The Courts and Political Controversy

POLI 104I

Where are we going?

- 6/27 - the relationship between law and politics.
- 6/29 - incorporation (OB2 – 4a)
- 7/4 - incitement (OB2 – 5a)
- 7/6 - obscenity (OB2 – 5b (first half))
- 7/11 - executive power (OB1 – 4a-d)
- 7/13 - election law (OB1 - 8c)
- 7/18 – threats & offensive speech (OB2 – 5b (second half))
- 7/20 - guns (OB2 365-387 + Bruen)
- **7/25 - privacy (OB2 – 11 + Dobbs)**
- 7/27 - review

Reading for 7/25

- privacy (OB2 – 11)
- privacy and reproductive freedom (OB2:1232-1285)
  - Griswold v. Connecticut
  - Roe v. Wade
  - Planned Parenthood of Southeastern Pennsylvania v. Casey
  - Dobbs v. Jackson [posted under today's module]
- privacy and personal autonomy (OB2:1286-1311)
  - Lawrence v. Texas
  - Cruzan by Cruzan v. Director, Missouri Department of Health
  - Washington v. Glucksberg
  - Vacco v. Quill

Constitutional Amendments

- 1st: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
- 3rd: No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.
- 4th: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- 5th: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

Constitutional Amendments

- 5th: [continued] …nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
- 9th: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
- 14th: [1868] Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or 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 laws.

Privacy (background)

- “A right of privacy is not specifically provided for in the Constitution or the Bill of Rights” (OB2:1228).
- Cooley, *Law of Torts* (1888): the “right to be let alone” [negative liberty].
- Boyd v. United States (1886): 4th and 5th amendments apply “to all invasions on the part of the government of its employees of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging g of his drawers, that constitutes the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty and private property.”
- Gilbert v. Minnesota (1920): private instruction of pacifism in the home protected by First Amendment.

Privacy (background)

- “Between 1890 and 1941, state courts in twelve states recognized a right of privacy; the number increased to eighteen by 1956 and then to more than thirty-one states by 1960” (OB2:1229).
- NAACP v. Alabama (1958): associational privacy protected by the First Amendment.
- Griswold v. Connecticut (1965): the right of privacy is found in the “penumbras” of the First, Third, Fourth, Fifth and Ninth Amendments (applies to the states via the 14th).
- Katz v. United States (1967): reasonable expectation of privacy protected by Fourth Amendment (see also Terry v. Ohio, 1968).
- Stanley v. Georgia (1969): private possession of obscene material protected by the First Amendment.

Privacy (reproductive freedom)

- Skinner v. Oklahoma (1942): eugenics-based sterilization of habitual criminals violates 14th Amendment (equal protection clause).
  - Marriage and reproduction are “basic civil rights” and to deprive someone of them is to withhold a “basic liberty.”
- See also Loving v. Virginia (1967), Zablocki v. Redhail (1978).

Privacy (reproductive freedom)

- Griswold v. Connecticut (1965): decided 7-2; reversed.
- Background: [A Connecticut law] “banned the use of any drug, medical device, or other instrument in furthering contraception. A gynecologist at the Yale School of Medicine, C. Lee Buxton, opened a birth control clinic in New Haven in conjunction with Estelle Griswold, who was the head of Planned Parenthood in Connecticut. They were arrested and convicted of violating the law, and their convictions were affirmed by higher state courts. Their plan was to use the clinic to challenge the constitutionality of the statute under the Fourteenth Amendment before the Supreme Court.”
- Question Presented: “Does the Constitution protect the right of marital privacy against state restrictions on a couple's ability to be counseled in the use of contraceptives?”

Privacy (reproductive freedom)

- Griswold v. Connecticut (1965): decided 7-2; reversed.
- Holding: “A right to privacy can be inferred from several amendments in the Bill of Rights, and this right prevents states from making the use of contraception by married couples illegal.”
- “While the Court explained that the Constitution does not explicitly protect a general right to privacy, the various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy. Together, the First, Third, Fourth, and Ninth Amendments create the right to privacy in marital relations. The Connecticut statute conflicted with the exercise of this right and was therefore held null and void.”

Privacy (reproductive freedom)

- Griswold v. Connecticut (1965): decided 7-2; reversed.
- Majority (Douglas): rights may include (by implication) secondary rights that make the exercise of the express guarantees “fully meaningful.”
- “…while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful...The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance....Various guarantees create zones of privacy.”
- “…the right of privacy which presses for recognition here is a legitimate one...older than the Bill of Rights - older than our political parties, older than our school system.”

Privacy (reproductive freedom)

- Griswold v. Connecticut (1965): decided 7-2; reversed.
- Majority (Douglas): “The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Privacy (reproductive freedom)

- Griswold v. Connecticut (1965): decided 7-2; reversed.
- Majority (Douglas): “The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.”
- “Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.“…Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”

Privacy (reproductive freedom)

- Griswold v. Connecticut (1965): decided 7-2; reversed.
- Concurrence (Goldberg): “I...agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court...and by the language and history of the Ninth Amendment.”
- “The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”
- “While this Court has had little occasion to interpret the Ninth Amendment, 6 "[i]t cannot be presumed that any clause in the constitution is intended to be without effect.”” [canon of construction]

Privacy (reproductive freedom)

- Griswold v. Connecticut (1965): decided 7-2; reversed.
- Concurrence (Harlan): “In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 . For reasons stated at length in my dissenting opinion in Poe v. Ullman, *supra*, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.”
- Concurrence (White): “In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment.”

Privacy (reproductive freedom)

- Griswold v. Connecticut (1965): decided 7-2; reversed.
- Dissent (Black): “I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used...For these reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.”

Privacy (reproductive freedom)

- Griswold v. Connecticut (1965): decided 7-2; reversed.
- Dissent (Black): “The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.”
- Eisenstadt v. Baird (1972): MA law forbidding use of contraceptives by married people violates the right to privacy [interpreted here as an individual right].

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Background: “In 1970, Jane Roe (a fictional name used in court documents to protect the plaintiff’s identity) filed a lawsuit against Henry Wade, the district attorney of Dallas County, Texas, where she resided, challenging a Texas law making abortion illegal except by a doctor’s orders to save a woman’s life. In her lawsuit, Roe alleged that the state laws were unconstitutionally vague and abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.”
- Question Presented: “Does the Constitution recognize a woman's right to terminate her pregnancy by abortion?”
- Holding: “Inherent in the Due Process Clause of the Fourteenth Amendment is a fundamental “right to privacy” that protects a pregnant woman’s choice whether to have an abortion. However, this right is balanced against the government’s interests in protecting women's health and protecting “the potentiality of human life.” The Texas law challenged in this case violated this right.”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Procedural Background: “A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford.”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Majority (Blackmun): “The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); id., at 460 (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, 381 U.S., at 486 (Goldberg, J., concurring).”
- “It is…apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”

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- “It is…apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Majority (Blackmun): “The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”
- “In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia(1969); in the Fourth and Fifth Amendments,...in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484 -485; in the Ninth Amendment, id., at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment...These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia (1967); procreation, Skinner v. Oklahoma (1942); contraception, Eisenstadt v. Baird (1972); family relationships...and child rearing and education...”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Majority (Blackmun): “This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”
- “On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree…As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Majority (Blackmun): “As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly…[w]e need not resolve the difficult question of when life begins.”
- “…the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling.”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Majority (Blackmun): “With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact…that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”
- “With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Majority (Blackmun): “Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.”
- Concurrence (Stewart): “the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Dissent (Rehnquist): “I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case.”
- “If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective.”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Dissent (Rehnquist): “applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.”
- “The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental...”

Privacy (reproductive freedom)

- Roe v. Wade (1973): decided 7-2; affirmed.
- Dissent (White): “With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.”
- “The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.”

Privacy (reproductive freedom)

- Maher v. Roe (1977): “In the wake of Roe v. Wade, the Connecticut Welfare Department issued regulations limiting state Medicaid benefits for first-trimester abortions to those that were "medically necessary." An indigent woman ("Susan Roe") challenged the regulations and sued Edward Maher, the Commissioner of Social Services in Connecticut.”
- “In a 6-to-3 decision, the Court held that the Connecticut law placed no obstacles in the pregnant woman's path to an abortion, and that it did not "impinge upon the fundamental right recognized in Roe." The Court noted that there was a distinction between direct state interference with a protected activity and "state encouragement of alternative activity consonant with legislative policy." Holding that financial need alone did not identify a suspect class under the Equal Protection Clause, the Court found that the law was "rationally related" to a legitimate state interest and survived scrutiny under the Fourteenth Amendment.”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Background: “The Pennsylvania legislature amended its abortion control law in 1988 and 1989. Among the new provisions, the law required informed consent and a 24 hour waiting period prior to the procedure. A minor seeking an abortion required the consent of one parent (the law allows for a judicial bypass procedure). A married woman seeking an abortion had to indicate that she notified her husband of her intention to abort the fetus. These provisions were challenged by several abortion clinics and physicians. A federal appeals court upheld all the provisions except for the husband notification requirement.”
- Question Presented: “Can a state require women who want an abortion to obtain informed consent, wait 24 hours, if married, notify their husbands, and, if minors, obtain parental consent, without violating their right to abortion as guaranteed by Roe v. Wade?”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Plurality: “It must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts.”
- “First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.”
- “Second is a confirmation of the State's power to restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger the woman's life or health.”
- “And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Plurality: “when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability…; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation…; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine….; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, e.g., Burnet, supra, 285 U.S. at 412 (Brandeis, J., dissenting).

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Plurality: “the sustained and widespread debate Roe has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for examination, and in each instance the result reached by the Court accorded with the principles we apply today.”
  - “The first example is that line of cases identified with Lochner v. New York, 198 U.S. 45 (1905), which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation.”
  - “The second comparison that 20th century history invites is with the cases employing the separate-but-equal rule for applying the Fourteenth Amendment's equal protection guarantee. They began with Plessy v. Ferguson, 163 U.S. 537 (1896), holding that legislatively mandated racial segregation in public transportation works no denial of equal protection…”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Plurality: “Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896.”
- “The underlying substance of [the Supreme Court’s] legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required.”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Plurality: “Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.””
- “We conclude the line should be drawn at viability, so that, before that time, the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of stare decisis. Any judicial act of line-drawing may seem somewhat arbitrary, but Roe was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition.”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Plurality: “The second reason is that the concept of viability, as we noted in Roe, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can, in reason and all fairness, be the object of state protection that now overrides the rights of the woman.”
- “Though [a] woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed.”
- “We reject the trimester framework, which we do not consider to be part of the essential holding of Roe.”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Plurality: “The conclusions reached by a majority of the Justices in the separate opinions filed today and the undue burden standard adopted in this opinion require us to overrule in part some of the Court's past decisions, decisions driven by the trimester framework's prohibition of all pre-viability regulations designed to further the State's interest in fetal life.”
- “To the extent Akron I and Thornburgh find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with Roe's acknowledgment of an important interest in potential life, and are overruled.”

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Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Plurality: “Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion…”
- “The unfortunate yet persisting conditions we document above will mean that, in a large fraction of the cases in which 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Plurality: “We next consider the parental consent provision. Except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian) provides informed consent as defined above…”
- “Subsection (12) of the reporting provision requires the reporting of, among other things, a married woman's "reason for failure to provide notice" to her husband. 3214(a)(12). This provision in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal. Like the spousal notice requirement itself, this provision places an undue burden on a woman's choice, and must be invalidated for that reason.”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Concurrence/Dissent (Blackmun): “[F]ive Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages.“
- “I join Parts I, II, III, V-A, V-C, and VI of the joint opinion…”
- “THE CHIEF JUSTICE's criticism of Roe follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy.”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Dissent (Rehnquist): “We think…that the Court was mistaken in Roe when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny.”
- “The joint opinion…cannot bring itself to say that Roe was correct as an original matter, but the authors are of the view that the immediate question is not the soundness of Roe's resolution of the issue, but the precedential force that must be accorded to its holding.”
- “Instead of claiming that Roe was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of stare decisis.

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Dissent (Rehnquist): “Roe decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. Roe decided that abortion regulations were to be subjected to "strict scrutiny," and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. Roe analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework.”
- “In our view, authentic principles of stare decisis do not require that any portion of the reasoning in Roe be kept intact.”
- “Apparently realizing that conventional stare decisis principles do not support its position, the joint opinion advances a belief that retaining a portion of Roe is necessary to protect the "legitimacy" of this Court.”

Privacy (reproductive freedom)

- Planned Parenthood of Southeastern Pennsylvania v. Casey (1992): decided 5-4
- Dissent (Scalia): “A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense.”
- “The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." Ibid. Rather, I reach it…because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.”

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Background: “In 2018, Mississippi passed a law called the “Gestational Age Act,” which prohibits all abortions, with few exceptions, after 15 weeks’ gestational age. Jackson Women’s Health Organization, the only licensed abortion facility in Mississippi, and one of its doctors filed a lawsuit in federal district court challenging the law and requesting an emergency temporary restraining order (TRO). After a hearing, the district court granted the TRO while the litigation proceeded to discovery. After discovery, the district court granted the clinic’s motion for summary judgment and enjoined Mississippi from enforcing the law, finding that the state had not provided evidence that a fetus would be viable at 15 weeks, and Supreme Court precedent prohibits states from banning abortions prior to viability. The U.S. Court of Appeals for the Fifth Circuit affirmed.”

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Question Presented: “Is Mississippi’s law banning nearly all abortions after 15 weeks’ gestational age unconstitutional?”
  - The Supreme Court granted certiorari to determine: ““"Whether all pre-viability prohibitions on elective abortions are unconstitutional.”“

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Holding: “The Constitution does not confer a right to abortion; Roe v. Wade, 410 U.S. 113, and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, are overruled. Justice Samuel Alito authored the majority opinion of the Court.”
- “The Constitution does not mention abortion. The right is neither deeply rooted in the nation’s history nor an essential component of “ordered liberty.”
- The five factors that should be considered in deciding whether a precedent should be overruled support overruling Roe v. Wade and Planned Parenthood v. Casey: (1) they “short-circuited the democratic process,” (2) both lacked grounding in constitutional text, history, or precedent, (3) the tests they established were not “workable,” (4) they caused distortion of law in other areas, and (5) overruling them would not upend concrete reliance interests.”

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Majority (Alito): "We hold that *Roe* and *Case*y must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."
- "The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy."

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Majority (Alito): "*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division."
- "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505 U. S., at 979 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand."

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Majority (Alito): “We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe*’s “central holding” based solely on the doctrine of *stare decisis*, but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based.”
- “We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. First, we explain the standard that our cases have used in determining whether the Fourteenth Amendment’s reference to “liberty” protects a particular right. Second, we examine whether the right at issue in this case is rooted in our Nation’s history and tradition and whether it is an essential component of what we have described as “ordered liberty.” Finally, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.”

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Majority (Alito): “Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed “potential life.” *Roe*, 410 U. S., at 150 (emphasis deleted); *Casey*, 505 U. S., at 852. But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other States may wish to impose tight restrictions based on their belief that abortion destroys an “unborn human being.” Miss. Code Ann. §41–41–191(4)(b). Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Majority (Alito): "*Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but "raw judicial power," *Roe*, 410 U. S., at 222 (White, J., dissenting), the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."
- "the Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process."

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Majority (Alito): "Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey*, we must address one final argument that featured prominently in the *Casey* plurality opinion.
- The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures."
- "This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work."

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Majority (Alito): “We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.”
- “Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history.”
  - A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity”…It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests”

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Majority (Alito): “These legitimate interests justify Mississippi’s Gestational Age Act.”
- “We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.”

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Concurrence (Thomas): “Thomas argued that the Court should go further in future cases, reconsidering other past Supreme Court cases that granted rights based on substantive due process, such as Griswold v. Connecticut (the right to contraception), Obergefell v. Hodges (the right to same-sex marriage), and Lawrence v. Texas (banned laws against private sexual acts). He wrote, "Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents.”””
- Concurrence (Kavanaugh): Kavanaugh “stated that it would still be unconstitutional to prohibit a woman from going to another state to seek an abortion under the right to travel, and that it would be unconstitutional to retroactively punish abortions performed before Dobbs when they had been protected by Roe and Casey.”

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Concurrence (Roberts): “Roberts wrote separately, concurring in the judgment, in that he believed the Court should reverse the Fifth Circuit's opinion on the Mississippi law and that "the viability line established by Roe and Casey should be discarded." Roberts did not agree with the majority's ruling to overturn Roe and Casey in their entirety, finding it "unnecessary to decide the case before us". He suggested a more narrow opinion to justify the constitutionality of Mississippi's law without addressing whether to overturn Roe and Casey. Roberts also wrote that abortion regulations should "extend far enough to ensure a reasonable opportunity to choose, but need not extend any further." He said that the Court should "leave for another day whether to reject any right to an abortion at all."”

Privacy (reproductive freedom)

- Dobbs v. Jackson (2022): decided 6-3; reversed and remanded.
- Dissent (Breyer, Kagan, Sotomayor): “The right Roe and Casey recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.”
- “[N]one of the cases the majority cites is analogous to today’s decision to overrule 50- and 30-year-old watershed constitutional precedents that remain unweakened by any changes of law or fact.”