



# TEACHING AMERICAN HISTORY

## READING PACKET FOR AUGUST 26<sup>TH</sup>, 2023 | INCORPORATION & SUBSTANTIVE DUE PROCESS

### CORE READING 1: LOCHNER V. NEW YORK

Source: 198 U.S. 45; <https://www.law.cornell.edu/supremecourt/text/198/45>.

Justice PECKHAM delivered the opinion of the Court, joined by Chief Justice FULLER and Justices BREWER, BROWN, and McKENNA.

... The indictment ... charges that [Mr. Lochner] violated the ... labor law of the state of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. . . . The mandate of the statute that “no employee shall be required or permitted to work” is the substantial equivalent of an enactment that “no employee shall contract or agree to work” more than ten hours per day, and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day’s work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours’ work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the federal Constitution. . . . The right to purchase or to sell labor is part of the liberty protected, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

The state therefore has power to prevent the individual from making certain kinds of contracts. . . . Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris<sup>1</sup> (both employer and employee), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring or from entering into any contract to labor beyond a certain time prescribed by the state.

This court has recognized the existence and upheld the exercise of the police powers of the states. . . . Among the later cases where the state law has been upheld by this court is that of . . . the act of the legislature of Utah . . . limiting the employment of workmen in all underground mines or workings to eight hours per day “except in cases of emergency, where life or property is in imminent danger.” It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day except in like cases of emergency. The act was held to be a valid exercise of the police powers of the state [because]. . . the kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor, were such as to make it reasonable and proper for the state to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. . . .



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It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.

The question whether this act [of New York] is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground. . . .

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go. . . .

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding, the trade of a baker has never been regarded as an unhealthy one. Very likely, physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all



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occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid although such limitation might seriously cripple the ability of the laborer to support himself and his family. . . .

. . . Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual. . . .

. . . The state in that case would assume the position of a supervisor, or pater familias,<sup>2</sup> over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment, it is not possible, in fact, to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven, his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary.

. . .

It is manifest to us that the limitation of the hours of labor. . . has no such direct relation to, and no such substantial effect upon, the health of the employee as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men sui juris) in a private business, not dangerous in any degree to morals or in any real and substantial degree to the health of the employees. Under such circumstances, the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the federal Constitution. .

. .

Justice HARLAN dissenting, joined by Justices WHITE and DAY:

. . . Speaking generally, the state, in the exercise of its powers, may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone, among which rights is the right "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation."<sup>3</sup> . . .

[But] I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals, or the public safety. . . .

. . . [A]ssuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for the rule is universal that a legislative enactment, federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. . . If there be doubt as to the validity



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of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. . . .

Let these principles be applied to the present case. . . .

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government, the courts are not concerned with the wisdom or policy of legislation. . . . I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. . . . Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. . . . Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors. . . .

[A] writer says: . . . “Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases, the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. . . .”

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the state to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the state to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. . . .

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state, and to provide for those dependent upon them. . . .

. . . We are not to presume that the state of New York has acted in bad faith. . . . Our duty, I submit, is to sustain the statute as not being in conflict with the federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown



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to be plainly and palpably inconsistent with that instrument. Let the state alone in the management of its purely domestic affairs so long as it does not appear beyond all question that it has violated the federal Constitution. This view necessarily results from the principle that the health and safety of the people of a state are primarily for the state to guard and protect.

. . . A decision that the New York statute is void under the Fourteenth Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the states to care for the lives, health, and well-being of their citizens. Those are matters which can be best controlled by the states. The preservation of the just powers of the states is quite as vital as the preservation of the powers of the general government. . . .

Justice HOLMES, dissenting:

I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day, we sustained the Massachusetts vaccination law.

. . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. . . .



## CORE READING 2: GRISWOLD V. CONNECTICUT

SOURCE: <https://teachingamericanhistory.org/document/griswold-v-connecticut/>

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven - a center open and operating from November 1 to November 10, 1961, when appellants were arrested. They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides:

"Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54-196 provides:

"Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined \$100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment....

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice - whether public or private or parochial - is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, supra, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, supra, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge... And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama* we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their



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right to freedom of association." Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. The right of "association," like the right of belief (*Board of Education v. Barnette*, 319 U.S. 624), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and 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 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."

The Fourth and Fifth Amendments were described... as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."

We have had many controversies over these penumbral rights of "privacy and repose." These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

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.

We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.



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## SUPPLEMENTAL READING 1: TIMBS V. INDIANA

SOURCE: [https://www.law.cornell.edu/supremecourt/text/17-1091#writing-17-1091\\_CONCUR\\_5](https://www.law.cornell.edu/supremecourt/text/17-1091#writing-17-1091_CONCUR_5)

Justice Thomas, concurring in the judgment.

I agree with the Court that the [Fourteenth Amendment](#) makes the [Eighth Amendment](#)'s prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the [Fourteenth Amendment](#)'s Due Process Clause to encompass a substantive right that has nothing to do with "process," I would hold that the right to be free from excessive fines is one of the "privileges or immunities of citizens of the United States" protected by the [Fourteenth Amendment](#).

I

The [Fourteenth Amendment](#) provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." "On its face, this appears to grant . . . United States citizens a certain collection of rights—i.e., privileges or immunities—attributable to that status." But as I have previously explained, this Court "marginaliz[ed]" the Privileges or Immunities Clause in the late 19th century by defining the collection of rights covered by the Clause "quite narrowly." Litigants seeking federal protection of substantive rights against the States thus needed "an alternative fount of such rights," and this Court "found one in a most curious place," —the [Fourteenth Amendment](#)'s Due Process Clause, which prohibits "any State" from "depriv[ing] any person of life, liberty, or property, without due process of law."

Because this Clause speaks only to "process," the Court has "long struggled to define" what substantive rights it protects. The Court ordinarily says, as it does today, that the Clause protects rights that are "fundamental." Sometimes that means rights that are " 'deeply rooted in this Nation's history and tradition.' " Other times, when that formulation proves too restrictive, the Court defines the universe of "fundamental" rights so broadly as to border on meaningless. Because the oxymoronic "substantive" "due process" doctrine has no basis in the Constitution, it is unsurprising that the Court has been unable to adhere to any "guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not." And because the Court's substantive due process precedents allow the Court to fashion fundamental rights without any textual constraints, it is equally unsurprising that among these precedents are some of the Court's most notoriously incorrect decisions.

The present case illustrates the incongruity of the Court's due process approach to incorporating fundamental rights against the States. Petitioner argues that the forfeiture of his vehicle is an excessive punishment. He does not argue that the Indiana courts failed to " 'proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions,' " or that the State failed to provide "some baseline procedures." His claim has nothing to do with any "process" "due" him. I therefore decline to apply the "legal fiction" of substantive due process.

II

When the [Fourteenth Amendment](#) was ratified, "the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' " Those "rights" were the "inalienable rights" of citizens that had been "long recognized," and "the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights" against interference by the States. Many of these rights had been adopted from English law into colonial charters, then state constitutions and bills of rights, and finally the Constitution. "Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in [the Bill of Rights] as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text."





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The question here is whether the [Eighth Amendment](#)'s prohibition on excessive fines was considered such a right. The historical record overwhelmingly demonstrates that it was.

### A

The Excessive Fines Clause “was taken verbatim from the English Bill of Rights of 1689,” which itself formalized a longstanding English prohibition on disproportionate fines. The Charter of Liberties of Henry I, issued in 1101, stated that “[i]f any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, but according to the measure of the offence so shall he pay. . . .” Expanding this principle, Magna Carta required that “amercedments (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood:”

“A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner, a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy.” Magna Carta, ch. 20 (1215), in A. Howard, *Magna Carta: Text & Commentary* 42 (rev. ed. 1998).

Similar clauses levying amercedments “only in proportion to the measure of the offense” applied to earls, barons, and clergymen. One historian posits that, due to the prevalence of amercedments and their use in increasing the English treasury, “[v]ery likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercedments.” The principle was reiterated in the First Statute of Westminster, which provided that no man should “be amerced, without reasonable cause, and according to the quantity of his Trespass.” The English courts have long enforced this principle. In one early case, for example, the King commanded the bailiff “to take a moderate amercedment proper to the magnitude and manner of th[e] offense, according to the tenour of the Great Charter of the Liberties of England,” and the bailiff was sued for extorting “a heavier ransom.”

During the reign of the Stuarts in the period leading up to the Glorious Revolution of 1688–1689, fines were a flashpoint “in the constitutional and political struggles between the king and his parliamentary critics.” From 1629 to 1640, Charles I attempted to govern without convening Parliament, but “in the absence of parliamentary grants,” he needed other ways of raising revenue. He thus turned “to exactions, some odious and obsolete, some of very questionable legality, and others clearly against law.”

The Court of Star Chamber, for instance, “imposed heavy fines on the king’s enemies,” in disregard “of the provision of the Great Charter, that no man shall be amerced even to the full extent of his means. . . .” “[T]he strong interest of th[is] court in these fines . . . had a tendency to aggravate the punishment. . . .” “The statute abolishing” the Star Chamber in 1641 “specifically prohibited any court thereafter from . . . levying . . . excessive fines.”

“But towards the end of Charles II’s reign” in the 1670s and early 1680s, courts again “imposed ruinous fines on the critics of the crown.” In 1680, a committee of the House of Commons “examined the transcripts of all the fines imposed in King’s Bench since 1677” and found that “the Court of King’s Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially; favouring Papists and Persons popishly affected; and excessively oppressing his Majesty’s Protestant Subjects.” The House of Commons determined that the actions of the judges of the King’s Bench, particularly the actions of Chief Justice William Scroggs, had been so contrary to law that it prepared articles of impeachment against him. The articles alleged that Scroggs had “most notoriously departed from all Rules of Justice and Equality, in the Imposition of Fines upon Persons convicted of Misdemeanors” without “any Regard to the Nature of the Offences, or the Ability of the Persons.”

Yet “[o]ver the next few years fines became even more excessive and partisan.” The King’s Bench, presided over by the infamous Chief Justice Jeffreys, fined Anglican cleric Titus Oates 2,000 marks (among other punishments) for perjury. For



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speaking against the Duke of York, the sheriff of London was fined £100,000 in 1682, which corresponds to well over \$10 million in present-day dollars—“an amount, which, as it extended to the ruin of the criminal, was directly contrary to the spirit of [English] law.” The King’s Bench fined Sir Samuel Barnadiston £10,000 for allegedly seditious letters, a fine that was overturned by the House of Lords as “exorbitant and excessive.” Several members of the committees that would draft the Declaration of Rights—which included the prohibition on excessive fines that was enacted into the English Bill of Rights of 1689—had themselves “suffered heavy fines.” And in 1684, judges in the case of John Hampden held that Magna Carta did not limit “fines for great offences” against the King, and imposed a £40,000 fine

“Freedom from excessive fines” was considered “indisputably an ancient right of the subject,” and the Declaration of Rights’ indictment against James II “charged that during his reign judges had imposed excessive fines, thereby subverting the laws and liberties of the kingdom.” Article 10 of the Declaration declared “[t]hat excessive Baile ought not to be required nor excessive fynes imposed nor cruel and unusuall Punishments inflicted.”

Shortly after the English Bill of Rights was enacted, Parliament addressed several excessive fines imposed before the Glorious Revolution. For example, the House of Lords overturned a £30,000 fine against the Earl of Devonshire as “excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land.” Although the House of Lords refused to reverse the judgments against Titus Oates, a minority argued that his punishments were “contrary to Law and ancient Practice” and violated the prohibition on “excessive Fines.” The House of Commons passed a bill to overturn Oates’s conviction, and eventually, after a request from Parliament, the King pardoned Oates. *Id.*, at 1329–1330.

Writing a few years before our Constitution was adopted, Blackstone—“whose works constituted the preeminent authority on English law for the founding generation,” explained that the prohibition on excessive fines contained in the English Bill of Rights “had a retrospect to some unprecedented proceedings in the court of king’s bench.” Blackstone confirmed that this prohibition was “only declaratory . . . of the old constitutional law of the land,” which had long “regulated” the “discretion” of the courts in imposing fines.

In sum, at the time of the founding, the prohibition on excessive fines was a longstanding right of Englishmen.

### B

“As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen,” including the prohibition on excessive fines. Thus, the text of the [Eighth Amendment](#) was “based directly on . . . the Virginia Declaration of Rights,’ which ‘adopted verbatim the language of the English Bill of Rights.’”

When the States were considering whether to ratify the Constitution, advocates for a separate bill of rights emphasized the need for an explicit prohibition on excessive fines mirroring the English prohibition. In colonial times, fines were “the drudge-horse of criminal justice,” “probably the most common form of punishment.” To some, this fact made a constitutional prohibition on excessive fines all the more important. As the well-known Anti-Federalist Brutus argued in an essay, a prohibition on excessive fines was essential to “the security of liberty” and was “as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, . . . and seizing . . . property . . . as the other.” Similarly, during Virginia’s ratifying convention, Patrick Henry pointed to Virginia’s own prohibition on excessive fines and said that it would “depart from the genius of your country” for the Federal Constitution to omit a similar prohibition. Henry continued: “[W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives” to “define punishments without this control.” *Ibid.*

Governor Edmund Randolph responded to Henry, arguing that Virginia’s charter was “nothing more than an investiture, in the hands of the Virginia citizens, of those rights which belonged to British subjects.” According to Randolph, “the



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exclusion of excessive bail and fines . . . would follow of itself without a bill of rights,” for such fines would never be imposed absent “corruption in the House of Representatives, Senate, and President,” or judges acting “contrary to justice.”

For all the debate about whether an explicit prohibition on excessive fines was necessary in the Federal Constitution, all agreed that the prohibition on excessive fines was a well-established and fundamental right of citizenship. When the Excessive Fines Clause was eventually considered by Congress, it received hardly any discussion before “it was agreed to by a considerable majority.” And when the Bill of Rights was ratified, most of the States had a prohibition on excessive fines in their constitutions.<sup>2</sup>

Early commentary on the Clause confirms the widespread agreement about the fundamental nature of the prohibition on excessive fines. Justice Story, writing a few decades before the ratification of the [Fourteenth Amendment](#), explained that the [Eighth Amendment](#) was “adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts,” when “[e]normous fines and amercements were . . . sometimes imposed.” Story included the prohibition on excessive fines as a right, along with the “right to bear arms” and others protected by the Bill of Rights, that “operates, as a qualification upon powers, actually granted by the people to the government”; without such a “restrict[ion],” the government’s “exercise or abuse” of its power could be “dangerous to the people.”

Chancellor Kent likewise described the [Eighth Amendment](#) as part of the “right of personal security . . . guarded by provisions which have been transcribed into the constitutions in this country from magna carta, and other fundamental acts of the English Parliament.” He understood the [Eighth Amendment](#) to “guard against abuse and oppression,” and emphasized that “the constitutions of almost every state in the Unio[n] contain the same declarations in substance, and nearly in the same language.” *Ibid.* Accordingly, “they must be regarded as fundamental doctrines in every state, for all the colonies were parties to the national declaration of rights in 1774, in which the . . . rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright.”

## C

The prohibition on excessive fines remained fundamental at the time of the [Fourteenth Amendment](#). In 1868, 35 of 37 state constitutions “expressly prohibited excessive fines.” *Ante*, at 5. Nonetheless, as the Court notes, abuses of fines continued, especially through the Black Codes adopted in several States. *Ante*, at 5–6. The “centerpiece” of the Codes was their “attempt to stabilize the black work force and limit its economic options apart from plantation labor.” Under the Codes, “the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers.” *Ibid.* The Codes also included “‘antienticement’ measures punishing anyone offering higher wages to an employee already under contract.”

The 39th Congress focused on these abuses during its debates over the [Fourteenth Amendment](#), the Civil Rights Act of 1866, and the Freedmen’s Bureau Act. During those well-publicized debates, Members of Congress consistently highlighted and lamented the “severe penalties” inflicted by the Black Codes and similar measures, suggesting that the prohibition on excessive fines was understood to be a basic right of citizenship.

For example, under Mississippi law, adult “freedmen, free negroes and mulattoes” “without lawful employment” faced \$50 in fines and 10 days’ imprisonment for vagrancy. Those convicted had five days to pay or they would be arrested and leased to “any person who will, for the shortest period of service, pay said fine and forfeiture and all costs.”

Similar examples abound. One congressman noted that Alabama’s “aristocratic and anti-republican laws, almost reenacting slavery, among other harsh inflictions impose . . . a fine of fifty dollars and six months’ imprisonment on any servant or laborer (white or black) who loiters away his time or is stubborn or refractory.” He also noted that Florida punished vagrants with “a fine not exceeding \$500 and imprison[ment] for a term not exceeding twelve months, or by being sold for



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a term not exceeding twelve months, at the discretion of the court.” At the time, such fines would have been ruinous for laborers.

These and other examples of excessive fines from the historical record informed the Nation’s consideration of the [Fourteenth Amendment](#). Even those opposed to civil-rights legislation understood the Privileges or Immunities Clause to guarantee those “fundamental principles” “fixed” by the Constitution, including “immunity from . . . excessive fines.” And every post-1855 state constitution banned excessive fines. The attention given to abusive fines at the time of the [Fourteenth Amendment](#), along with the ubiquity of state excessive-fines provisions, demonstrates that the public continued to understand the prohibition on excessive fines to be a fundamental right of American citizenship.

\* \* \*

The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection. As a constitutionally enumerated right understood to be a privilege of American citizenship, the [Eighth Amendment](#)’s prohibition on excessive fines applies in full to the States.



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## SUPPLEMENTAL READING 2: MEYER v. STATE OF NEBRASKA

SOURCE: <https://www.law.cornell.edu/supremecourt/text/262/390>

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained and successfully passed the eighth grade. The information is based upon 'An act relating to the teaching of foreign languages in the state of Nebraska,' approved April 9, 1919, which follows:

'Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

'Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

'Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100), or be confined in the county jail for any period not exceeding thirty days for each offense.

'Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.'

The Supreme Court of the state affirmed the judgment of conviction. It declared the offense charged and established was 'the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade,' in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefore. And it held that the statute forbidding this did not conflict with the [Fourteenth Amendment](#), but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion:

'The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of permitting for eigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state.

'It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its



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education, therefore, from among the many that might be taught, is obviously necessary. The Legislature no doubt had in mind the practical operation of the law. The law affects few citizens, except those of foreign lineage.

Other citizens, in their selection of studies, except perhaps in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence.

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the [Fourteenth Amendment](#):

'No state \* \* \* shall deprive any person of life, liberty or property without due process of law.

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares:

'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.



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It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and 'that the English language should be and become the mother tongue of all children reared in this state.' It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable and cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:

'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. \* \* \* The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams v. Tanner* pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by



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limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes and Mr. Justice Sutherland, dissent.





## SUPPLEMENTAL READING 3: DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION (2022)

SOURCE: <https://www.law.cornell.edu/supremecourt/text/19-1392>

Excerpt: Majority Opinion, Justice Samuel Alito

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey ranged from the constitutionally irrelevant (e.g., its discussion of abortion in antiquity) to the plainly incorrect (e.g., its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point in which a fetus was thought to achieve “viability,” i.e., the ability to survive outside the womb. Although the Court acknowledged that States had a legitimate interest in protecting “potential life,” it found that this interest could not justify any restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend Roe’s reasoning.

At the time of *Roe*, 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State.

Eventually, in *Planned Parenthood v. Casey*, the Court revisited *Roe* . . . The opinion concluded that *stare decisis*, which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe*’s “central holding”—that a State may not constitutionally protect fetal life before “viability”—even if that holding was wrong.

*Casey* threw out *Roe*’s trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an ‘undue burden’ on a woman’s right to have an abortion. . . . The three Justices who authored the controlling opinion “call[ed] for the contending sides of a national controversy to end their national division” by treating the Court’s decision as the final settlement of the question of the constitutional right to abortion.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stage of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.

Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as “viable” outside the womb. In defending this law, the State’s primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On the other side,



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respondents and the Solicitor General ask us to reaffirm Roe and Casey, and they contend that the Mississippi law cannot stand if we do so.

We hold that Roe and Casey 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. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment’s protection of “liberty.” Roe’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both Roe and Casey acknowledged, because it destroys what those decisions called “fetal life” and what the law now before us describes as an “unborn human being.”

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. . . .

We discuss [substantive due process] in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents’ amici have now offered as yet another potential home for the abortion right: the Fourteenth Amendment’s Equal Protection Clause. . . . Neither Roe nor Casey saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State’s regulation of abortion is not a sex-based classification and is thus not subject to the “heightened scrutiny” that applies to such classifications. . . . The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a “mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.” . . . And as the Court has stated, the “goal of preventing abortion” does not constitute “invidiously discriminatory animus” against women. . . .

With this new theory addressed, we turn to Casey’s bold assertion that the abortion right is an aspect of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. . . .

We begin by considering the critical question of whether the Constitution, properly understood, confers a right to obtain an abortion. . . .

The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right much show that the right is somehow implicit in the constitutional text. . . .

In interpreting what is meant by the Fourteenth Amendment’s reference to ‘liberty,’ we must guard against the natural human tendency to confuse what the Amendment protects with our own ardent views about the liberty that Americans



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should enjoy. That is why the Court has long been reluctant to recognize rights that are not mentioned in the Constitution. . . . Instead, guided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term “liberty.” When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to an abortion that has come to our attention was published only a few years before *Roe*.

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow. . . .

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court’s own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. And though *Roe* discerned a “trend toward liberalization” in about “one-third of the States,” those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. . . .

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973 . . . .

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey* . . . .

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the “workability” of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance . . . .

[T]o ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion . . . .

We do not pretend to know how our political system or society will respond to today’s decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled . . . .



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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. . . .

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.

Excerpt: Concurrence, Justice Brett Kavanaugh

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests of protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.

The issue before this Court . . . is not the policy or morality of abortion. The issue before the Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion. . . . On the question of abortion, the Constitution is . . . neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address. . . .

After today’s decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans. . . . But the parties’ arguments have raised other related questions, and I address some of them here.

First, is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut* . . . , *Eisenstadt v. Baird* . . . , *Loving v. Virginia* . . . , and *Obergefell v. Hodges* . . . . I emphasize what the Court today states: Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.

Second, as I see it, some of the other abortion-related legal questions raised by today’s decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today’s decision takes effect? In my view, the answer is no based on the Due Process Clause or the Ex Post Facto Clause.

Excerpt: Concurrence, Justice Clarence Thomas

I write separately to emphasize a . . . more fundamental reason why there is no abortion right guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that “due process of law” merely requires executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. . . . [T]he Due Process Clause at most guarantees process. It does not, as the Court’s substantive due process cases suppose, “forbi[d] the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided.” . . .

[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold* [*v. Connecticut*], *Lawrence* [*v. Texas*], and *Obergefell* [*v. Hodges*]. Because any substantive due



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process decision is “demonstrably erroneous” . . . , we have a duty to “correct the error” established in those precedents . . . . After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court’s substantive due process cases are “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment.

Substantive due process exalts judges at the expense of the People from whom they derive their authority. . . . In practice, the Court’s approach for identifying those fundamental rights unquestionably involves policymaking rather than neutral legal analysis. The Court divines new rights in line with its own, extraconstitutional value preferences and nullifies state laws that do not align with the judicially created rights.

Substantive due process . . . has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

Excerpt: Concurring in the Judgment, Chief Justice John Roberts

I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman’s right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further— certainly not all the way to viability. Mississippi’s law allows a woman three months to obtain an abortion, well beyond the point at which it is considered “late” to discover a pregnancy. . . . I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*. The Court’s opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us. . . .

Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. . . .

Almost all know [about a pregnancy] by the end of the first trimester. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman to decide for herself whether to terminate her pregnancy. . . .

The Court’s decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case. . . .



## TEACHING AMERICAN HISTORY

Both the Court’s opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks. . . . I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

Excerpt: Joint Dissent, Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor

For half a century, *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman’s right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman’s body or the course of a woman’s life: It could not determine what the woman’s future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

The Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions until after fetal viability, so long as the ban contained exceptions to safeguard a woman’s life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a “substantial obstacle” on a woman’s “right to elect the procedure” as she (not the government) thought proper, in light of all the circumstances and complexities of her own life.

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. . . .

[O]ne result of today’s decision is certain: the curtailment of women’s rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman’s reproductive freedom, the Constitution also protected “[t]he ability of women to participate equally in [this Nation’s] economic and social life.” . . . But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State’s assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today’s majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. 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. . . . They are all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions. . . .



## TEACHING AMERICAN HISTORY

The majority has no good reason for the upheaval in law and society it sets off. Roe and Casey have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework Roe and Casey developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. . . . The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. Stare decisis, this Court has often said, contributes to the actual and perceived integrity of the judicial process by ensuring that decisions are founded in the law rather than in the proclivities of individuals. Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent. . . .

The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman's rights to equality and freedom. Today's Court, that is, does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life. Roe and Casey thought that one-sided view misguided. In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

The majority makes this change based on a single question: Did the reproductive right recognized in Roe and Casey exist in "1868, the year when the Fourteenth Amendment was ratified?" . . . The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. . . . But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. . . . If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendment's ratifiers are germane. . . . Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening"—the point when the fetus moved in the womb. And early American law followed the common-law rule. So the criminal law of that early time might be taken as roughly consonant with Roe's and Casey's different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of Roe. That is convenient for the majority, but it is window dressing... Had the pre-Roe liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers' views are germane.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. . . . If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation.



## TEACHING AMERICAN HISTORY

Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase “We the People.” In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) . . . Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women’s rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship. . . .

So how is it that, as Casey said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution subjects discrimination against them to heightened scrutiny? How is it that our Constitution, through the Fourteenth Amendment’s liberty clause, guarantees access to contraception (also not legally protected in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today, that same constitutional clause protected a woman’s right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority’s pinched view of how to read our Constitution. . . . [I]n the words of the great Chief Justice John Marshall, our Constitution is “intended to endure for ages to come,” and must adapt itself to a future “seen dimly,” if at all. . . . That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers’ invitation. It has kept true to the Framers’ principles by applying them in new ways, responsive to new societal understandings and conditions. . . .

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of “liberty” and “equality” for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example Obergefell used a few years ago. The Court there confronted a claim . . . that the Fourteenth Amendment “must be defined in a most circumscribed manner, with central reference to specific historical practices”—exactly the view today’s majority follows. . . . And the Court specifically rejected that view. In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant of interracial marriage. The Fourteenth Amendment’s ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia* read the Fourteenth Amendment to embrace the Lovings’ union. If, Obergefell explained, “rights were defined by who exercised them in the past, then received practices could serve as their own continued justification”—even when they conflict with “liberty” and “equality” as later and more broadly understood. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges’ “own ardent views,” ungrounded in law, about the liberty that Americans should enjoy. . . . [A]pplications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State’s ban on contraceptive use. Judges, he said, are not ‘free to roam where unguided speculation might take them. . . . Yet they also must recognize that the constitutional ‘tradition’ of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution’s most fundamental commitments to new conditions. That is why Americans . . . have a right to marry across racial lines. And it is why, to go back to Justice Harlan’s case, Americans have a right to use contraceptives so they can choose for themselves whether to have children. . . .





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Faced with all these connections between Roe/Casey and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) . . .

According to the majority, no liberty interest is present [in the context of abortion]—because (and only because) the law offered no protection to the woman’s choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in Lawrence and Obergefell to same-sex intimacy and marriage. It did not protect the right recognized in Loving to marry across racial lines. It did not protect the right recognized in Griswold to contraceptive use. For that matter, it did not protect the right . . . not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even “undermine”—any number of other constitutional rights.

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout’s honor. Still, the future significance of today’s opinion will be decided in the future. And law often has a way of evolving without regard to original intentions—a way of actually following where logic leads, rather than tolerating hard-to-explain lines.

By overruling Roe, Casey, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons stare decisis, a principle central to the rule of law. [In previous cases overturning precedent,] the Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. . . . None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.

[The Court’s decision] makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled Roe and Casey for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

This Court will surely face critical question about how [its new approach] applies. Must a state law allow abortions when necessary to protect a woman’s life and health? And if so, exactly when? How much risk to a woman’s life can a State force her to incur, before the Fourteenth Amendment’s protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment’s protection of liberty and equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management? . . .

Justice Jackson once called a decision he dissented from [Korematsu v. United States (1944)] a “loaded weapon,” ready to hand for improper uses. . . . We fear that today’s decision, departing from stare decisis for no legitimate reason, is its own loaded weapon. Weakening stare decisis threatens to upend bedrock legal doctrines, far beyond any single decision. Weakening stare decisis creates profound legal instability. And as Casey recognized, weakening stare decisis in a hotly contested case like this one calls into question this Court’s commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today’s decision takes aim, we fear, at the rule of law. . . .



## TEACHING AMERICAN HISTORY

Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. It eliminates a 50-year-old constitutional right that safeguards women’s freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court’s legitimacy. . . .

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.