have no term limits – they serve until they retire, or die in office. The benefits and drawbacks of lifetime appointments is something you might want to discuss in seminars, but the intention is so that justices are not ' beholden ' to anyone, and so that they are free to make decisions. The longest serving justice on the Court is Clarence Thomas, two from the left on the front row there, who has been in office since 1991.

Slide 5

So what are some of the most significant Supreme Court decisions, which have established important precedents in the United States?

The first listed here is *Dred Scott v Sanford* (1857), where it was ruled that no descendent of slaves could be a citizen of the United States. Then we have *Plessy v Ferguson* (1896) which ruled that the 14th amendment, 1868, of 'equal protection' allowed for segregation, with the justification of 'separate but equal'. This particular case was brought from Louisiana, where the Separate Car. This particular case was brought from Louisiana, where the Separate Car Act of 1890 stated that railroads had to have separate but equal accommodations for whites and African Americans.

Brown v Board of Education overturned this. It was a case against segregated schools, and the ruling argued that "separate educational facilities are inherently unequal". However, it took a long time for this to be enforced, because the Court doesn't have enforcement power. The Governor withdrew the national guard from supporting the enforcement, so President Eisenhower had to order federal troops into Little Rock, Arkansas, to enforce the ruling.

The *Miranda v. Arizona* (1966) established Miranda rights, from the fifth and sixth amendments (right against self-incrimination; rights to representation and a fair trial). This built on *Gideon v. Wainwright* (1963) which said you have a right to free counsel for a felony charge. However, on 23rd June, SC ruled police officers can't be sued under federal civil rights law for not reading rights. Violations of Miranda doesn't necessarily mean violation of AC rights.

Roe v. Wade (1973) – AC prohibits laws that severely restrict or deny access to abortion. Violates fourth amendment, right to privacy. 14th amendment of right to due process. Abortion restricted at the end of pregnancy.

Citizens United v FEC (2010) – political donations are an act of free speech, and corporations (non-profits, unions, associations) have AC rights.

Obergefell v Hodges (2015) – all states must issue marriage licenses to same-sex couples, and recognise marriages.

Slide 6

So how might justices go about making decisions? Pacelle (2015) discusses three key models that might indicate how justices make decisions.

- The Legal Model: this is where justices make a judgement on a piece of legislation or executive action by looking at precedent (or previous Court decisions) and a close reading of the Constitution.
- The Strategic Model: the idea that justices account for the fact that they want to maintain their legitimacy as an institution that knows it is unelected, and that they do not have any enforcement power. Justices aim to make decisions that are roughly in line with public opinion on particular issues, though with a lag. This is strategic, so that approval stays reasonably high for the Supreme Court.
- The Attitudinal Model: this is the idea that justices have attitudes, ideologies or political views that influence their decision making. [Segal and Cover]. This is what is meant by conservative and liberal justices – on a political spectrum. Be careful not to talk about justices as Democrats

and Republicans – they are not necessarily members of parties, though they can be registered party members.

The final concept is activism vs restraint. If justices are activist, they may interpret the Constitution in light of contemporary values and context. It means justices are more likely to impact policies, making decisions that some argue should be left to the elected branches. It may also mean going against precedent. Activism is usually associated with more liberal justices, but this is not always the case. *Roe v. Wade* is a famous case of judicial activism. Judicial restraint, on the other hand, involves a stricter reading of the Constitution – justices will not take any action if the case does not directly contravene the Constitution, and will largely adhere to precedent of previous cases. They are also much more likely to let lower courts have the final word. This is associated with more conservative justices.

Slide 7

We now move on to the recent overturning of *Roe v. Wade*. This is an image of pro-choice protesters marching through Manhattan in 1970, three years before the ruling.

Slide 8

How did the challenge to *Roe v. Wade* come about? With the Supreme Court becoming more ‘conservative’ since Trump’s three appointments of Justice Gorsuch, Kavanaugh and Coney Barret, many Republican-led states began to create legislation which would have gone against the ruling of *Roe v. Wade*, and thus would be unconstitutional as the decision stood. Some of these included reducing the period that someone could access abortion, others created very restrictive laws about where abortion clinics could be situated, effectively shutting down state access to abortion. These states included Louisiana, Texas, Missouri, and Georgia. They understood that these laws would get challenged in the courts, by eventually a case would end up having to be taken up by the Supreme Court. The case that was argued to the Supreme Court was that of *Dobbs v. Jackson Women’s Health Organisation*, from Mississippi. It was argued in December 2021. In May of this year, Justice Alito’s draft opinion was leaked, outlining that the Court was planning to overturn precedent of *Roe* and *Planned Parenthood*, and say that abortion legislation was a decision that should be made by elected officials, rather than the Court, and that the Constitution did not protect the right to access abortion. This ruling was formally released in June of 2022.

Slide 9

To give you a snap shot of the decision made: “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”.

Slide 10

What impact will this have on access to abortion in states across the US? This map here helps to show which states will spring into action now to restrict abortion. The states in dark blue have plans to restrict abortion once *Roe* was overturned. The states in turquoise blue are states where pre-*Roe* decision abortion bans are still on the books, but have not been enforced while this decision stood,

since 1973. And the light blue states of Oklahoma, Arkansas and Mississippi have both pre- and post-Roe v Wade laws that will trigger into action. So overall, at least 19 states are expected to trigger restrictive laws now.

Slide 11

Some are arguing now that the Court has become too political and needs reform. This is something you will be discussing in seminars, so when conducting your reading, do bear this in mind. Here are some of the arguments around whether the Court might need reform, and how this could take place.

Some argue that currently, the justices are independent and appointed by democratically-elected presidents, and because one might not like particular decisions does not mean that reform is necessary. Some argue that checks on the Court need to be implemented: you may have seen some political commentary about how Trump's nominees were asked whether Roe v. Wade was established precedent and should stand, and they said yes, indicating either they lied then or changed their minds.

Some argue for court expansion, to offset the conservative justices that have been appointed. Being able to appoint justices as a president is really just luck – although you will probably read about Obama's failed attempt to appoint a justice in his final year in office. Others suggest term limits.

To protect certain policy areas, the Constitution can be changed so that decisions are not left to the Supreme Court. So, for example, Dred Scott v. Sanford was overturned by the 13th and 14th amendments to the Constitution. However, as we looked at back in week two, it is very difficult to amend the Constitution, particularly in times of hyper-partisanship.

Slide 12

Finally, some questions to think about. First, has the SC become too political? Second, should the SC justices have term limits? And finally, should some 'policy areas' be off-limits to the SC?

Slide 13

To summarise, we have looked at the role of the Supreme Court, how they make decisions, the overturning of Roe v. Wade, and briefly whether anything about the Supreme Court needs to change.