

THE DEMOCRACY PROJECT

II. ABORTION

7. ABORTION AND THE CONSTITUTION

Given the wealth of resources and debate surrounding constitutional interpretation of abortion rights, we have broken this section into two parts:

Part I: Overview and Questions to Explore We begin with an overview to provide essential background knowledge and offer some compelling questions to present to students. These questions may serve as overarching essential questions, discussion questions, prompts for essays, or other useful springboards to frame a lesson or unit.

Part II: The Constitutional Debate In Part II, we offer an explanation of strict vs. loose construction of the Constitution. The purpose of this pedagogical frame is to assist teachers in their development of a lesson or unit that utilizes constitutional interpretation as one of many valuable tools for helping students navigate this complex and divisive topic. (This can also serve as a useful framework for other topics in the *The Democracy Project*, as it encourages students to consider why they might support a loose interpretation on one issue and strict interpretation on the other.)

Part II also outlines three student activities which may be used separately or in sequence.

PART I: OVERVIEW AND QUESTIONS

OVERVIEW
You may wish to begin by familiarizing your students with the relevant Supreme Court cases: *Roe v. Wade* (1973), *Planned Parenthood v. Casey* (1992), and *Dobbs v. Jackson Women's Health Organization* (2022).

Is Abortion a Constitutional Right? (From the Brennan Center for Justice)

Not under the U.S. Constitution, according to the current Supreme Court. In *Dobbs v. Jackson Women's Health Organization* (2022), the Supreme Court overturned *Roe v. Wade* (1973), which guaranteed a constitutional right to abortion. Some state constitutions, however, independently protect abortion rights.

In *Roe v. Wade*, the Supreme Court decided that the right to privacy implied in the 14th Amendment protected abortion as a fundamental right. However, the government retained the power to regulate or restrict abortion access depending on the stage of pregnancy. And after fetal viability, outright bans on abortion were permitted if they contained exceptions to preserve life and health. For the following 49 years, states, health care providers, and citizens fought over what limits the government could place on abortion access, particularly during the second and third trimesters. But abortion was fundamentally legal in all 50 states during that period.

Writing for the majority in *Dobbs*, Justice Samuel Alito said that the only legitimate unenumerated rights — that is, rights not explicitly stated in the Constitution — are those "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty." Abortion, the majority held, is not such a right.

Following *Dobbs*, reproductive rights are being decided state by state. Constitutions in 10 states — Alaska, Arizona, California, Florida, Kansas, Massachusetts, Minnesota, Montana, New Jersey, and New Mexico — have been interpreted by state high courts to guarantee the right to abortion or protect access more strongly than the federal constitution. Other state legislatures have passed laws protecting abortion rights. Many states, however, have made abortion illegal.

In "Of Course the Constitution Has Nothing to Say About Abortion" Jill Lepore responds to Alito: "Women are indeed missing from the Constitution. That's a problem to remedy, not a precedent to honor." Regardless of one's position on abortion, it is an important point to make, as we explore constitutional interpretations, that unlike the Second Amendment, there is no *intent* to explore on the part of the Founders, as women were simply not considered persons.

Lepore goes on to say, "I don't happen to think *Roe* was well argued. I agree with Ruth Bader Ginsburg's early analysis–that grounding the right in equality rather than privacy might have been a sounder approach." This, of course, represents the position in favor of abortion. What might someone who opposes abortion assert about the constitutional wisdom of how abortion rights have been and/or should be considered?

QUESTIONS TO EXPLORE

1. How are **America's founding documents** (The Constitution, Bill of Rights, and the Declaration of Independence) relevant and valuable to the abortion debate? What are the limits to how they might inform a response to the question of abortion?

2. How do you think about **"life, liberty, and the pursuit of happiness"** in the context of the abortion debate?

3. Is abortion a **Constitutional right**? Explain.

4. How might the **gender-specific nature of abortion** complicate our reliance on the Constitution for guidance?

5. What are some **new ways of framing the debate** on abortion that might be more responsive to current social, political, economic and/or cultural realities? (Refer to the Categories of Analysis and Reframing the Conversation frames for suggestions.)

6. **The Harm Principle**, articulated by Oliver Wendell Holmes, states: "The right to swing my fist ends where the other man's nose begins." Is this a useful principle to explore in the context of abortion? Why or why not?

7. A.J. Jacobs refers to the Constitution as a **"national Rorschach test."** Caitlin Flangan refers to a first-trimester ultrasound as a Rorschach test. If this is the case (and you may reject the premise by Jacobs and/or Flangan), on what grounds do we base our response to this morally and politically complex question?

8. Justice Brett Kavanaugh, a key vote in abortion cases, suggested in *Dobbs* that **the Constitution was "neither pro-life nor pro-choice."** If this is the case, what is the role of the Constitution in settling the abortion debate? Does it have one?

PART II: THE CONSTITUTIONAL DEBATE

Many of our most contested political issues come down to different interpretations of the Constitution. The debate over "strict" vs. "loose" (or "broad") constructionism can offer a valuable framework for engaging students in principled and intellectually consistent debate on a range of controversial issues–without an explicit partisan or identity anchor.

(Note: Some teachers may prefer to work with "originalism" and "living constitutionalism"--or some other combination including "textualism." If these are terms your students are more familiar with, you should adapt your lesson accordingly.)

While intellectual continuity is not the primary aim of this project (and may not be a developmentally appropriate goal for some students), questions regarding constitutional philosophy can serve as a valuable starting point for students to begin to develop a coherent, principled, and intellectually consistent approach to many of the most controversial issues furthering our political divide. In short, if we are going to encourage reasoned debate on contentious issues, we need to provide students with some tools and frameworks for reasoning.

Two Approaches to Interpretation:

Strict Construction: a philosophy of constitutional interpretation that holds that the Constitution should be interpreted and applied based on a precise reading of the text and text alone–aiming to avoid biases of the Court and judicial activism.

Loose Construction: a philosophy of constitutional interpretation that favors applying knowledge from outside the Constitution's text, such as historical and political context, scientific data, etc. This approach treats the Constitution as a living document.

Activity 1: The 14th Amendment

Have students read and annotate the 14th Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Questions to Consider:

1. What might a "strict" reading of the 14th Amendment assume is settled or obvious about abortion? What might a "loose" reading assume is settled or obvious?

2. What might proponents of a "strict" interpretation care about? What values might they hold? What might proponents of a "loose" interpretation care about? What values might they hold?
3. What, if any, relevant information might a "strict" interpretation fail to consider? What might a "loose" interpretation fail to fully address?
4. What values or assumptions, if any, do both approaches share? Identify the relative strengths and weaknesses of each philosophical approach. This will be a valuable test of intellectual consistency as you seek to apply your chosen approach to subsequent constitutional questions.
5. Does a "strict" or "loose" interpretation of the 14th Amendment necessarily translate to an obvious position on abortion rights? Explain.

Activity 2: Constitutional Interpretation

This activity prompts students to consider the merits and limitations of strict and loose constructionism in the context of abortion.

1. Have students work in small groups to identify two strengths and two weaknesses of **strict constructionism** when it comes to making a responsible and constitutional set of policies to address abortion. Ask each group to identify two strengths and two weaknesses. Follow with a class discussion.
2. Have students return to their groups and do the same activity with **loose constructionism.** Follow with a class discussion.
3. Display the groups' agreed-upon strengths and weaknesses on the board/screen.
4. Ask students - either individually or as part of their small groups - to establish whether they think a strict or loose approach to the Constitution will lead to more effective policies on abortion–and why.

Remind students that philosophical approaches relevant to abortion legislation are also relevant to other Constitutional debates (gun rights, free speech, etc.). Therefore, the aim is not to work backwards from an established position on abortion, but to develop an understanding of how one's approach to interpreting the Constitution might influence a whole host of issues, including abortion.

Activity 3: Writing for Understanding

Regardless of the discipline, it is strongly encouraged to have students do some form of writing after each activity to help clarify their ideas and construct an effective argument grounded in evidence and analysis. Some options may include:

Option 1: Write a **thesis** based on one or both of the activities above and bullet 2 pieces of related evidence or examples to support it.

Sample theses:

A. *Because the Constitution includes no prohibition of abortion, a strict interpretation could conclude that the 14th Amendment's "equal protection" clause protects the right of a woman to have an abortion.*
B. *A loose interpretation of the Constitution could allow for a fetus/the unborn to be protected from the State depriving them of "life and liberty," as well as "equal protection."*
C. *Since the Constitution does not reference abortion, it does not require protection.*

Option 2: Develop an **outline** that includes a thesis, three topic sentences, and 2-3 pieces of evidence to support their positions. This can be valuable even if students do not go on to write a full essay.

Option 3: Complete a **Relationship ID** (example below).
A Relationship ID is a brief piece of writing that provides an opportunity for students to demonstrate their understanding of two terms by synthesizing and analyzing–rather than summarizing. This Relationship ID prompts students to identify each author's position and then explore points of divergence and convergence between the two positions. Students then form a sophisticated thesis, a body paragraph with evidence and analysis, and a short conclusion explaining the broader significance of their argument to fully demonstrate their understanding.

Relationship ID Thesis Examples: The Fourteenth Amendment and Abortion

A. *While the right to abortion in Roe v. Wade was grounded in the Fourteenth Amendment, opponents of abortion look to the same amendment to make a constitutional argument against abortion.*
B. *Within the Fourteenth Amendment lies the most persuasive argument both for and against the right to abortion, depending on one's constitutional interpretation.*
C. *The complexity of the constitutional debate regarding abortion lies in the Fourteenth Amendment's Equal Protection Clause, as proponents of abortion rights interpret equal protection in the context of gender equality, while opponents assert that equal protection applies to the unborn.*

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