

## **From *Roe* to *Dobbs*: The Fallen Road of Reproductive Liberty**

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*This paper examines the evolutionary change of reproductive rights throughout the legal precedents from *Roe* to *Dobbs*. From analyzing the development of the reproductive rights argument and its relation to the Due Process and Equal Protection Clause, this paper argues that while these cases seem to favor interpreting the Constitution in a more literal sense, they ironically drift away from the Fourteenth Amendment's original intention of protecting the rights of people. With an emphasis on judicial interpretations on the rights to due process and liberty in the Fourteenth Amendment, the author seeks to provide a connection between precedents and legislative definitions with their embodiment of societal and religious expectations, where these connections reveal a more promising basis for abortion rights – the Equal Protection Clause.*

### **Background**

Throughout American history, preserving the constitutional rights of people has been the focal point of many consequential Supreme Court decisions. From *Powell v. Alabama* (1932), to *Gideon v. Wainwright* (1963), to *Miranda v. Arizona* (1966), the ongoing fight over constitutional rights shaped decades of jurisprudence, particularly around the Due Process Clause of the Fourteenth Amendment. Multiple landmark Supreme Court rulings have gradually constrained the constitutional right to liberty in America. *Jacobson v. Massachusetts*, taking place in 1905, was the catalyst for a focus shift in the United State Supreme Court from economic

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liberty to bodily integrity, medical choice, and personal liberty.<sup>2</sup> In 1904, a state law passed in Massachusetts allowed cities to require smallpox vaccinations for their residents. The plaintiff Henning Jacobson was fined five dollars for refusal of vaccination. Jacobson sued the state of Massachusetts on the grounds that the state mandatory vaccination law violated his Fourteenth Amendment right to liberty with an unreasonable use of traditional police power.<sup>3</sup> The ruling of *Jacobson* upheld states' rights to enforce mandatory vaccination laws, affirming that individual liberty can be overruled for the betterment of the common good. The judgment of *Jacobson* initiated conversations surrounding personal liberty in the Supreme Court, which later in the 1960s and onward became central in reproductive rights cases.

Among pro-life supporters of the early 1900s, the common thought was that abortion is morally wrong because a fetus' life ought to be protected and prioritized over its mother's.<sup>4</sup> However, legal opinion shifted in the late 1960s when scholars started to value the well-being of pregnant women. For example, Daniel Williams in his journal *No Happy Medium* believed that expanding abortion access was in society's interests, as it allowed impoverished mothers to avoid raising children they could not financially support.<sup>5</sup> Despite opposition from pro-life advocates, early abortion liberalization bills garnered public support.<sup>6</sup> Interestingly, some pro-life advocates also believed that legalizing abortion could help address social issues like overpopulation and environmental concerns.<sup>7</sup> The clash of public and legal opinions fostered

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<sup>2</sup> *Jacobson v. Massachusetts* 197 US 11, 833 (1905).

<sup>3</sup> *Id.* at 834.

<sup>4</sup> Daniel K. Williams, *No Happy Medium: The Role of Americans' Ambivalent View of Fetal Rights in Political Conflict over Abortion Legalization*, 25 J. POLICY HIST. 42, 42 (2013).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*



further debates around abortion rights and its connection to liberty.

Justices' interpretations of the Fourteenth Amendment and its margins have made an impact on due process. These interpretations resulted in legislative restrictions on the exercise of reproductive rights, and various social impacts with respect to social welfare and healthcare regulations. From analyzing the development of the reproductive rights arguments and its relation to the Due Process and Equal Protection Clauses, this paper argues that while these cases seem to favor interpreting the Constitution in a more literal sense, they ironically drift away from the Fourteenth Amendment's original intention of protecting the rights of people.

The Court's focus on the Due Process Clause, including the right to liberty and privacy, resulted in the strengthening of reproductive rights. Relying on the Justices' interpretation of the Fourteenth Amendment, the Supreme Court in *Roe v. Wade* extended the reasoning of *Griswold v. Connecticut* (1965), as *Griswold* examined the legality of contraception and contraceptive procedures, stating that the liberty protected by the Due Process Clause included a woman's right to terminate a pregnancy.<sup>8</sup> From the interpretation of *Griswold*, Justice Stewart concurred with this precedent, recognizing that the Constitution was able to cover more freedoms than those that are "explicitly named in the Bill of Rights."<sup>9</sup> This extension included women's reproductive rights; as referenced by Justice Harlan, "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."<sup>10</sup> Under such circumstances, the Due Process

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<sup>8</sup> *Id.* at 227.

<sup>9</sup> *Roe v. Wade*, 410 US at 115.

<sup>10</sup> Anthony C Cicia, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 *FORDHAM LAW REV.*, 2242 (1996); *Roe v. Wade*, 410 US at 116.



Clauses both in the Fifth and Fourteenth Amendment protects the right to liberty, including the right to have an abortion based on the pregnant woman's choice. It also indicates the freedom to exercise one's right without the unreasonable intervention or intrusion of any state government.

### ***Roe v. Wade* - A Focus on Due Process, Liberty, and "Persons"**

In 1973, Jane Roe (fictional name to protect plaintiff's identity) filed a lawsuit against the Dallas County district attorney of Texas, Henry Wade, regarding a Texas law that made abortion illegal except under the order of a doctor.<sup>11</sup> Roe claimed that the Texas abortion statute was unconstitutional, violating a woman's constitutional right to privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.<sup>12</sup> To examine the statute's constitutionality, the Supreme Court justices, led by Chief Justice Warren E. Burger, considered whether a pregnant woman's choice to terminate her pregnancy is a fundamental privacy right protected by the Due Process Clause of the Fourteenth Amendment.<sup>13</sup> Hence, as written by Justice Blackmun, the majority's ruling was predominantly based on the interpretation of the Due Process Clause. The supporters of the Texas abortion statute cited the fetus' right to life based on the belief that a fetus should also be considered a "person" protected under the Fourteenth Amendment.<sup>14</sup> Over the years, the Supreme Court has defined a "person" in Section One of the Fourteenth Amendment as any human being "born or naturalized in the United States," extending to entities like corporations for property.<sup>15</sup> Although all above are protected by the Due Process and Equal Protection clauses, unborn fetuses are consistently excluded

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<sup>11</sup> *Roe v. Wade* 410 US 113, 113 (1973).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 114.

<sup>15</sup> *Roe v. Wade*, 410 US at 114.



from this protection, making it a contentious legal debate.<sup>16</sup> However, Justice Blackmun asserted that a fetus defined as a “person” by the Fourteenth Amendment lacks precedential support; therefore, such a claim should not stand. The Texas statute heavily relied on its argument of a potential fetal life, conveying that when considering the rights of a pregnant woman and her fetus, the rights of the fetus should not be placed at a subordinate level to the mother’s.<sup>17</sup> Blackmun questioned the validity of implementing the Equal Protection Clause, arguing not only that it makes the legal question more confusing, but also that the unborn fetus was never legally recognized as a “person.” According to Justice Blackmun and other justices in the majority, there was no indication that the definition of a “person” can be extended to any possible “prenatal application.”<sup>18</sup> Therefore, the Supreme Court decided that the Texas abortion statute was unconstitutional.

The self-conflicting nature of the Equal Protection Clause regarding reproductive rights is another reason why cases are focused more on the Due Process Clause. The Equal Protection Clause is typically used in discrimination cases between two or more groups of people, such as protecting individuals from gender-based discrimination.<sup>19</sup> In the context of reproductive rights, applying the Equal Protection Clause would require weighing the rights of women against those of fetuses. However, regardless of which side the justices favor, the Equal Protection Clause would inherently discriminate against the opposing party, contradicting its purpose of

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<sup>16</sup> *Meaning of Person in the Equal Protection Clause*, LII / LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/constitution-conan/amendment-14/meaning-of-person-in-the-equal-protection-clause>.

<sup>17</sup> *Id.* at 113.

<sup>18</sup> Paul Benjamin Linton, *Roe v. Wade and the History of Abortion Regulation*, 15 AM. J. LAW MED. 227, 229 (1989).

<sup>19</sup> Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY LAW J. 815 (2007).



eliminating discrimination. If the state's interest is to prioritize the potential life of a fetus, then women's rights would be constitutionally discriminated against.<sup>20</sup> A common counterargument regards the main concern of the Equal Protection Clause. According to Professor Siegel at Duke Law, being "selective in protecting potential life" is a form of discriminatory legal action the Equal Protection Clause itself aimed to eliminate.<sup>21</sup> Therefore, there can never be a definitive answer to whose life should be prioritized.

### ***Planned Parenthood v. Casey* - Conceptualizing Roe: Substantive Due Process and Liberty**

In the early 1990s, in *Planned Parenthood v. Casey*, Justices O'Connor, Kennedy, and Souter expressed skepticism toward the concept of "liberty" as defined in *Roe v. Wade*. While reaffirming *Roe*, the Justices in *Casey* believed that, while states should protect a woman's right to terminate their pregnancies as derived from the Fourteenth Amendment's Due Process Clause, they suspected that the concept of right to "liberty" should encompass a "substantive" nature, which can potentially lead to limitations for such rights.<sup>22</sup> Substantive rights is an umbrella term that refers to the liberties which the government cannot infringe upon without sufficient justification. Fundamental Rights is a branch of substantive rights that is protected by but not explicitly listed in the Constitution.<sup>23</sup>

Compared to *Roe*, *Casey* considered more aspects of pregnancy when setting out a somewhat less rigid line for reproductive rights. By referencing Justice Harlan's dissent in

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<sup>20</sup> Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA LAW REV. DISCOURSE 160, 163 (2013).

<sup>21</sup> *Id.*

<sup>22</sup> *Planned Parenthood of Southeastern Pa. v. Casey* 505 US 833, 833 (1992).

<sup>23</sup> *Substantive Due Process*, LII / LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/substantive\\_due\\_process](https://www.law.cornell.edu/wex/substantive_due_process).



*Poe v. Ullman* (1961), in which the Due Process Clause was said to protect all individuals from “arbitrary legislation” and the abuse of governmental power in pursuing constitutional freedom and liberties, *Casey’s* ruling recognized the “personal privacy” guaranteed by *Roe* was too broad.<sup>24</sup> While *Casey* upheld *Roe*, Justice O’Connor diverged from *Roe’s* ruling, especially in regard to how Blackmun categorized abortion rights as “fundamental.”<sup>25</sup> Justice O’Connor believed this categorization elevated the constitutional power of the right to liberty and granted individuals an “absolute” liberty. She argued that this kind of “absolute,” non-restrictive liberty is not protected by the Constitution, especially within the context of abortion and reproductive rights.<sup>26</sup> The concept of liberty overreach restrained not only government interference but also the exercise of the absolute right to liberty of individuals, particularly towards the absolute freedom of reproductive rights and abortion.

The Justices in *Casey* claimed that liberties under the Fourteenth Amendment are protected if recognized by the Bill of Rights, and if not so-recognized, by (in some cases) the Fourteenth Amendment.<sup>27</sup> This is supported by the reliance on the Equal Protection Clause in *Loving v. Virginia* (1967), which granted constitutionality to the right to interracial marriage free from discrimination, a right not explicitly stated in the Constitution.<sup>28</sup> Similarly, when the limit of rights is up to interpretation in the courts, in the context of abortion, states may restrict liberty through judicially reasoned interpretation.

As a consequence of *Loving*, the action to restrict a woman’s right to terminate pregnancy became a liberty protected by the Constitution. By replacing and overturning *Roe’s* “strict scrutiny standard of review,” the highest standard

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<sup>24</sup> *Poe v. Ullman* 367 US 497, 497 (1961).

<sup>25</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 US at 833.

<sup>26</sup> *Id.* at 834.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*



of judicial review, used to determine if a law is constitutional, with an “undue burden standard”, states’ restrictions of abortion only became unconstitutional if they caused unbearable obstacles for women when undergoing “pregnancy of [a] non-viable fetus.”<sup>29</sup> The undue burden standard examines whether a law has placed substantial obstacles in the path of a person seeking their right, in this case to abortion. To pass the strict scrutiny standard of review, the government must prove that the law established is narrowly tailored for a compelling state interest. This evaluation, as suggested by the Justices in *Casey*, should be based on a rational-basis review, requiring the state to justify its interest with a legitimate rationale.<sup>30</sup>

The court claimed that ultimately, protection of life can not outweigh individual liberty claims.<sup>31</sup> Women have the right to exercise choices on reproduction, as well as promoting their status in society to be treated equally, both economically and socially. Upholding *Roe*, the justices in *Casey* reaffirmed the right to terminate early-stage pregnancy.<sup>32</sup> Overall, under *Casey*, the Constitution protected women’s liberty to reproductive rights under the “undue burden test” and also protects states’ ability to pass reasonable laws regulating abortion without confronting women with “undue burdens.”<sup>33</sup> Therefore, reproductive rights cases rejected neither the equal protection clause nor the Due Process Clause when considering which was a more suitable basis under this circumstance. Rather, the judges in this case concluded that women's fertility rights and reproductive autonomy were more equally treated under the Due Process Clause.

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<sup>29</sup> *Id.* at 835.

<sup>30</sup> *Id.* at 836.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 837.

<sup>33</sup> *Id.*



***Dobbs - The Overrule of Roe and Casey***

However, the trend of gradually narrowing the interpretation of women's reproductive rights continued. In 2022, a Mississippi law called the "Gestational Age Act" prohibited all abortions with only a few exceptions. The Supreme Court ruling in *Dobbs v. Jackson* held that *Roe* and *Casey* must be overruled, as there is no reference to abortion rights in the Constitution, and the right to abortion is not explicitly protected by the Due Process Clause in the Fourteenth Amendment.<sup>34</sup> Justice Alito argued that both substantive and procedural Due Process protections for liberty have been overstated. Without an explicit constitutional basis, *Dobbs* rejected previous interpretations and instead sought to limit the recognition of individual liberty to those rights explicitly stated in the Constitution. Deriving this ideology from *Casey*, Justices in *Dobbs* assert that Liberty, as it pertains to the Fourteenth Amendment, does not include abortion rights.<sup>35</sup> This decision blurred the line between "women's liberty interest and state's interest in prenatal life" as the court declared that the scope of "liberty" is too broad and difficult to define.<sup>36</sup>

Through the claim that precedents have foreclosed the Equal Protection Clause argument, Justices on the Supreme Court established that the issues around reproductive rights are not "sex-based classification", and granting the right to a procedure that "only one sex can undergo" does not "[heighten] constitutional scrutiny."<sup>37</sup> In other words, the prevention of abortion does not violate the Equal Protection Clause because the ban can not be deemed unreasonable. Once again, the Equal Protection Clause was sidelined as a defense in reproductive rights cases, despite claims that abortion bans disproportionately and intentionally affect one sex. Ultimately,

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<sup>34</sup> *Dobbs v. Jackson Women's Health Organization* 597 US 215 (2022).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*



the ruling of *Dobbs* left the abortion right for the states to decide, which resulted in the limitation of reproductive rights in many states.

On the basis of the Due Process Clause and the Equal Protection Clause, reproductive rights cases predominantly focused on the Due Process Clause as a support for the Judges' arguments. From *Roe* to *Casey*, the Due Process Clause protected individuals' rights from unreasonable intrusions of the state and was open to interpretation as to what right falls under its protection. Due to its ambiguous nature, and through analyzing precedents and traditions, the Due Process Clause included rights that were not explicitly written in the Constitution.<sup>38</sup> Because it seeks to protect tradition, it often looks backward and allows greater flexibility in interpretation.<sup>39</sup> From the inclusion of abortion rights, restriction of absolute liberty, and the eventual restraint on reproductive rights, both pro-life and pro-choice positions find that the Due Process Clauses would be able to provide a certain extent of constitutional evidence.

On the contrary, the Equal Protection Clause was not at the center of reproductive rights cases due to its nature of seeking equality between individuals.<sup>40</sup> This made it difficult to apply in abortion cases, which often involve conflicting interests: between a pregnant woman and the fetus, or between a woman's liberty and the state's interest in intervening. Some Justices noted that the Equal Protection Clause aligns more with gender based classifications, but its application in abortion cases often requires courts to choose between conflicting parties, making itself contradictory in such contexts.<sup>41</sup>

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<sup>38</sup> Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection*, 55 UNIV. CHIC. LAW REV. 1161, 1175 (1988).

<sup>39</sup> *Id.*

<sup>40</sup> Linton, *supra* note 14 at 229.

<sup>41</sup> *Dobbs v. Jackson Women's Health Organization*, 597 US at 217.



However, precisely because of the flexibility of the Due Process Clauses, the shift of interpretation can have significant consequences for reproductive rights cases. The emphasis on Due Process in past reproductive rights cases ultimately contributed to the *Dobbs* decision, which delegated the right to abortion to individual states.<sup>42</sup> Departing from the original intention of the constitution, the jurisprudence gradually narrowed the literal interpretation of the due process clause in the Fourteenth Amendment, deterring the development of its humanized analysis. These intentions, according to Justice Brandeis's dissent in *Olmstead* that argued for a broad privacy right, are to "secure conditions favorable to the pursuit of happiness."<sup>43</sup> Furthermore, this accentuation is highly likely to affect how future cases regarding reproductive rights will be ruled, as the American legal system is heavily based on stare decisis, a legal doctrine that means to follow precedents and stand by things decided.

From a sociological perspective, the debate around reproductive rights and the Fourteenth Amendment reinforces gender stereotypes, subjecting women to roles imposed by the state.<sup>44</sup> While Justice Blackmun warned in *Roe* that invoking the Equal Protection Clause can risk reinforcing gender-based assumptions and stereotypes, experience now shows that it is the better grounds on which to base a Constitutional argument for abortion rights.<sup>45</sup> Social impact can shape public opinion and influence the healthcare industry, affecting medical fees and accessibility to procedures.<sup>46</sup> The gendered impact of reproductive rights cases' rulings play a significant role in the effect of a women's right to control her own body".

Ultimately, the right to abortion should be safely regulated but not prohibited or eliminated. However, the legal

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<sup>42</sup> Linton, *supra* note 14 at 229.

<sup>43</sup> *Olmstead v. United States* 277 US 438, 438 (1928).

<sup>44</sup> Siegel and Siegel, *supra* note 20.

<sup>45</sup> *Roe v. Wade*, 410 US at 113.

<sup>46</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 US at 834.



doctrines and precedents in the United States interpreted the Constitution in diverse approaches, sometimes drifting away from the intention of the Constitution drafters. Under such circumstances, rights are limited, and many are taken away, this includes the life-saving abortion rights. There is no panacea for the issue debated around abortion rights, and safe abortion should be a right protected under the Fourteenth Amendment of the Constitution.

