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# SUPREME COURT OF UNITED STATES ON ABORTION LAWS

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## ABSTRACT

Abortion laws have been amongst the most controversial socio-legal issues of the 20<sup>th</sup> century United States of America and now with the judgement of Supreme Court in *Dobbs v. Jackson Women's Health Organisation* overruling *Roe v. Wade*, it is again the talk of the town. The Supreme Court has been busy with abortion and broadly with reproductive rights question from the second half of the 20<sup>th</sup> century. The matter was settled in the landmark case of *Roe v. Wade* in 1973 and remained so for more than 40 years but with the *Dobbs* judgement it is again open for the States to formulate law regarding abortion. Many States have in fact formulated laws regulating abortion after the *Dobbs* judgement. Many socio-legal thinkers consider that the Supreme Court has opened the Pandora's Box through the judgement. Other view is that while the *Roe v. Wade* judgement was progressive in nature and was in alignment with the ultimate American spirit of freedom, *Dobbs* is regressive in nature and curtails the autonomy of women in regard to her body and reproductive rights. The 14<sup>th</sup> Amendment of the Constitution introduced the term 'liberty' and the Supreme Court in both of these cases have interpreted the term 'liberty' differently. While it was broadly interpreted in *Roe* its meaning was considered to be that of only that which is 'deeply rooted in the Nation's history and tradition.'

**Keywords:** Abortion, *Roe v. Wade*, *Dobbs v. Jackson Women's Health Organisation*

## Introduction

The most significant difference between homo-sapiens and all other species on earth is the ability to think by means of complex reasoning. This would entail that humans have a capability of contemplation of future, which is alien to other species; thus enshrining the attribute of taking decisions as per likes and dislikes, needs, wants and other human emotions. With the growth of science and technology this desire to take control of various aspects of one's life has taken unprecedented strides. Human body itself can be moderated according to one's wishes to certain extent, thanks to scientific advancements. This includes control over reproductive choices as well. Though the war between science and religion is not new. When the churches weren't kind on Galileo Galilei who made contributions in the field of astronomy and physics, it would be hysterical to think that they (churches and other religious institutions) would tolerate any kind of actions which would otherwise regulate the conduct of society on day to day basis. It would be hard to imagine such religions, particularly which are proselytising in nature to be in favour or would be supportive of birth control. Thus it should come as no surprise that the major religion in United States of America, i.e. Christianity and its prime institution, the churches, have always been against any regulation of child births, beginning from contraceptives to abortions and in fact the number of children.

This paper aims to trace the legal journey of laws relating abortion in United States of America, essentially through judgements of the Supreme Court of USA. It was in the landmark case of *Roe v. wade*<sup>1</sup> in which the Supreme Court recognised the right of abortion under the purview of right to privacy as inculcated in the American Constitution through the 14<sup>th</sup> amendment. But this was recently overturned in the case of *Dobbs v. Jackson Women's Health Organisation*<sup>2</sup>, creating a lot of hue and cry from feminists and human rights organisations throughout USA. Though the conservatives have overwhelmingly welcomed the decision. The paper follows the development of both the cases and journey in between.

## Prior to Roe v. Wade

During the colonial era, and some period after that abortion in United States was legal throughout the country, provided it was done before 'quickening' i.e. period where the pregnant person starts feeling the movement of the foetus, and in fact it was in 1821, that for the first

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<sup>1</sup> 410 U.S. 113 (1973)

<sup>2</sup> 597 U.S. 2022.

time that state of Connecticut introduced a law criminalising abortion<sup>3</sup>. Post this, law against abortion became the norm during the mid-19<sup>th</sup> to mid-20<sup>th</sup> century and in fact, contraceptives were subject to different criminal sanctions.<sup>4</sup> Prior to the Roe v. Wade judgement that was delivered on January 22, 1973 almost every state in United States had a law criminalising abortion.

In the late 1950s, a medical drug by the name of 'thalidomide' was being used by pregnant women for morning sickness and nausea. It had severe adverse impact on the health of those women<sup>5</sup>. Several other health issues like rubella caused likes of Dr. Alan Frank Guttmacher to raise voice against abortion laws in the country.

### **Right to Privacy under American Constitution**

The 14<sup>th</sup> Constitutional Amendment of the American Constitution passed in 1866 deals with multiple significant aspects for American citizens- citizenship, state action, privileges and immunity clauses being a few. The first section<sup>6</sup> of the said amendment mentions another essential attribute- Due Process of Law. This 'due process of law' when interpreted by the Supreme Court paved way for 'right to privacy', which further, through Supreme Court's multiple judgements, encompassed in itself right to use contraceptives and other birth control means and more importantly the right to abortion.

### ***Griswold v. Connecticut***<sup>7</sup>

Estelle Griswold, executive director of the Planned Parenthood League of Connecticut was fined for violating the anti-contraception Law of 1879 (umbrella law of which being the Connecticut Comstock Act, 1873) which prohibited the use and sale of contraceptives. The matter was heard by the Supreme Court and the judgement was given by a majority of 7:2 with Justice William O. Douglas interpreting the broad definition of 'right to privacy' and how it

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<sup>3</sup> Linda Greenhouse, Reva B. Siegel, "Before (and After) Roe v. Wade: New Questions about Backlash", 120 YLJ 2034 (2011)

<sup>4</sup> Ibid.

<sup>5</sup> James H Kim, Anthony R. Scialli, "Thalidomide: The Tragedy of Birth Defects and the Effective Treatment of Disease" 122 TOXICOLOGICAL SCIENCES 1 (2011)

<sup>6</sup> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>7</sup> 381 US 479 (1965)

formed part of the Bill of Rights. Though, this case only gave permission for the use of contraceptives in the case of married people and not unmarried couples.

### ***Eisenstadt v. Baird*<sup>8</sup>**

This case proved to be a step further from *Griswold*. William Baird who was a reproductive right activists was convicted under the Massachusetts law, which prohibited use and distribution of the contraceptives to unmarried couples. Supreme Court struck down the law finding it violating the “Equal protection clause” of the constitution, which was inserted by the 14<sup>th</sup> constitutional amendment. The Court found distinguishing between married and non-married couple to be violation of the Equal protection clause.

### ***United States v. Vuitch*<sup>9</sup>**

One of the bigger disappointments and setbacks for the reproductive right activists and supporters came in the case of *United States v. Vuitch*, where the Supreme Court held that the District of Columbia’s abortion laws is not vague. The law permitted abortion on the grounds of preservation of mother’s life and health. Milan Vuitch provided abortion services and was charged on multiple occasions for violating the stated grounds. He contested in the Supreme Court that the term ‘health’ is a vague term. The circuit court agreed with the view but the Supreme Court held that it is not the case i.e. it is not constitutionally vague. The Court held that the term ‘health’ included both, the physical and psychological connotations. Though Justice Douglas had a dissenting opinion, which would soon be applied in *Roe v Wade*.

### ***Roe v. Wade*<sup>10</sup>**

*Roe v. Wade* proved to be a watershed moment for reproductive right movement in American history. This case finds its roots in the state of Texas. Roe in *Roe v. Wade* is actually a pseudonym, Jane Roe, whose real name was Norma McCorvey. She became pregnant in 1969 for a third time and she didn’t wanted to have the baby. Her advocates, Sarah Weddington and Linda Coffee filed a suit on her behalf as the Texas law prohibited abortion except on the

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<sup>8</sup> 405 US 438 (1972)

<sup>9</sup> 402 US 62 (1971)

<sup>10</sup> 410 U.S. 113 (1973)

ground of saving the mother's life. 'Wade' on the other hand was the district attorney in the state of Texas.

The District Court gave the decision in favour of the petitioner. The Court struck down the Texas law relying on the 9<sup>th</sup><sup>11</sup> and 14<sup>th</sup> Amendment of the Constitution.

The matter went to the Supreme Court. The judgement was delivered on 22<sup>nd</sup> January, 1973 with a 7:2 majority. The judges agreed that the term 'liberty' as stated in the 14<sup>th</sup> amendment has to be interpreted broadly. The act of abortion was considered to be under the purview of "right of privacy". The court expressed an opinion that an unwanted child can bring distress in the life and future of the mother as well as all the people associated with the child.

The defendant argued that life begins at conception itself, and it's the duty of the state to protect the same. The Court held that the word 'person' used in the constitution does not consider foetus as person.<sup>12</sup>

On the same day, Supreme Court decided another case dealing with abortion issue, ***Doe v. Bolton***<sup>13</sup> which dealt with the state of Georgia's abortion laws. Supreme Court in this case too with 7:2 majority struck down the said law.

### ***Planned Parenthood of South Eastern Pennsylvania v. Casey***<sup>14</sup>

Though there were a few cases in between which dealt with the issue of abortion and they for all decided on the basis of *Roe v. Wade*, though this case too didn't overrule *Roe v. Wade* and in fact it was reaffirmed, but surely modified it to certain extent. The Court strictly refused to overrule the 'essential holding' of the *Roe*'s judgement<sup>15</sup>.

The Pennsylvania Abortion Control Act, 1982 imposed certain conditions for women seeking abortion- spousal consent in case of adult and parental consent in case of minor along with 24

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<sup>11</sup> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

<sup>12</sup> Erwin Chemerinsky, "Constitutional Law: Principles and Policies" 887-888, Aspen Publishers, New York, 2006

<sup>13</sup> 410 US 179 (1973)

<sup>14</sup> 505 US 833 (1992)

<sup>15</sup> "To overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."

hour waiting period.

Court diluted the ‘trimester test’ and a new test of ‘undue burden’ was introduced which is “substantial obstacle in the path of a woman seeking an abortion before the foetus attains viability.” The Court thus struck down the spousal consent clause of the Act and upheld other provisions.

### ***Dobbs v. Jackson Women’s health Organisation***<sup>16</sup>

This case changed the entire dynamics of the abortion laws in the United States of America. While *Roe v. Wade* created a settled principle of abortion for more than 40 years, *Dobbs v. Jackson* disrupted it and surely it resulted in protests all across the country by the reproductive rights activists.

The case dealt with the Mississippi Gestational Act, 2018 which prohibited abortion after 15 weeks except for emergencies. This violated both *Roe v. Wade* and *Planned Parenthood v. Casey*. Thomas Dobbs was the Mississippi state medical officer who filed for a writ of certiorari, which was granted.

Justice Alito authored the judgement for the majority was supported by Justices Thomas, Gorsuch, Kavanaugh, and Barrett. It was held that right of abortion was nowhere expressly mentioned in the Constitution. Further it was held that the principle of ‘liberty’ as stated in the 14<sup>th</sup> Amendment should be understood in regard to those rights that are ‘deeply rooted in the Nation’s history and tradition.’ The court didn’t find abortion to be deeply rooted in America’s history and tradition. In fact, the court find that traditionally abortion was considered to be a ‘crime’ in United States of America as when 14<sup>th</sup> Amendment was passed almost three quarters of the states had law against abortions. Further, the Court held that abortion cannot be considered as a ‘fundamental right.’

### **Conclusion**

After the *Dobbs* judgement, the dynamics of the abortion laws has changed immensely in the United States. It is upon the states now to formulate laws regarding abortion. But, it goes without saying that the judgement has opened room for a lot of controversies. Further, litigation

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<sup>16</sup> 597 US \_\_ 2022

would also see an increase. Though, the most important issue remains that of autonomy of women on her own body. Laws against abortion primarily violates the reproductive choice of women. It has to be kept in mind that the Supreme Court's judgement has only given the rights to the State to draft laws against abortion. It's now upon the states to decide whether they would go for such law in this day and time. It further open questions broadly related to reproductive rights like use and sale of contraceptives as well. State, if they go for anti-abortion law will have to make sure that it would not result in unregulated and unmonitored abortion practices. Future, obviously holds all the answers but it is for sure that Supreme Court has opened the Pandora's Box.