# Roe v. Wade – A History

There is one abortion clinic in the entire State of Mississippi, in Jackson. In 2018, the Mississippi legislature passed a law banning almost all abortions after the 15th week of pregnancy. (The exceptions are medical emergency or severe fetal abnormality; the law does not provide exceptions for pregnancies resulting from rape or incest). In signing the bill into law, Mississippi governor Phil Bryant stated, "We'll probably be sued here in about a half hour, and that'll be fine with me. It is worth fighting over."

*Gov. Bryant*

As Gov. Bryant predicted, the day the Mississippi law was to go into effect, Jackson Women's Health Organization, Mississippi's only abortion clinic, filed a lawsuit in federal court challenging the law's constitutionality and requesting an order temporarily halting the law from going into effect while the case was decided. The defendant in the case (the person the abortion clinic sued) is Thomas Dobbs, a Mississippi health official, responsible for the enforcement of the abortion law. The case is named *Dobbs v. Jackson Women's Health Organization*.

At the trial court level, the state of Mississippi argued that the law was constitutional because recent scientific advancements suggest that fetuses can sense outside stimulation, including pain, at only twelve weeks. In deciding in favor of the abortion clinic and against the Mississippi law, the trial court applied the standard for fetal "viability" that was set forth in the 1973 decision in *Roe v. Wade*, and its 1992 follow-up decision in *Planned Parenthood v. Casey*. These Supreme Court decisions infamously established an unfettered constitutional right to an

abortion any time before the so-called "viability" of a fetus, which is commonly taken to be around 24 weeks (i.e., when presumably the fetus is "viable," or able to survive outside the mother's womb). The trial court in *Dobbs* held that the law violated the "due process rights" of women seeking abortions in Mississippi in violation of the *Roe* and *Casey* decisions.

*Fetus at 23 weeks*

Mississippi appealed that decision, and the intermediate appellate court (called "The Fifth Circuit Court of Appeals") affirmed the lower court's decision, holding that the Supreme Court decisions in *Roe* and *Casey* unequivocally created a right to an abortion any time within the six-month "pre-viability" period. This meant that the lower court's grant of the plaintiff's request for a temporary restraining order – halting the law from going into effect until the issue could be fully resolved on appeal – would stand.

Mississippi then petitioned the U.S. Supreme Court to review the case, and the Supreme Court agreed to hear the appeal. (The Supreme Court does not have to hear every case that is appealed to them, and often refuses to do so, for any of several reasons.) The Supreme Court agreed to address the question of whether all pre-viability prohibitions on abortions were unconstitutional.

The Supreme Court heard oral arguments on December 1, 2021. Oral argument provides an opportunity for a Court to ask the opposing sides to a lawsuit questions in an effort to clarify the issues before the Court decides the case. Those issues were first raised and argued in depth in writings submitted by the parties to the Court, called "briefs." In cases of

significant social impact, non-parties to the litigation – called *amici curiae* – may also submit briefs for the Court's consideration. Several *amici* have filed briefs in the *Dobbs* case in support of both sides, including the US Conference of Catholic Bishops. The Supreme Court is expected to hand down its decision in June or July this year.

***How did we get here?*** *Dobbs* is part of a well-thought out plan to get a case before the Supreme Court that might prompt the Court to overturn *Roe v. Wade*'s almost 50-year reign of tyranny against the unborn. A similar law in Texas, passed around the same time, called the "Fetal Heartbeat law," is also making its way through various legal challenges. That law bans abortions after a fetal heartbeat is detected – around six weeks. The timing of this legal opportunism coincides with a major ideological shift on the Court, with the death of the "liberal" Justice Ginsberg, and three recent appointments to the Court by President Donald Trump – presumably of "conservative" and pro-life justices.

But the history of *Roe v. Wade* – the primary case being challenged by *Dobbs* – goes back to the constitutional founding of the United States.

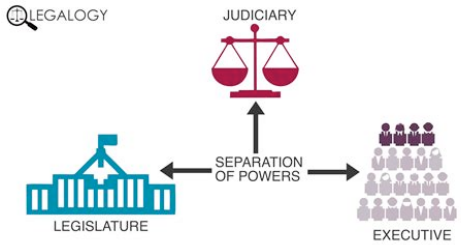
The first question that may come to mind is how and why the Supreme Court gets to decide an issue like this. Is it in the Constitution? If not, shouldn't it be a matter for an elected legislature to decide, instead of a group of unelected lawyers? Or why don't the individual states get to decide their own abortion laws? Why does the federal government, and more specifically the Supreme Court, get to decide this issue for the whole country?

To answer this question, we need to know about the federal system set up by the Constitution, and the role it gives to the Supreme Court; or, as the case may be, the role appropriated by the Court to itself, with regard to resolving certain types of legal disputes. With that threshold question answered, we can then address the question of how the Court reached its decision in *Roe*, one of the most divisive and controversial decisions in U.S. legal history, and whether there was a legitimate legal basis for the decision. In other words, should *Roe* be overruled, and if so, on what legal basis?

(This implicates the issue of *stare decisis* – "to stand with respect to what has been decided"; i.e., the jurisprudential rule that prior decisions of an appellate court are binding on the court and cannot be undone except in the most exceptional circumstances. The first question in that vein is whether *Roe* and *Casey* qualify at all as *stare decisis* [binding precedent]. It has been suggested that these cases may have been so wrongly decided that they have no binding force on the Court. There is a good case to be made for that. Alternatively, the precedential value of *Roe* and *Casey* may be reconsidered and undone in light of new developments in our understanding of fetal development and/or philosophical and legal definitions of a human person. In either case, *Roe* and *Casey*, as *stare decisis*, have a built in inertia or resistance to being overruled simply by the fact that they are long-standing decisions

of the Supreme Court. *Dred Scott*, the other worst decision in American history, was only around a few years before the 14th Amendment to the Constitution undid it. *Roe v. Wade* has been around for almost 50 years.)

Returning to the issue: Why does the Supreme Court get to decide this? Recall that the U.S. Constitution sets up a national (federal) government based on separation of powers among the three branches of government – the executive (president), the legislative (Congress) and the judicial branches (the Supreme Court and any other courts Congress creates).




Separation of powers, also called a system of "checks and balances," has been described as intentional inefficiency. As history repeatedly shows, an efficient centralized authority can be and extremely dangerous thing.


At the same time it establishes this national government, the Constitution also creates, and expresses the intention of preserving, a ***federalist*** system where the individual states maintain a large part of their sovereignty and cede that sovereignty to a centralized federal government in only specified and limited areas. This division of power – between state governments and the federal government – is meant to provide protection against an overreaching national government.

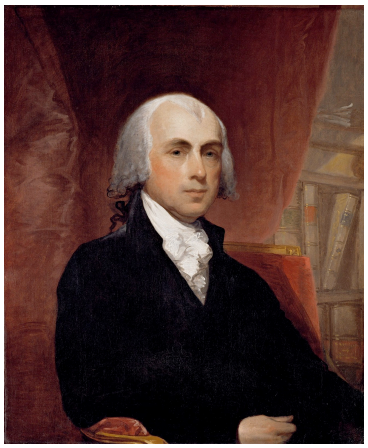
In order to get the States to agree to ratify the Constitution, it was required that the Bill of Rights be appended to the Constitution, granting various specified freedoms to citizens and restricting government actions against individuals. As we'll see, the original Bill of Rights and later amendments to the Constitution, are vital elements of the jurisprudential background of *Roe v. Wade*.

The Constitution is divided into Articles that define and limit the roles of the three branches of government. Article II deals with the powers of the executive branch. Article I sets limits on what Congress can do. While states have very broad authority to pass all sorts of laws for the common welfare, the Constitution limits the ***federal*** government's power to pass laws regulating individual persons to very specific and enumerated areas – such as those involving interstate commerce. In essence, Congress cannot pass any law it wishes; but any laws Congress passes must be specified in the Constitution as a type of law Congress has authority to enact. States are under no such restrictions (except as their own constitutions dictate). This is why, for example, gun laws are generally speaking state laws and not federal laws. It is also why the abortion and other laws implicated in *Dobbs* are always state laws.

Article III defines and limits the role of the federal courts. Note that each state has its own system of courts. Article III of the U.S. Constitution has nothing to do with state courts. Article III is the shortest article dealing with the three branches of government. It doesn't say a lot. ***It does <u>not</u> say that the federal courts, or the Supreme Court, has the right to interpret and apply what the Constitution says.*** But in *Roe v. Wade* (and innumerable other cases before and after), the Supreme Court did just that. In fact, when most people think of the Supreme Court, that's all they think the Court does.

But if the Supreme Court does not get that power from the text of the Constitution, where does it get it? The story begins when John Adams loses his re-election bid to Thomas Jefferson in the 1800 election.

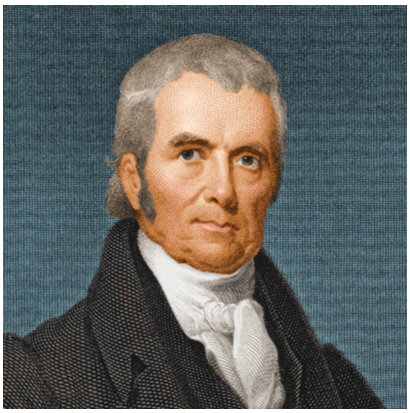
In 1801, just before leaving office, Adams appointed a bevy of his political allies to key positions (mostly judges). It was a clear attempt to undermine the incoming Jefferson administration. The commission for one of those appointments – a man named Marbury – had not been delivered to the appointee when Jefferson took office, and Jefferson ordered his secretary of state – James Madison – not to deliver it.



*Madison*

Marbury applied to the Supreme Court for something called a "writ of mandamus" – a request that the Court order Madison to deliver Marbury's commission to him.

From this rather petty political squabble, Chief Justice John Marshall penned the most important and influential legal opinion in U.S. history. The decision was *Marbury v. Madison*, decided in 1803.



*Marshall*

Marshall used Jefferson's dispute with Marbury as an opportunity to establish the principle of judicial review – giving the Supreme Court, and federal courts in general, authority to interpret the Constitution (which, as already noted, is a function not actually specified in the Constitution). Judicial review essentially gives the Supreme Court the power to dictate to the executive and legislative branches which of their actions are or are not consistent with the Constitution, and therefore which acts are valid or invalid.

The way Marshall went about this was quite brilliant, albeit technical and arcane. He first held that Madison's refusal to deliver the commission was in fact illegal – Marbury had a right to the commission and Madison had a duty to deliver it. The proper and normal remedy for Madison's refusal would be for the Court to order him to deliver the commission to Marbury. But first the Court looked closely at the law Congress had enacted giving the Supreme Court jurisdiction over this type of case (i.e., involving writs of mandamus).

This is where it gets interesting. Marshall concluded that the act of Congress had given the Supreme Court greater jurisdiction than the Constitution allowed, and therefore that the Act was unconstitutional; which meant the Court could **not** order Madison to deliver the commission, because the Constitution did not give it the power to do so.

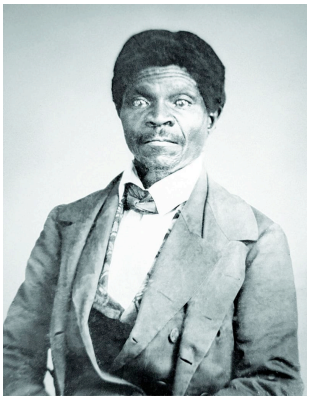
With an irony that is nothing less than sublime – Marshall struck down the law that had tried to give the Supreme Court too much power. I.e., he used an extra-constitutional power to invalidate a law that gave the Court greater jurisdiction than the Constitution allowed. In doing so he bestowed on the Supreme Court the essentially limitless power – not enumerated in the Constitution – to invalidate any laws the Court deemed to be in conflict with the Constitution. So in denying itself the power to decide Marbury's dispute as being beyond its constitutional purview, the Court simultaneously gave itself the power to determine the validity of any laws passed by Congress, and even of executive actions (such as its recently striking down the presidential vaccine mandate).

Marshall's decision in *Marbury v. Madison* is ultimately what allowed the Court to decide *Roe v. Wade*, and is why the Supreme Court gets to decide whether Mississippi's abortion law is constitutional, or must be struck down. It's worth knowing that, while Congress cannot grant the Supreme Court more power than the Constitution gives it, Congress can pass laws, and has done so, limiting what cases the Supreme Court can and cannot decide. A pro-life Congress could conceivably exclude state laws prohibiting or restricting abortion from the Supreme Court's jurisdiction.

Subsequent Supreme Court decisions would give the Court authority to review **state** laws that violated certain provisions of the Constitution (such as the abortion laws in *Roe*, *Casey*

and *Dobbs*). But it's interesting to note that the doctrine of judicial review was hardly applied for most of the 19th century. Not until after the Civil War, and the 14th Amendment to the Constitution and subsequent civil rights movements, did Marshall's doctrine of judicial review come into full force.

*Dred Scott v. Sandford*, decided in 1857, shares with *Roe v. Wade* the dubious distinction of being among the worst judicial decisions in U.S. history. There are compelling arguments that its holding – that the Constitution in no way contemplated the possibility of citizenship for former slaves – was an important factor precipitating the civil war. After the disaster of the war, Congress passed the 13th, 14th and 15th Amendments to redress the injustices of historical slavery in the U.S.: The 13th Amendment prohibited slavery everywhere in the U.S. and the 15th gave former slaves the right to vote. The 14th Amendment, adopted in 1868, had as its immediate purpose the protection of former slaves from unequal treatment in the southern states by Jim Crow laws and the like. It has expanded far beyond that original purpose and has become the primary constitutional source and main vehicle for the creation, promulgation and protection of individual civil rights. The relevant language of the 14th Amendment is:



*Dred Scott*

> *"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."*

This key language – called the "Due Process Clause" and the "Equal Protection Clause" is expressly a restriction on what ***states*** can do, unlike the rest of the Bill of Rights, which limits

***federal*** power. (The amendment was soon interpreted to also limit federal power, based on similar language in the 5th Amendment.) In fact, prior to the adoption of the 14th Amendment, the Bill of Rights was held not to restrict state power, but only federal power. With the passage of this amendment, both state and federal governments had to play by the same rules (for the most part). The 14th Amendment also gave Congress authority to pass laws related to civil rights – authority it did not have before 1868. (Recall the earlier discussion about the Constitution limiting what types of laws Congress could pass.) The 14th Amendment therefore represents the constitutional locus and primary source of "civil rights" law in the U.S.

The Due Process Clause bars the government (state or federal) from depriving a person of life, liberty or property "without due process of law." "Due process of law" means one of two somewhat different things. Its main meaning – having to do with process or procedure – requires that no one can suffer a detriment at the hands of government without first having been given proper notice of the government's claim and an opportunity to respond to it. Main examples of this have to do with being property notified of a legal claim against you before a court can issue a judgment affecting your freedom or property.

But "due process" has always also had a non-procedural, or "substantive" component. "Due process" can mean protection of any rights and protections enumerated elsewhere, such as in the Bill of Rights. More broadly, "due process" has come to encompass all rights that can be considered "fundamental, basic, indisputable and firmly rooted in principles of justice." Such fundamental interests often derive from the natural law, or from long-standing traditions of English law (which themselves often reflect the natural law). They include the right to marry, the right raise and educate one's children as one sees fit, as well as specifically enumerated

rights such as the rights to free speech, free association, and the free exercise of religion. A law interfering with these fundamental rights is said to violate due process.

Over time the Court established standards of review to apply to due process (and equal protection) claims. Standards of review are rules a court follows when deciding a case. The two main standards are called "rational basis review" and "strict scrutiny." Rational basis review allows the court to strike down laws only if they are irrational or arbitrary. It is extremely deferential. Under this standard, a law need only have some rational and non-arbitrary basis related to a legitimate government interest for the law to be upheld. Treating felons and non-felons differently with regard to voting rights is an example of a law that would likely pass rational-basis review. Laws almost always survive this standard of review intact.

Strict scrutiny was first applied to discrimination based on racial classifications. It is the least deferential. Under strict scrutiny, there must be some compelling justification for a law that discriminates based on race, not just some non-arbitrary basis, and the law must be narrowly drafted to achieve its purpose. If a law is subject to strict scrutiny, as a practical matter, it will almost always be struck down.

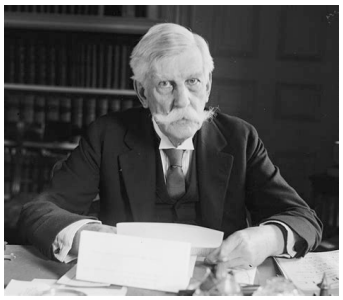
Strict scrutiny is important in this discussion because it also applies to laws implicating fundamental rights and due process violations. Therefore, a law that interferes with a fundamental right will only survive a constitutional challenge if (i) it has some compelling and important justification and (ii) it restricts the right in the least possible manner and only insofar as necessary to achieve the state's compelling interest.

During the Progressive Era of the early 20$^{th}$ century several laws infringing on fundamental rights relating to family and procreation were challenged under the due process

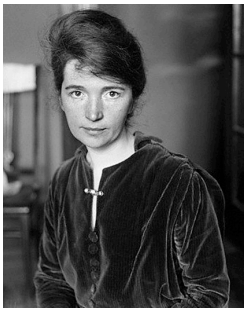
clause. One of the earliest cases to apply strict scrutiny to a fundamental right was *Pierce v. Society of Sisters of the Holy Name of Jesus and Mary*, decided in 1925, which was a challenge to an Oregon law requiring all children to attend public school. The Supreme Court held the law violated parents' fundamental due process rights to raise their own children. This fundamental right to family autonomy would, over time, morph into a right to privacy (a right not specified in the Constitution).

In contrast, in *Buck v. Bell*, decided in 1927, Justice Oliver Wendell Holmes held that compulsory sterilization of the mentally ill did not violate due process. The decision was motivated by contemporary theories of eugenics (Margaret Sanger, founder of Planned Parenthood, supported the decision). *Buck v. Bell* shows how prevailing ideologies and activism can influence Supreme Court decisions.

*Carrie Bell (left)*



*Oliver Wendell Holmes*



*Sanger*

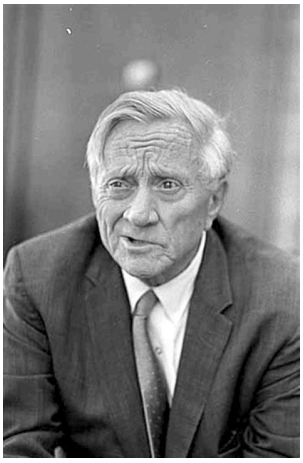
These early due process cases do not yet recognize any fundamental rights with regard to reproduction. This changed in 1942 with *Skinner v. Oklahoma*, which challenged a law that repeat criminal offenders could be sterilized. The Court struck down the law on an equal protection claim because it did not apply to white-collar criminals. (The defendant was a chicken thief.) The Court held such a distinction was irrational and arbitrary; it also recognized

a fundamental due process right to procreate. With *Skinner* "reproductive rights" become a due process concern with constitutional implications.

The "sexual revolution" beginning in the 1960s became fertile ground for the recognition or creation of fundamental rights subject to due process protection. *Poe v. Ullman* (1961) was a case challenging a 19th-century Connecticut law prohibiting the use of contraceptives, and making it illegal to dispense advice about the use of contraceptives. The Supreme Court declined to decide the case for lack of "ripeness" – i.e., there was no actual dispute to decide because the law was never, and not ever likely to be, enforced.

However, four years later, in *Griswold v. Connecticut* (1965), the defendant, a population control advocate and an executive at Planned Parenthood, forced the issue by openly declaring her violation of the law, which forced the State of Connecticut's hand to prosecute her.

*Griswold*



*Justice William O. Douglas wrote the Opinion of the Court in* Griswold. *He would later join the majority decision in* Roe v. Wade.

The importance of *Griswold* cannot be overestimated. It is the foundation for *Roe v. Wade*. The Court struck down the Connecticut law, arguing that there was a fundamental right to ***marital privacy***, and, as such, the state could not dictate the conduct of a married couple

when it came to their intimate activity. The fundamental right to privacy was not found in the Constitution or the Bill of Rights – at least not explicitly. Nor could the Court locate such a fundamental right in the natural law or English common-law tradition. Quite the contrary, there is no legal tradition of an inviolable right to complete privacy, as many legitimate laws infringe on a person's privacy (e.g., NJ's ban on tinted car windows and tax laws requiring financial disclosure). The dissenting Justices pointed this out, rejecting such a right to privacy as having no legal basis and as a dangerous foundation for creating rights.

So the Court had to get creative. It argued that the marital privacy right, though not specifically enumerated in the Constitution, was like a shadow ("penumbra"), that was cast by "emanations" coming from certain rights specified in the Bill of Rights, such as the right to free association (1st Amendment); the right not to have soldiers quartered in your home (3rd Amendment); the protection against unreasonable searches and seizures (4th Amendment); and the right against self-incrimination (5th Amendment).

"Penumbras" that "emanate" from the Bill of Rights is poetic, not legal language. Nevertheless, the Court used this as a basis to justify its conclusion that the privacy of the marital relationship deserved the highest regard, and that the Connecticut law improperly interfered with that newly-created privacy right. It is notable that the Court suggested a ban on manufacturing or selling contraceptives would not run afoul of the Constitution, since that would in no way interfere with marital privacy.

But *Griswold*'s supposed high regard for the sanctity of marriage was soon seen to be a thin façade. In *Eisenstadt v. Baird*, decided in 1972, the Court completely ignored its prior esteem for marital privacy, and held that a Massachusetts law banning the ***sale*** of

contraceptives was unconstitutional because it discriminated against ***unmarried*** persons. The right to marital privacy had morphed into a right of complete personal autonomy in matters of sexual activity. *Eisenstadt*, like *Griswold*, was a deliberately set-up case – violation of the law was publicly flouted to force a prosecution so the law could be challenged.

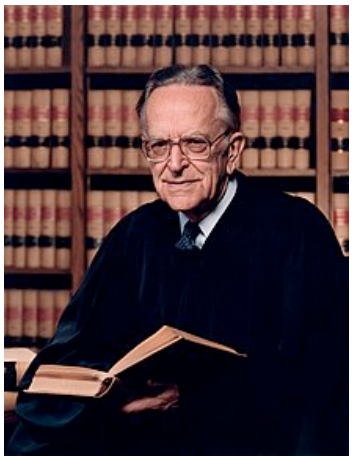
*Bill Baird*

This was the last piece in the set-up for *Roe*, decided the following year. In a 7-2 decision, the Court relied on *Griswold* and *Eisenstadt* to overturn a Texas law banning abortions except to save the life of the mother. The Court subsumed a women's decision to have an abortion under the fundamental "right to privacy" created by *Griswold* (for married couples) and in *Eisenstadt* expanded to everyone.

*Norma McCorvey – "Roe." Later in life she became a Christian, and Catholic, and publicly expressed regret for her role in* Roe v. Wade.

However, the Court held that the right to an abortion was not completely unrestricted. Specifically, the *Roe* Court set up the trimester system and held there was an unfettered constitutional right to an abortion only during the first trimester, when the mother's right to privacy was paramount, and the state could show no compelling interest to interfere with it. In the second trimester, the state had an interest in limiting abortions to protect the mother's health, so reasonable restrictions were constitutionally allowed. Not until the third trimester – the time of "viability" – did the state have a valid interest in protecting what was, according to

the Court, potentially a human life. In the third trimester the state was within its rights to prohibit abortions, but any such restrictions must provide exceptions for the mother's health. But in a companion case, *Doe v. Bolton*, the Court defined the mother's health so broadly that in effect, abortions were as a practical matter legally permitted throughout pregnancy.



*Justice Harry Blackmun wrote the Court's Opinion in* Roe v. Wade. *He was joined by Chief Justice Warren Burger, and Justices Douglas, Brennan, Stewart, Marshall and Powell. Justices White and Rehnquist dissented.*

The Court skirted around arguments that the fetus was a person, relying on questionable historical analysis of legal and social attitudes towards the unborn. But the Court also stated that protection of "potential life" is a valid state interest that could justify restrictions on abortion. As ideas of fetal viability and what constitutes a living human being develop, this caveat may be the chink in the armor of *Roe*'s abortion mandate.

*Planned Parenthood v. Casey* was decided in 1992. It challenged a Pennsylvania law that put certain restrictions on abortions, such as requiring informed consent. It had two important consequences. First, the standard of review was changed from strict scrutiny to the lesser "substantial burden" test. The Supreme Court did not overturn *Roe*. But it did recognize states' interest in protecting the life of the unborn and promoting birth over abortion, and hence states could pass laws requiring informed consent before an abortion was performed, as long

as those laws did not place an undue burden on a women seeking an abortion before viability (6 months) – which remained inviolable.

*Casey* is notorious for its so-called "mystery of life" passage, which arguably expands the right to privacy that forms the basis for *Roe* into an unchecked right of personal autonomy:

> *[A]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*

*Casey* also rejects the trimester scheme established in *Roe* and makes viability the sole criteria of when abortions can and cannot be restricted. It is this viability standard that is at issue in *Dobbs*, and which the Supreme Court will either reject, preserve, or modify when it decides the case this summer.

Prior to *Roe*, most states had abortion bans on their books. The issue was left to the states to resolve as a political matter. *Roe* rendered dozens of states' abortion laws invalid. After *Roe*, abortion became exclusively a legal issue, to be decided by lawyers arguing before judges, removed from political discourse. If *Roe* and *Casey* are overturned or seriously compromised, abortion will again become a political issue to be decided on the state level by means of the election process. New Jersey has already taken action in anticipation of this, passing one of the most extreme and barbaric abortion laws ***on the planet***. Let's hope and pray that next year's March for Life has no need to go to Washington D.C., and that we can focus all of our efforts on Trenton.