

THE REJECTION OF *ROE v WADE* BY THE UNITED STATES SUPREME COURT AFTER FIVE DECADES – A SEISMIC DECISION

1 Introduction

The recent dramatic about-turn of the United States Supreme Court (USSC) in *Dobbs v Jackson Women's Health Organisation (Dobbs)* in May 2022 regarding the rights of women in the United States to an abortion has caused a major uproar. Overruling one of the most famous of all USSC cases, *Roe v Wade* (410 US 113 (1973) (*Roe*)), five decades after it was decided, has had major repercussions. To fully comprehend the impact that *Roe* had on the United States, it is opportune to give an overview of *Roe*, which was a dramatic judgment and became established law for 50 years. In revisiting *Roe*, it is difficult to understand why such a clear and well-reasoned majority judgment has been overruled.

Roe raised serious legal, moral and religious issues. The central issue was whether a woman had a legal right to an abortion. The USSC by a majority of seven to two held that woman had a constitutionally protected right to an abortion. As will be seen, *Roe* based its decision on its interpretation specifically of the Fourteenth Amendment of the United States Constitution.

All major cases before the USSC can be put into two categories – abortion cases and all others. Abortion remains the central legal issue before that court. It defines the judicial philosophies of the justices of the USSC. It dominates their nomination and confirmation processes. The abortion controversy is sensitive and emotional. It generates vigorous, opposing views. It inspires deep and absolute convictions. A person's philosophy, experiences, exposure to the raw edges of human existence, religious beliefs, and attitudes towards family values, and the moral standards a person establishes and seeks to observe all influence their thinking about abortion.

It arguably delineates the difference between the National Democratic and Republican parties. When, during the confirmation proceedings of the present Chief Justice Roberts, he was asked about his views on *Roe*, he was careful not to commit himself. His answer was that *Roe* was settled as a precedent of the court and entitled to be respected under the principles of *stare decisis*, but he added that the justices of the Supreme Court do sometimes reverse their own precedents (Toobin *The Nine: Inside the Secret World of the Supreme Court* (2008) 327).

Abortion issues remain eternal. Does a woman have a legal right to an abortion? Is the termination of a pregnancy a decision to be made by a

woman and her doctor, or is the protection of potential human life a legitimate interest of the State? At what point does an unborn person acquire legal rights that are protected under the law? The majority and dissenting judgments in *Roe* represent the full spectrum of legal approaches to these and related questions. However, no court decision exists in a vacuum and the controversial issues raised in *Roe* continue to be raised and debated in the legal and political life of the United States, as they do in other jurisdictions.

2 Factual background

The circumstances that led to *Roe* arose in 1970 in the state of Texas. An unmarried pregnant woman desired to terminate her pregnancy, but the laws of Texas made abortion a crime, except when it was necessary to save the life of the mother. She decided to challenge the Texas abortion law, and the pseudonym “Jane Roe” was created to protect her privacy. She brought her case against Henry Wade, the district attorney charged with enforcing the law of Texas in her county.

Jane Roe filed a class-action lawsuit brought on behalf, not only of herself – a pregnant woman who wanted access to a safe and legal abortion – but also of all other women in a similar situation. Roe contended that the Texas law making abortion a crime, and other state laws that similarly restricted or prohibited abortion, violated rights that she and other women had under the United States Constitution. Roe submitted that the state of Texas did not have the right to invade her privacy, which, she asserted, included her right to decide whether or not to terminate her pregnancy. Relying on the concept of personal liberty embodied in the Fourteenth Amendment, she also argued that the Constitution gave her rights as an individual that meant she should be free from state interference of this sort. This was the main basis of Roe’s argument.

The first ten Amendments to the United States Constitution, all adopted as far back as 1791, are commonly called the Bill of Rights. Their principal purpose is to protect the individual against various sorts of interference by the federal government. The Thirteenth, Fourteenth and Fifteenth Amendments were enacted for the purpose of barring discrimination by states against individuals. Of greatest interest to the discussion of *Roe* is the Fourteenth Amendment. Section 1 provides, in full, as follows:

“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.”

This Fourteenth Amendment is commonly referred to as the “due process clause” of the United States Constitution. It suffices to say that it does not, and nor does any other Amendment constituting the Bill of Rights, refer to a right to privacy.

Wade argued that the State had a proper interest in protecting both a pregnant woman's health and human life from the moment of conception. He submitted that the Texas legislature expressed in clear language that abortion was a crime, except if necessary to save the life of the mother. He also submitted that a majority of states in the United States had similar laws. He argued that the State had an interest in protecting the health and welfare of all its people, regulating doctors, medical facilities and procedures, including the abortion procedure, and protecting those who were yet unborn.

Roe was first heard in a federal court in Texas. *Roe* then appealed directly to the USSC. *Roe* argued for an unconditional right to terminate her pregnancy. Texas argued for an unconditional right to protect unborn human life.

3 The right to privacy

Owing to the centrality of the Fourteenth Amendment's "due process clause" in the *Roe* decision, it is imperative to refer to a previous USSC decision on the meaning of "No state ... shall deprive any person of life, liberty or property, without due process of law". This decision is *Griswold v Connecticut* (381 US 479 (1965) (*Griswold*)), known as the "contraceptive case". At issue in *Griswold* was a Connecticut statute that forbade the use of contraceptives (and made it a criminal offence); the statute also forbade aiding or counselling others on their use. The defendants were the director of the Planned Parenthood Association and its medical director. They were convicted of counselling married persons in the use of contraceptives. The Supreme Court struck down the relevant statute finding that several of the Amendments in the Bill of Rights protect the privacy interest and create a zone or penumbra of privacy surrounding the marriage relationship. The court concluded that the right of married persons to use contraceptives fell within this zone or penumbra of privacy. Three of the concurring opinions specifically held that the Connecticut statute violated the Fourteenth Amendment's "due process clause", which included the "right to privacy".

Griswold was one of the USSC's most controversial and far-reaching decisions. The court for the first time recognised a constitutional right to privacy, thereby barring the state of Connecticut from enforcing its statute forbidding the use of contraceptives by married couples.

By the time *Griswold* was decided, a substantial consensus had emerged in the United States on the desirability of family planning through contraception. Even Justice Stewart, who held that the Connecticut anti-birth-control statute should be upheld, called the statute an "uncommonly silly law". *Griswold* became the leading precedent for the USSC's extension of the right to privacy to include a woman's right to an abortion in *Roe*.

In *Eisenstadt v Baird* (405 US 438 (1972) (*Eisenstadt*)), *Griswold* was expanded on by the USSC. Here the court, by invoking the Fourteenth Amendment, invalidated a statute that permitted contraceptives to be distributed only by registered pharmacists and only to married persons. The court held that such a statute discriminated against the unmarried. The court held that if the right of privacy means anything, it is the right of the individual,

married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Griswold and *Eisenstadt* led to what can be referred to as the “right of reproductive autonomy”, which laid the basis for *Roe*, which was to follow.

4 The decision of the Supreme Court in *Roe*

Justice Blackmun delivered the opinion of the court (in which Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall and Powell joined). Justice Rehnquist filed a dissenting opinion, in which Justice White joined. (In what follows, the various approaches of the Justices are discussed using a broad brush, without dissecting the details.)

According to Justice Blackmun, although the Constitution did not explicitly mention any right to privacy, the court has recognised the existence of a right of personal privacy, or a guarantee of certain areas or zones of privacy, under the Constitution, such as in the First, Fourth, Fifth and Ninth Amendments, and especially in the first section of the Fourteenth Amendment. These rights to personal privacy, Justice Blackmun held, could be deemed to be “fundamental” or “implicit in the concept of ordered liberty”. This right of privacy, held Justice Blackmun, was broad enough to encompass a woman’s right to decide whether or not to terminate her pregnancy.

Such a right, however, was not absolute and was not unlimited. The majority concluded that the right of personal privacy (which includes a woman’s right to decide on an abortion) is not unqualified and must be considered against a state’s legitimate interests, which may override the rights of the pregnant woman that are at stake.

Despite holding that a woman’s right to privacy (which includes a right to an abortion) is a fundamental right under the Fourteenth Amendment, the court held that a state had a limited right to regulate abortions, but could not absolutely prohibit them. The court thereupon divided pregnancy into three trimesters and prescribed a different rule for each. During the first trimester, a state may not ban or even closely regulate abortions. The decision to have an abortion, and the manner in which it is to be carried out, are left to the pregnant woman and her physician. During the second trimester, a state may protect its interest in the mother’s health, by regulating the abortion procedure in ways that are reasonably related to the mother’s health – for example, provision for the operation to take place in a hospital or a clinic. It was emphasised that a state may only protect the mother’s health and not the fetus’s life during this period. At the beginning of the third trimester, the court stated, the fetus becomes “viable”. This means that it has a capability of meaningful life outside the mother’s womb. After such viability, a state has a compelling interest in protecting the fetus. It may thus regulate or even prohibit abortion, but abortion must be permitted where it is necessary to preserve the life or health of the mother.

Justice Stewart, in a separate concurring judgment, emphasised what was held in *Griswold* – namely, that the birth-control law of Connecticut was unconstitutional because it substantively invaded the “liberty” that was protected by the “due process clause” of the Fourteenth Amendment. Stewart also referred to *Eisenstadt*, which recognised the right of the individual, married or single, to be free from governmental intrusion in matters so fundamentally affecting a person as the decision to bear or beget a child. That right, held Stewart, necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.

Justice Douglas, in his concurrence, held that the Fourteenth Amendment protected freedom of choice in one’s life, respecting marriage, divorce, procreation, contraception and the education and upbringing of children.

Justice Rehnquist, in his dissent, had difficulty in comprehending how the right to “privacy” was involved in the case. He could not agree with the majority’s sweeping invalidation of any restrictions during the first trimester as being justifiable. He saw the majority opinion as being more legislative than judicial. Contrary to the majority, he found that a right to an abortion is not so rooted in the conscience and traditions of the people of the United States as to be ranked as “fundamental”.

5 *Doe v Bolton*

Along with *Roe*, the court simultaneously decided a companion case from Georgia, *Doe v Bolton* (410 US 179 (1973)). The court made it clear that the cases were to be read together. The pleadings of the Doe couple presented them as a childless married couple, the woman not being pregnant, and having no desire to have children because of medical advice that Mary Doe should avoid pregnancy and for other highly personal reasons. They feared that if they faced the prospect of becoming parents and pregnancy ensued, they would want to terminate it by an abortion. They asserted an inability to obtain an abortion legally in Texas. They thus alleged a detrimental effect upon their marital happiness because they were forced into a choice of either refraining from sexual relations or endangering Mary Doe’s health through a possible pregnancy. They also claimed that if Mary Doe should in future become pregnant owing to failure of contraceptive measures, and she wanted an abortion, that would be illegal under Texas statutes.

In *Doe v Bolton*, the opinion of the court was also delivered by Justice Blackmun, in which Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall and Powell joined. Justices White and Rehnquist (as in *Roe v Wade*) dissented. Of relevance is Justice Douglas’s concurring judgment, in which he saw the Georgia statute as being at war with a long line of Supreme Court decisions – such as *Union Pacific R Co v Botsford* (141 US 250); *Terry v Ohio* (392 US 1); *Katz v United States* (389 US 437) and *Meyer v Nebraska* (262 US 390), which all protect individual liberty against governmental intrusion and allow the individual to enjoy common-law privileges essential to the orderly pursuit of happiness by free men. He held that all these cases had a clear implied message that a woman is free to make the basic decision whether or not to bear an unwanted child.

6 Roe partially overruled

In *Planned Parenthood of Southeastern Pennsylvania v Casey* (60 USLW 4795 (*Casey*)), important aspects of *Roe* were partially overruled. These aspects were abortion's status as a "fundamental right", and a state's almost complete inability to regulate first-trimester abortions, and the whole trimester framework of *Roe*. The majority of the court declined to overrule *Roe* explicitly but the practical result of the decision, in a nutshell, was that states may restrict abortion as long as they do not place an "undue burden" on the woman's right to choose.

It must be noted that *Casey* was decided 20 years after *Roe*, and the changed composition of the court introduced new viewpoints and philosophies on this contentious issue. (As to how the personal philosophies of justices of the Supreme Court determine their approaches to the law, see Toobin *The Nine: Inside the Secret World of the Supreme Court*; Woodward and Armstrong *The Brethren: Inside the Supreme Court* (1979); O'Brien *The Supreme Court in American Politics* (2003); Starr *First Among Equals: The Supreme Court in American Life* (2002); Garbus *Courting Disaster: The Supreme Court and the Unmasking of American Law* (2002) and Greenburg *Supreme Conflict* (2007)).

At issue in *Casey* were a number of significant restrictions on abortion, such as a requirement that a woman wait 24 hours after receiving information from a doctor on abortion, and a requirement that a married woman notify her husband of her intent to abort. Such restrictions were *prima facie* clearly unconstitutional judged by the standards of *Roe*.

There were three distinct voting blocs in *Casey*. First, traditionally "liberal" Justices Stevens and Blackmun (the author of *Roe*) wished to reaffirm *Roe* completely. Secondly, four "conservative" Justices (Rehnquist, White, Scalia and Thomas) wished to overturn *Roe* completely. The third bloc were middle-of-the-road Justices (O'Connor, Souter and Kennedy) who wished to reaffirm the central principles of *Roe*, but to allow state regulation that did not "unduly burden" the woman's freedom to choose. The court eventually decided, five to four, to maintain *Roe* as a precedent but decided, seven to two, to allow states to regulate more strictly than *Roe*.

Casey rejected the trimester approach used by *Roe* as the basis to govern abortion regulations. As stated above, according to *Roe*, no regulation at all was permitted during the first trimester. Regulations to protect a woman's health were permitted during the second trimester, but not to further a state's interest in potential life. During the third trimester, because the fetus was now viable, a state could prohibit abortion as long as the life or health of the mother was not at stake.

In place of the trimester approach of *Roe*, *Casey* introduced the "undue burden" standard. An "undue burden", the court held, was where a regulation had the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus. Such a regulation, the court held, would have the effect of a state reaching into the heart of the liberty protected by the due process clause and could thus be prohibited. A

state could, for example, make regulations to further the health and safety of the woman, as long as such regulations did not “unduly burden” the woman’s right to abortion. After “viability” however, a state may prohibit all abortions not needed to protect the health or life of the mother.

Casey made it clear that a woman’s right to decide whether to terminate her pregnancy remains an interest that receives special constitutional protection.

7 Conclusion

What *Roe* proved was that the United States Constitution rests not on any static meaning but on its adaptability to cope with current problems and needs. *Roe* proved that the Constitution is a living Constitution. It stood for an expansive conception of the democratic way of life as the foundational ideal of constitutional interpretation. The court revived the “due process clause” of the Fourteenth Amendment to protect human dignity. The court expanded constitutional rights by pointing to their contribution to protecting human dignity. The focus of *Roe* was whether individual dignity had been honoured – that is, whether the worth of an individual had been acknowledged.

In contrast to *Roe* and succinctly put, *Dobbs* decided by a majority that abortion is not a constitutionally related issue, and that the Bill of Rights is not a consideration, and that it is for each state within its discretion to regulate abortion in its own jurisdiction.

Dobbs proves that much depends on how the USSC is constituted and how new justices are appointed, and retirements take place. It is virtually impossible to say with any certainty which issues are settled for the long term. Explosive issues – such as abortion, for example – will remain tenuous. The replacement of a liberal justice by a conservative justice, and *vice versa*, can transform the law for generations. Six of the nine present USSC justices, including three Donald Trump appointees, are considered conservatives. It is thus no surprise that the USSC overturned *Roe*.

With a liberal Democratic presidential incumbent at present and conceivably for at least the next six years, more liberal appointees to the USSC could conceivably resurrect *Roe* as being the pre-eminent legal authority on abortion. It is for this reason that *Roe* will continue to be a hotly debated decision on abortion with its vociferous protagonists and detractors. The views expressed by the seven-to-two majority of the USSC in *Roe* will not disappear overnight and will continue to dominate the abortion debate in the United States for the foreseeable future. Thus, *Roe* demands a continuous incisive discussion. It is the purpose of this note to take part in this discussion.

What are the expected consequences of *Dobbs*? Many conservative Republican-led states are expected to introduce measures restricting access to abortion. Near-total bans can be expected. Many measures on abortion may provide exceptions for cases of rape or incest. Many women may not have the financial means to travel across multiple state lines for an abortion,

once widespread bans are imposed. This could lead to women ending their pregnancies outside the medical system, with attendant legal and health risks. The USSC in *Dobbs* was not swayed by testimonies of women who had abortions after being raped, who wanted to continue their education, who wanted to escape poverty, or who wanted to avoid the consequences of teenage pregnancies.

Dobbs, in effect, has damaged women's dignity and freedom in making a decision that is right for their bodies and their circumstances, as was emphasised in *Roe*. In one stroke, it consigned *Roe* to the dustbin. It is to be hoped this will be only temporary, until the USSC reverts to a majority of liberal justices.

Whatever one's views on abortion or *Roe* or *Dobbs* may be, the differing views on the controversial topic may never be reconciled – not by philosophers, theologians, legal or medical scholars.

Opinion polls have consistently shown that the majority of Americans are in favour of *Roe*, and it will be interesting to see whether *Dobbs* is going to cause a backlash against the conservative Republican party in future elections.

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