

Privacy Rights Under the Constitution: Procreation, Child Rearing, Contraception, Marriage, and Sexual Activity

September 14, 2022

A line of Supreme Court cases establishes that the U.S. Constitution guarantees a person’s ability to make certain decisions in matters related to [procreation](#), [child rearing](#), [contraception](#), marriage (including [interracial marriage](#) and [same-sex marriage](#)), and consensual [sexual activity](#). In some instances, the Supreme Court has interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to provide substantive protections against government interference in these personal matters. The Supreme Court has also characterized the [Equal Protection Clause as supplementing](#) these due process protections when a state seeks to limit the exercise of protected rights to particular groups, resulting in the Court striking down laws that, for example, denied the “fundamental” right to marriage to interracial or same-sex couples. The Court’s approach to identifying rights protected by the Constitution has changed over the years. In the 1997 decision *Washington v. Glucksberg*, the Court stated that the standard for recognizing such rights is that they must be “‘[deeply rooted](#) in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’” [Before and after Glucksberg](#), however, the Court acknowledged that some rights do not necessarily fit into that historical framework.

In the 2022 decision *Dobbs v. Jackson Women’s Health Organization*, the Supreme Court upheld a Mississippi law prohibiting abortion after 15 weeks on the ground that the Constitution does not protect a right to abortion. Employing the *Glucksberg* framework, *Dobbs* [overruled *Roe v. Wade*](#) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which recognized and then reaffirmed a [right to the procedure](#) under the Due Process Clause. *Dobbs* is the [first decision in recent history](#) in which the Supreme Court overruled prior decisions recognizing a right the Court had [previously characterized](#) as “fundamental” under the Constitution. Some have suggested that other rights, such as the right to contraceptive access, that were recognized by the Court under a different framework than *Glucksberg* may be reassessed. Yet, the *Dobbs* majority [explicitly averred](#) that its ruling does not cast doubt on the continuing validity of Court precedents recognizing rights outside the abortion context, and, furthermore, considerations for continuing to recognize these precedents may be different, and more compelling, than in *Dobbs*.

Congressional Research Service

<https://crsreports.congress.gov>

LSB10820

This Legal Sidebar outlines the constitutional framework for privacy rights, reviews select Supreme Court decisions, discusses legal considerations following the *Dobbs* decision, and presents considerations for Congress.

Constitutional Framework

Due Process

The Due Process Clauses of the [Fifth](#) and [Fourteenth](#) Amendments generally prohibit federal and state governments from “depriv[ing] any person of life, liberty, or property, *without due process of law*.” Due process, while not “[precisely defined](#),” generally refers to a “[fundamental fairness](#)” requirement when the government seeks to burden an individual’s life, liberty, or property interests. According to the Supreme Court, the “[touchstone](#)” of due process is “the protection of the individual against arbitrary action of government.” The Court has [determined](#) that the Due Process Clauses contain both “substantive” and “procedural” components. While procedural due process is concerned with the fairness of the *procedures* employed when the government seeks to deprive an individual of one of the aforementioned interests, the [substantive component](#) “bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” The substantive due process inquiry revolves around whether the government’s deprivation of a person’s life, liberty, or property is justified by a sufficient purpose. The Supreme Court has long held that some protected liberty interests are so important that they are deemed “fundamental rights,” subjecting governmental deprivations of those interests to greater judicial scrutiny as described below.

But when is a liberty interest considered “fundamental”? Justices and scholars have [debated](#) how the Court should decide this question, and the Court often refrained in older decisions from “[defin\[ing\] with exactness the liberty thus guaranteed](#)” by the Due Process Clause. In recent decades, though, the Court has often employed a historical approach to guide and restrain the scope of substantive due process. In the 1997 decision *Washington v. Glucksberg*, the Court held that assistance in committing suicide is not a fundamental liberty interest protected under the Due Process Clause. The Court [declared](#) that fundamental liberties are those “deeply rooted in this Nation’s history and tradition.” The Court also called for a “careful description” of any asserted right. The Court in *Dobbs*—the most recent case considering whether a claimed liberty interest qualifies as fundamental—[cited Glucksberg](#) in concluding that access to abortion is not a fundamental right.

If a liberty interest is deemed a fundamental right, the challenged law or government action must generally [satisfy](#) the most stringent standard of judicial review: strict scrutiny. Strict scrutiny requires the government to justify the law by demonstrating that it serves a compelling government interest and is narrowly tailored to achieve that interest (the law is not too broad or too limited). If a liberty interest is *not* considered fundamental, a court generally need only apply the rational basis test; the law or government action must be rationally related to a legitimate government purpose. For instance, as addressed in *Dobbs*, rational basis review applies to abortion restrictions [because abortion is not a fundamental right](#).

Equal Protection

The [Fourteenth Amendment’s Equal Protection Clause](#) has also played a role in the Supreme Court’s recognition of certain fundamental rights protected by the Constitution. The Clause provides that states must not “deny to any person ... the equal protection of the laws.” ([Equal protection principles apply to the federal government](#) through the Fifth Amendment’s Due Process Clause.) At times, a government restriction may draw a distinction among people. The equal protection inquiry asks whether the

government's classification is justified by a sufficient purpose. While most classifications drawn by the government are subject to rational basis review, some distinctions are subject to heightened scrutiny. For example, [race-based classifications are subject to strict scrutiny](#), and [gender-based classifications are subject to an intermediate standard](#) between strict scrutiny and rational basis.

The Court has also employed equal protection principles to [expand rights](#) recognized under substantive due process to new classes of persons. For instance, the Court held that restricting the use of contraception to married couples [denied unmarried individuals equal protection](#) and violated their fundamental right to contraception. Laws and government actions that seek to limit particular groups' exercise of a fundamental right are [subject to strict scrutiny](#), whether or not the government employs a classification that would typically trigger more stringent review under the Equal Protection Clause.

Privacy Rights

The Supreme Court has held that the Constitution protects as fundamental an individual's autonomy to make certain decisions, relying on substantive due process and sometimes equal protection principles to supplement due process protections. The discussion below outlines major decisions in this area.

Child Rearing

Since the early 20th century, the Supreme Court has recognized a parent's right to control the upbringing of their children under substantive due process. In *Meyer v. Nebraska*, the Court struck down a state law that prohibited teaching in [any language other than English](#) in public schools. The Court reasoned that the statute [invaded "liberty" guaranteed by the Fourteenth Amendment](#) and declared that parents have a right to make decisions regarding the upbringing of their children. The Court [reaffirmed this right](#) in *Pierce v. Society of Sisters*, in which the Court voided a state law requiring children to attend public schools. The right of a parent to control the upbringing of their child is [not absolute, however](#); a state may intervene if necessary to protect a child, as such an action may ["be necessary to accomplish \[a state's\] legitimate objectives."](#)

Marriage

Other cases have established a fundamental right to marry. In 1967, the Court first recognized the fundamental right to marry as a liberty interest protected under the Due Process Clause. In *Loving v. Virginia*, the Court declared unconstitutional a Virginia statute that prohibited interracial marriage. Chief Justice Warren, writing for a unanimous court, first held that the state anti-miscegenation law was an equal protection violation based on an [impermissible racial classification](#). The *Loving* court then also recognized a [right to marry as a fundamental right](#) protected under substantive due process. The Court has reaffirmed the right to marry on several [occasions](#). In 2015, the Court held in *Obergefell v. Hodges* that same-sex couples can [exercise the fundamental right to marry](#) in all states, and that states must recognize marriages validly performed out-of-state. The Court reasoned that state laws limiting marriage to opposite-sex couples excluded a category of persons from exercising the [fundamental right to marry](#) under substantive due process. The majority also [discussed](#) in the substantive due process analysis that such laws deny equal protection to individuals because of their sexual orientation.

Sexual Activity

In the 2003 decision *Lawrence v. Texas*, the Court held that the substantive component of the Due Process Clause protects a right to [engage in private, consensual sexual activity](#). Two men engaging in sexual activity had been convicted under a Texas law prohibiting "deviate sexual intercourse." The Court struck

down the law, ruling that states may not prohibit private sexual activity between consenting adults. Yet, the *Lawrence* Court did not specify whether such right is fundamental, and it is unclear what level of scrutiny would apply upon a future legal challenge. One circuit court [concluded](#) shortly after *Lawrence* that sexual activity is not a fundamental right subject to strict scrutiny. *Lawrence* expressly overruled *Bowers v. Hardwick*, in which the Court held that the right to privacy does not protect a right to engage in private, consensual same-sex activity.

Reproductive Autonomy

The Court has generally recognized a constitutionally protected right to make certain choices related to reproduction. At first, in the 1926 decision *Buck v. Bell*, the Court upheld a state's ability to sterilize an 18-year-old woman, described as "feeble-minded," under a law that allowed for the involuntary sterilization of "mental defectives" held in state institutions. The Court [rejected the due process argument](#) that no circumstance could justify a sterilization order. Though it did not expressly overrule *Buck*, the Court later held in *Skinner v. Oklahoma* that the [right to procreate is a fundamental right](#), and that government-imposed involuntary sterilization (certain criminal defendants in the *Skinner* case) must satisfy the strict scrutiny test.

One of the most significant cases recognizing a right to make certain personal decisions was the Court's 1965 decision in *Griswold v. Connecticut*. There, the Supreme Court declared unconstitutional a state law that prohibited the use and distribution of contraceptives to married couples. Justice Douglas, writing for the majority, reasoned that a right to privacy was implicit in the Bill of Rights, particularly the First, Third, Fourth, and Fifth Amendments, and protected "[the sacred precincts of the marital bedroom](#)." The Court expressly [rejected](#) the argument that privacy was a liberty interest under the Due Process Clause.

The Court's approach, however, quickly shifted. Less than a decade later, the Court moved away from the recognition of a generalized "right to privacy" found in the Bill of Rights to instead identifying certain matters of personal intimacy as being among the liberties protected by the Due Process Clause. The denial of these protected liberties to specific groups, in turn, were sometimes found to violate equal protection principles as well. In the 1972 decision *Eisenstadt v. Baird*, the Supreme Court expanded the right to contraception to unmarried individuals on [equal protection grounds](#) because the state law treated unmarried individuals differently from married couples. The Court also highlighted the right to privacy: "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision [whether to bear or beget a child](#)." In the term after *Eisenstadt*, the Court decided *Roe v. Wade*, in which it held that the Constitution protects a right to terminate pregnancy before viability. In the 7-2 decision, the Court in *Roe* identified the [right to privacy as a "liberty"](#) interest under the Due Process Clause. The *Roe* court explained that the right to terminate pregnancy accords with the right to privacy as laid out in *Griswold* and *Eisenstadt*, specifically the right to decide "whether or not to bear or beget a child." *Roe* [acknowledged a valid state interest](#) in "protecting potential life," and the Court's decision included a trimester framework to strike a balance between a woman's choice and a state's interest in potential life. Then, in another challenge to state contraception restrictions, the Court in the 1977 decision *Carey v. Population Services International* nullified a New York law that made it a crime to sell or distribute contraceptives to minors younger than 16 years old. The Court [reiterated](#) that the right to privacy, as laid out in *Griswold*, *Eisenstadt*, and *Roe*, is a liberty interest under the Fourteenth Amendment, and clarified that laws restricting contraceptives [must satisfy strict scrutiny](#).

Nearly two decades later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court affirmed *Roe* but added that the government may regulate abortions before viability if the regulation does not impose an [undue burden](#). Like *Roe*, *Casey* recognized a larger reproductive right but sought to strike a balance between potential state interests prior to viability and the choice to seek an abortion. (For more information on the judicial history of abortion, see [CRS Report RL33467, Abortion: Judicial History and](#)

Legislative Response, by Jon O. Shimabukuro.) However, in the 2022 decision *Dobbs v. Jackson Women's Health Organization*, the Court revisited whether the Constitution protects abortion as a fundamental right under substantive due process. The Court upheld a Mississippi law prohibiting abortion after 15 weeks. Overruling *Roe* and *Casey*, the Court reasoned that the Constitution neither expressly mentions abortion nor implicitly guarantees a right to abortion under substantive due process.

Legal Considerations Post-Dobbs

Dobbs may provide guidance in future legal challenges outside the abortion context on how fundamental rights are identified under substantive due process, though much remains unclear. The *Dobbs* court identified a [historical approach](#)—the *Glucksberg* framework—as the controlling method to identify rights protected under the Due Process Clause. The claimed right “must be ‘[deeply rooted in this Nation's history and tradition](#)’ and ‘[implicit in the concept of ordered liberty](#).’” This approach appears to call for consideration of the level of abstraction at which the right should be stated and what historical evidence constitutes a sufficient record of history and tradition. It seems unlikely that the current Court would recognize other fundamental rights unless the claimed right satisfies the *Glucksberg* framework.

The reversal of *Roe* and *Casey* has raised question over whether other Court decisions recognizing certain fundamental rights may be reexamined, however. Justice Thomas's [concurrence](#) and the [joint dissent](#) by three Justices of the Court reflect some skepticism in the continued recognition of certain privacy rights in light of *Dobbs*, particularly *Griswold*, *Lawrence*, and *Obergefell*. The *Dobbs* majority, however, emphasized that the ruling does not “[undermine](#)” other decisions, and distinguished abortion from these other rights as involving a valid state interest in [protecting fetal life](#). This “[critical moral question](#),” according to the Court, is better reserved for the people and their elected representatives.

In overruling *Roe* and *Casey*, the Court not only considered whether the right to abortion comported with the *Glucksberg* framework, but also whether principles of stare decisis counseled against overruling prior decisions recognizing a right to abortion. The doctrine of stare decisis generally provides that courts should adhere to precedent unless there is sufficient reason to change course, even when a later Court may have decided an issue differently. In *Dobbs*, the majority [considered whether stare decisis counseled to adhering to *Roe* and *Casey*'s holdings](#), and [concluded that five factors favored overruling these decisions](#). First, the Court held that *Roe* and *Casey* [erroneously interpreted](#) the Constitution to provide for a right to abortion. Second, the Court reasoned that *Roe* “[stood on exceptionally weak grounds](#),” criticizing *Roe* for failing “to ground its decision in text, history, or precedent” and relying “on an erroneous historical narrative,” among other shortcomings. Third, the Court concluded that *Casey*'s undue burden framework was not sufficiently “[workable](#).” Fourth, the Court stated that *Roe* and *Casey* [distorted other legal doctrines](#). Lastly, the Court concluded that there was a [lack of concrete reliance](#) on *Roe* and *Casey* because abortions are generally unplanned and reproductive planning can be adjusted.

The doctrine of stare decisis, [according to the *Dobbs* court](#), would likely inform the Supreme Court's decision on whether to reassess other substantive due process rights that it has previously recognized. Although the *Dobbs* majority pointed to several factors in its stare decisis analysis counseling overruling *Roe* and *Casey*, two of the most notable were the majority's [conclusions that “*Roe* was egregiously wrong from the start” and “\[i\]ts legal reasoning was exceptionally weak.”](#) Other stare decisis factors may be important, as well. For example, in the contexts of [marriage and contraception](#), the stare decisis factors of reliance interests and workability may be different, and perhaps more compelling to a future Court than they were in the abortion context.

While *Dobbs* stated that *Glucksberg*'s historical approach is the proper one, the Court has, at times, declined to rely on historical practices when determining who can exercise certain rights. *Loving* first recognized the fundamental right to marry and did not define the bounds of this fundamental right by reference to who was allowed to marry historically. Writing for the majority in *Obergefell*, in which the

Court extended the fundamental right to marry to same-sex couples, Justice Kennedy declared that the *Glucksberg* historical approach [did not necessarily conflict](#) with holding that same-sex couples could exercise the fundamental right to marry. He rejected the argument that the “careful description” of the right at issue was a right to same-sex marriage. Justice Kennedy stated that the issue at hand involved the “right to marry in its comprehensive sense, asking if there was sufficient justification for excluding the relevant class from the right.” The Court observed that “[i]f rights were defined [by who exercised them in the past](#), then received practices could serve as their own continued justification.” How the Court describes a right and how it applies historical practice may thus be instrumental in determining whether it deems the right constitutionally protected.

In addition, whether or not a claimed fundamental right is at issue, the Equal Protection Clause may protect against certain government infringements if a law or action by the government treats one class of persons differently from another. Laws and government actions encompassing suspect classifications (e.g., race or sex) must satisfy a more stringent level of judicial scrutiny, either strict or intermediate scrutiny depending on the classification (though the *Dobbs* Court [stated](#) that the denial of abortion access is not a sex-based classification subject to heightened scrutiny).

Regardless of whether *Dobbs* suggests a willingness by the Supreme Court to reconsider its prior recognition of a fundamental right using the *Glucksberg* framework, lower courts remain bound by the Court’s earlier decisions in these cases. As the Court has [repeatedly](#) advised, even when a Supreme Court decision “appears to rest on reasons rejected in some other line of decisions,” the lower courts “should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” In other words, whether or not *Dobbs* leads to the Supreme Court’s reconsideration of its prior recognition of other rights outside the abortion context, lower courts must adhere to those decisions until and unless a future Court overrules them.

Congressional Considerations

Congress may consider whether to use its legislative authority to enact legislation that protects or otherwise regulates areas of concern in matters related to procreation, child rearing, contraception, marriage, and consensual sexual activity between adults. Examples of potential sources of [congressional authority](#) include the Commerce Clause, the spending power, and Section 5 of the Fourteenth Amendment. Congress’s ability to codify an individual right currently or formerly held by the Supreme Court to be constitutionally protected is discussed in [CRS Legal Sidebar LSB10787, Congressional Authority to Regulate Abortion](#), by Kevin J. Hickey and Whitney K. Novak.

The 117th Congress has introduced several pieces of legislation related to privacy rights. The House of Representatives passed the [Right to Contraception Act](#) (H.R. 8373), which would establish a federal right for individuals to obtain and use contraceptives. The [Respect for Marriage Act](#) (H.R. 8404), another bill the House passed, would provide some protections for marriage, including same-sex and interracial marriages. The legislation would repeal provisions in federal law that define marriage as between a man and woman. (The Supreme Court nullified this provision in 2013 in [United States v. Windsor](#), but the provision remains on the books.) H.R. 8404 would also require states to recognize valid marriages performed out-of-state—regardless of sex, race, ethnicity, or national origin—through Congress’s authority under the [Full Faith and Credit Clause](#). Other bills introduced aim to restrict states from adopting laws that interfere with individuals exercising fundamental rights, such as [consensual sexual activity](#).

Author Information

Kelsey Y. Santamaria
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.