



UNITED STATES SUPREME COURT DECISION BRIEF

Texas Conservative Coalition
Research Institute

*Dobbs v. Jackson Women's Health
Organization*

(Decided on June 24, 2022)

FACTS AND BACKGROUND

Mississippi enacted a statute prohibiting abortion in most cases once the fetus reaches a gestational age of 15 weeks. Jackson Women's Health Organization, an abortion clinic, sued in federal court to prevent enforcement of the statute, arguing that the ban violated *Roe v. Wade* and its progeny's prohibition on states curtailing the right to an abortion prior to the fetus reaching viability.

LOWER COURT RULING

The district court enjoined enforcement of the statute, holding that it was bound by U.S. Supreme Court precedent. The Fifth Circuit affirmed.

QUESTION PRESENTED FOR THE U.S. SUPREME COURT

The question before the Court was whether all pre-viability prohibitions on elective abortions are unconstitutional.

HOLDING BY THE U.S. SUPREME COURT

The Court held, by a 6-3 margin (including Chief Justice Roberts' concurrence in a more limited opinion), that the Mississippi statute is constitutional, overruling *Roe* and its progeny. The Court began its analysis by examining whether the Constitution grants a right to an abortion. *Casey v. Planned Parenthood*, a 1992 case, upheld *Roe* but altered the reasoning to support it. The *Casey* court grounded its decision in a general right to liberty under the 14th Amendment's Due Process Clause, which is discussed in a line of precedents referred to as the Court's "substantive due process" cases. As the court has long cautioned, recognizing unenumerated rights under substantive due process "has long been controversial." While the Constitution does recognize unenumerated rights, the Court limits those rights to those that are "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." But as the Court noted, abortion is not mentioned in the Constitution and there is no evidence in the nation's history that it was ever viewed as a fundamental right. It certainly

was not deeply rooted in the nation's history, nor implicit in the concept of ordered liberty. Indeed, three-quarters of states at the time the 14th Amendment was enacted (28 out of 37) made abortion a crime, and the others followed the common law, which restricted the right to an abortion. Of the nine other states, eight criminalized abortion by 1910. By the time *Roe* was decided, 30 states still banned abortion and the others placed restrictions on it that were more severe than those that would be allowed under *Roe*. Given this history, abortion proponents cannot claim that abortion is rooted in the history or traditions of the United States. If abortion is not a right guaranteed by the Constitution, then political disputes over it are settled in the same way that the American people solve other heated disputes: through the legislative process.

Moreover, abortion is distinguishable from the cases that *Roe* supporters cite as supporting a broad conception of liberty, such as those striking down state prohibitions against homosexual relations and same-sex marriage. Leaving aside the point that unrestrained individual autonomy would justify drug use and prostitution, among other things, abortion stands apart because it involves the destruction of fetal life.

The Court also rejected *Roe* supporters' appeal to stare decisis. While overturning precedent is a serious matter, the Court has done so before, and in important cases, such as *Brown v. Board of Education*. Several factors in the instant case argued for overturning precedent, most particularly the poor reasoning of *Roe* and *Casey*. As *Casey* acknowledged, *Roe*'s focus on viability and a trimester timeframe were arbitrary, with no grounding in the law. But *Casey* itself muddled the waters further, by inventing an "undue burden" test and grounding the right to an abortion in the 14th Amendment despite American history suggesting otherwise.

MEANING FOR TEXAS

The overturning of *Roe* and its progeny is one of the great conservative victories in the modern era, and a testament to the work of millions of dedicated people over the last five decades. The issue now returns to the states, to be decided through the normal legislative process. Texas, among other states, has prepared for a potential overturn of *Roe* by enacting a "trigger" law.ⁱ This statute will, subject to narrow exceptions, criminalize the performance of an abortion in Texas (other than by the pregnant woman herself) beginning 30 days after the "issuance of a United States Supreme Court judgment in a decision overruling, wholly or partly, *Roe v. Wade*."ⁱⁱ As Texas Attorney General (AG) Ken Paxton notes, "A judgment can issue in about a month, or longer if the Court considers a motion for rehearing."ⁱⁱⁱ But notably, the AG stated post-*Dobbs* that Texas statutes which predate *Roe* and were never repealed might be used as a basis by prosecutors to prosecute those performing an abortion, effective immediately.

The Legislature should focus on two issues in the abortion context after *Dobbs*. First, it should examine the state's adoption infrastructure and prepare for an increase in the number of women offering their child up for adoption. Second, the Legislature has enacted a number of provisions imposing civil liability or injunctions against individuals or government entities that aid pregnant women in procuring abortions, most notably Senate Bill 8 (87R; Sen. Hughes, et al.) and Senate Bill 22 (86R; Sen. Campbell, et al.). It can be anticipated that liberals around the United States post-*Dobbs* will form organizations

the purpose of which is to assist pregnant women in Texas in procuring abortions, most likely by paying for travel to abortion clinics outside Texas. The Legislature should consider what amendments, if any, should be made to these laws to ensure that the state's prohibition on abortion is not undermined.

ⁱ See House Bill 1280 (87R, Rep. Capriglione, et al.), codified as Chapter 170A of the Health & Safety Code.

ⁱⁱ Id.

ⁱⁱⁱ [https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory%20\(updated%20draft%2006.21.2022\)%20\(1\).pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=](https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory%20(updated%20draft%2006.21.2022)%20(1).pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)