

ROE V. WADE: A COMPARATIVE STUDY INTO ITS IMPLICATIONS AND THE PRESENT DEBATE

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Abstract

When we talk about women they are entitled to several rights which are claimed by them across the globe these rights include bodily integrity, protection from sexual harassment, fair wages, reproductive rights etc. These rights are recognized and supported by institutionalizing them into law or local custom by some countries whereas they are violated and suppressed by others. Since ancient times the status of women regarding these rights has remained an all-time low, for a long period of time women has been treated as a commodity violating their Human rights the most recent violation has been witnessed in Texas supreme court ruling overturning the historic judgment of roe v wade 1973, Which made abortion legal in the United States , the present ruling is in clear violation of this judgement this article shall analyze the case of 1973 and how the present ruling violates it.

Keywords: Abortion, Judgement, Pregnancy, Privacy, Trimester

Introduction

Abortion is termed a medical procedure that terminates a pregnancy. It is considered an essential healthcare need for millions of women and girls around the world. In an estimate, 1 out of 4 pregnancies turns into abortion every year moreover according to global estimates from 2010 –2014, around 45% of all induced abortions are unsafe¹. That too, they are performed under unsafe conditions without any proper medical equipment and by unprofessional medics and about 73 million induced abortions are performed every year across the globe with six out of 10 abortions being unintended and only 29% being induced abortions with developing countries worldwide bearing about 97% of unsafe abortions,² of which fifty percent occur in Asia.

Abortions are one of the safest methods of terminating unwanted pregnancy if performed under proper medical procedure, but in situations where states restrict abortions then people are left with no choices and are compelled to opt for unsafe methods of abortion. Despite these

¹ Susheela Singh & Lisa Ramirez, *Abortion worldwide 2017 uneven progress unequal access*, Guttmacher institute ,(March 2018). <https://www.guttmacher.org/report/abortion-worldwide-2017>.

² Rachel Benson Gold, *Lessons from before Roe*, Guttmacher policy review, volume 6 issue 1 <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue>.

restrictions criminalizing abortion, some countries allow (to what is called an exception to these restrictive barriers) women to seek an abortion in cases of pregnancy resulting from rape or incest, in situations where there is a life-threatening risk associated with the pregnancy. Only a minor number of abortions are associated with these reasons; which means the majority of the women and girls living under these restrictive regimes have to undergo unsafe methods of abortion, putting their life at risk.

What do you think about these restrictive barriers made by states? Is it valid for a state to regulate the reproductive rights of women, including the right to abortion? Or it should be the choice of the party? Some argue that it is a matter of private rights of individuals and should be undisturbed, while another section argues that it is the responsibility of the state to protect the rights of the unborn.

These questions were raised in the landmark case of 1973 *Roe v Wade* which led the US supreme court famously make a ruling on abortion rights in which the court recognized the “right to privacy” and also decided that the right to privacy extends to command over pregnancy. In *Roe v Wade* the court tried to create a framework to balance the state’s role and privacy rights so that they may not conflict with each other. Still, even after *Roe* those who oppose abortion have advocated for stricter abortion laws; still they haven’t been able to ban abortion but managed to put certain limitations on it. Influenced by them certain states have placed restrictions on abortions under certain situations such as mandatory disclosure of risk information, and parental notification requirements.

These heated issues have led to the current overturning of *Roe v Wade* in which the US supreme court in a shocking turn of events has decided to reverse the previous ruling. We shall analyze more about these issues further in detail.

Status of Abortion in the US before *Roe V. Wade*

The concept of abortion did not just get invented in the United States after the historic judgment of 1973 was written down by the supreme court, on contrary its legality has been a part of a long legal history in the United States. If we trace back its roots, abortion was generally legal in the United States during the mid-late 19th century at least during the first trimester of pregnancy (the period when women could feel the fetus moving in her belly).

The problem started when the American Medical Association came out against abortion soon, after which the Catholic Church also gave a proclamation banning abortion. Influenced by all

these events, congress on March 3, 1973, passed a law known as the Comstock Act³. Which defined contraceptive substances as coarse and illicit, it also banned abortion-inducing drugs, making birth control a federal offense nationwide.

Things further started escalating during the 1960s, when the women's rights movement gained momentum, aiming for safe and improved access to contraceptive methods. The movement led to the legalization of abortion in different states. For instance, in 1970 Hawaii became the first state to legalize abortion and other states like Alaska, and Washington also followed suit. They allowed licensed physicians to proceed with abortions on permission before fetal viability. For women seeking an abortion, it was a requirement in all three states to be a resident for at least 30 days before the procedure. New York also repealed its anti-abortion laws but did not had any residency requirements.

All these requirements laid down by states created unending hurdles for women seeking abortion as now they have to travel long distances to get a legal abortion done. Just to put that into picture, a year before Roe v Wade was declared, around 100,000 women traveled from their home States to New York for getting a legal abortion⁴. According to an estimated report from the Guttmacher Institute around 50,000 women traveled more than 500 miles to get an abortion in New York while about 7,000 women traveled for more than 1,000 miles, and even some 250 also traveled up to 2,000 miles coming far away from places such as Arizona Idaho, and Nevada⁵.

Access to legal abortions was mostly unavailable until the years fell before Roe v Wade. Before 1973, women were able to obtain the required permission for an abortion by their respective states only if it was proven that such pregnancy will endanger their life. However, in the period between 1967 and 1973, some states allowed legal abortions when pregnancies resulted from rape or incest.

Illegal Abortions

Despite the underlying legal history of abortion in the states before Roe,1973 the primary cause of abortion for American women has always been unwanted pregnancy, thus with this problem mingling the society the best choice for women before 1973 was to go for illegal abortions as

³ The Comstock Act 1973

⁴ History.com Editors, *Roe v wade Decision and background*, History (June 24, 2022) <https://www.history.com/topics/womens-rights/roe-v-wade>.

⁵ Rachel Benson Gold, "*Lessons from before Roe: will past be prologue*" Guttmacher institute, (March 2018) <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue>.

legal abortion had very limited access to which only women with financial means had some ground.

The number of illegal abortions estimated during the period ranging from the 1950s to 1960s was from 200,000 to 1.2 million per year. According to the data analysis of North Carolina, about 829,000 induced abortions performed in 1967 were illegal⁶. Another method through which we can determine the presence of illegal abortions is the death toll. In the year 1930, the prominent cause for the death of about 2700 women was officially listed as illegal abortions. Such methods of abortion can be humiliating and detrimental at worst as they can cause grievous injury or even death.

Background behind the case of 1973

Obtaining abortion before the quickening period was the method followed in common law in England the same tradition has been followed in the United States, where obtaining an abortion before quickening (a period where fetus movements can be observed) was not an offense, Connecticut inspired by the lord Ellenborough's act (1803) became the first State introducing law banning abortion after quickening.⁷

By the beginning of 1967 around thirteen States allowed access to abortion. While several states restricted abortion procedures, somewhat 31 States opened access to the procedure but only if it was meant to protect the mother's life which included Texas. So how did the case Roe v wade come into the spotlight? Many believe that it was the historic case that made abortion legal. However, Doe v Bolton⁸ is considered as the foundation on which Roe v Wade was declared.

In the year 1970 Supreme Court while deciding Doe v. Bolton observed that abortion is valid under three circumstances, if there is a serious threat that forcing such pregnancy will endanger the person's life, or if there is a chance that the fetus will be born with some unrepairable permanent physical or mental disability, or if such pregnancy is the result of rape.

Roe v Wade is indeed a controversial case that has changed the view on abortion in the United States. It all started with Norma McCorvey a Texas resident where it was illegal to undergo an

⁶ Rachel Benson Gold & Megan K. Donovan, *Lessons from before abortion was legal*, Scientific American, (September 1, 2017) <https://www.scientificamerican.com/article/lessons-from-before-abortion-was-legal/>.

⁷ The New York Times, *The Dobbs v. Jackson Decision Annotated*, The New York Times,(June 24, 2022) <https://www.nytimes.com/interactive/2022/06/24/us/politics/supreme-court-dobbs-jackson-analysis-roe-wade.html>.

⁸ Doe v Bolton Doe ,410 U.S at 179

abortion unless the pregnancy was a result of rape or incest, which were the least of the reasons in the United States for obtaining an abortion. She was only 21 years old when she became pregnant with the third child. Norma's friends influenced her to falsely claim that she has been raped to get an abortion granted by the state but she failed due to lack of evidence. Norma was then advised to meet two lawyers: Linda Coffee and Sarah Weddington. Both the attorneys filed a federal lawsuit in the district court of Dallas Texas County on behalf of Norma McCorvey the federal suit was filed under the name "Jane Roe" against the district attorney of Dallas County Henry Wade. The principal issue raised in Roe v Wade was whether or not the constitution protects a woman's right to control her birth through abortion .

Supreme court, while deciding the case, held that a woman's right to abortion falls under the ambit of the right to privacy, recognized under *Griswold v. Connecticut*,⁹ which has been secured under the fourteenth amendment. The court in its judgment introduced the trimester system in which absolute autonomy was provided to the women regarding abortion in the first trimester (first three months) and state's interest was also secured during the second and third trimester under which State was allowed to regulate abortion. Later in the year, 1992 court in *Planned Parenthood v Casey*¹⁰ changed the standard required by States for regulating abortion from trimester system to fetal viability (The period where a fetus can survive outside the mother's Womb) which is usually estimated at around 28 weeks but can also be as early as 24 weeks.

The 14th amendment provides the right to due process available at the state level. Since its adoption, the due process clause has always been used by the supreme court to strike down any state laws or statutes which infringe personal liberties and such issues which are not expressly mentioned under the constitution, just like the right to privacy. The Roe v. Wade case heavily relied on this Clause which concluded that restricting abortion infringes the right to privacy under the constitution by violating a person's choice to abort a birth.

Another significant development that came across Roe v. Wade was an issue regarding when life begins. The court while hearing this issue said: "When those professionals who have trained in their respective fields of Medicine, philosophy, and theology are unable to speculate a valid conclusion, how can the judiciary at this stage of man's knowledge can answer the such question."

⁹ *Griswold Connecticut* (1965),381 U.S. at 479

¹⁰ *Planned Parenthood v. Casey* (1992), 505 U.S at 833

So actually, when does life begin? This question must be wandering around your mind right now. When does life begin? Is it at conception or at birth? It is undoubtedly a very difficult question to answer. This question has inherently created confusion between the right to life and the right to privacy. Let us just focus on our primary question. It is a very difficult issue to resolve since different cultures have their own opinions regarding this question. Some argue that life begins at birth. For example, in the Jewish, faith it is considered that life begins at birth. But if we look into the catholic view, they believe that life begins at conception while in the modern day if we ask a doctor his views tend to be that Life begins somewhere before birth. The answer to this question remains sensitive to date, but the court while declaring Texas abortion laws unconstitutional also created a framework of rules so that both the fetus and mother's life could be protected by giving autonomy to the woman during the first trimester in which the woman was free to obtain an abortion without any interference from the government. But also allowed the states to regulate abortion in the second and third trimesters to secure the life of the unborn.

Why the case of 1973 is notable in US history

Roe. v. Wade has a significant place in US history since many people believe that it was the case that legalized abortion in the states but, what they get wrong is that it was not the first case that legalized abortion all it did was change the way the states can regulate abortion and secured abortion in right to privacy covered under the constitution. It was the first case that established that criminalizing abortion can cause injury to women rather than the physician.

The Historic judgment given by the supreme court which struck down anti-abortion laws in the States and legalized abortion created more heat than any other case in the history of the United States. One section of the population influenced by the religious customs of the Catholic Church and other fundamentalist beliefs held against abortion by stating that aborting an unborn is more likely a murder, while the other section of the population believed that American women had a right to choose, whether she bears a child or not and by applying unreasonable restrictions through government on this right violates her freedom and personal privacy.

The decision held in 1973 have created a long battle already in Swing for 20 years which has divided it into two segments, thus those who oppose it describe themselves as “pro-life” and its advocates who have constantly made efforts to prevent its overturning describe themselves

as “pro-choice”¹¹. Justice Blackmun who wrote the majority decision has also been threatened for his life in the past by the condemners of the decision.¹² In his letters mailed to him, he has been described as a murderer and compared to Pontius Pilate and Adolf Hitler.

Support in favor of abortion rights has been increasing rapidly even in this 21st century, advocates of Roe have described abortion as a vital part of women’s right, bodily integrity, and personal freedom. The majority of opinion polls conducted in the United States in late 2021 have shown that majority of the Americans support abortion with about 60% believe that abortion is reasonable during the first trimester, which drops to 20% for the second trimester.¹³ Another Gallop poll estimated as early as May 2022 showed that about 50% of Americans believe that abortion should be legal under some circumstances while 35% believe that it should be legal under any circumstances and the rest 15% believe that abortion shouldn’t be legal under any circumstance¹⁴.

Those opposing Roe have advocated for more regressive abortion laws to which they have only been partially successful as these opponents have managed to place certain limitations on abortion under certain situations such as parental notification requirements, and mandatory declaration of abortion risk information; but still they are unable to ban abortion completely, and till date it remains a heated issue in the United States.

As described by Justice Harry Blackmun, “abortion will never be a simple issue. It will remain a debatable topic for years to come because somebody’s beliefs on it rely on their opinion of the world and what they believe regarding the beginning of life.”.

Current overturning

In a historic turn of events, the supreme court of the United States reversed the landmark Roe v Wade case on June 24, 2022 which declared abortion as a constitutionally protected right under the right to privacy. The overturning was ruled by the conservative majority court in Dobbs v Jackson Women’s Health Organization.¹⁵ The court in its findings ruled that the right to abortion is not deeply rooted in the United States’ customs and traditions. This decision has

¹¹ KL Simmons, *The Absurdity of abortion rights being challenged in 2022*, ByrsIf (May 3, 2022) <https://byrsif.co/the-absurdity-of-abortion-rights-being-challenged-in-2022> .

¹² Elizabeth Olson, *Justice Harry Blackmun who has received numerous death threats*, United Press International (March 4, 1984) <https://www.upi.com/Archives/Justice-Harry-Blackmun-who-has-received-numerous-death-threats>.

¹³ Jean Li & Emilia Thompson DeVaux, *Where Americans stand on abortion*, Five Thirty Eight (May 6, 2022), <https://fivethirtyeight.com/features/where-americans-stand-on-abortion-in-5-charts/>.

¹⁴ *Abortion*, Gallop report (May 2,2022) <https://news.gallup.com/poll/1576/abortion.aspx>.

¹⁵ Dobbs v. Jackson Women Health’s Organization, 19-1392 U.S at 597

eliminated the constitutional right to abortion, which was in force for almost 50 years. Not only this ruling will impact, women but will also change the political landscape in America.

The case *Dobbs v Jackson* is centered around the Mississippi gestational age act¹⁶, which restricted abortion after 15 weeks. The law was struck down by a lower court because of constitutional protection granted by *Roe v Wade*, after which the matter reached the Supreme Court. The court in a 6-3 ruling upheld the Mississippi Act overturning the 50-year-old law. The ruling has effectively restored the power of the states to regulate abortion and will enable them to create their policies regarding abortion.

Justice Samuel Alito who has written in his majority opinion that “*Roe was outrageously wrong from the very beginning and its explanations are weak and the ruling had damaging results which are very far from resolving the national issue of abortion, both Roe and Casey has only created heated debates and unreasonable division*”

Around 13 States have already passed “trigger laws” which came into effect as soon as *Roe v Wade* was reversed, including the Mississippi Act which restricts abortion after 15 weeks. Thus, over the past few decades, many states have tried to introduce anti-abortion laws. While, most of them were declared unconstitutional by lower courts because they were violating *Roe v Wade*. But now there is a certain chance that they will be implemented.

How it will impact women

Since the overturning, there would be no federal law to obtain an abortion in the United States. Now the sole right to regulate abortion will fall up to the states. Most of the conservative states will bring back the regressive laws which were previously struck down by *Roe v Wade* in 1973 and the standard of fetal viability will be prohibited. According to an estimate by the New York Times, legislative bodies of 22 states will move a ban on abortion or make access to it difficult, and majorly marginalized poor women will most likely suffer, the report also said that the number of legal abortions in the US will probably be reduced by 14% moreover women seeking abortion even during the early stages will be subjected to criminal penalties.¹⁷

Such restrictions will further put the burden on women as now they will have to travel long distances to the particular State having access to legal abortion which will not be a viable option for low-income groups thus, will harm those with the least economic resources, further it will

¹⁶ Gestational Age Act, 2018, s41-41-191 (Mississippi code Title 41)

¹⁷ New York Times, *How abortion ban will ripple across America*, New York Times (June 24, 2022) <https://www.nytimes.com/interactive/2022/06/24/upshot/dobbs-ro-abortion-driving-distances.html>.

affect minorities already facing racism in the state. For example, in Florida, black women constitute about 15% of the population but around 75% in arrests related to pregnancy.¹⁸ This is a dark period for women in the United States, but advocates and supporters are constantly fighting legal battles to protect women from these regressive laws.

CONCLUSION

Obtaining abortion should be the choice of the woman as it places a lot of stress on her and also puts her life at risk, it should be consequently her decision whether to keep the child or not; but this right must not be absolute. It is acceptable that some reasonable restrictions on this right should be there because not only it affects the mother but also the unborn, thus it remains a question whether life begins at conception or birth which hasn't been answered but it should be kept in mind that between these two parallel lines of the customs and beliefs the child also suffers.

The States have a right to regulate the health of their citizens but what should be kept in mind is that such restrictions should be reasonable as we have witnessed in the recent Act of Mississippi which was upheld by the supreme court overturning *Roe v Wade*; the law makes abortion illegal after 15 weeks, so what happens if the women don't even know about their pregnancy by that period? Such a law will not enable her to end such pregnancy within the timeframe and also what happens if the financial conditions of the family are not enough to sustain a child? By forcing such a child, only burden on the family will increase. Further, we must stand in solidarity and push back against such regressive laws no matter where we live and protect the marginalized who largely suffer. We must rise against the government to turn abortion into an essential healthcare service and also rise for reforms for protecting healthcare individuals so that they are not criminalized for performing abortions.

¹⁸ Jared council, *The Three Biggest Implications For Black Women From Roe V. Wade's Fall*, Forbes (June 28, 2022) <https://www.forbes.com/sites/jaredcouncil/2022/06/28>.