

# **Quo Vadis? The Future of Women's Rights and Beyond Aftermath of Dobbs**

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## **Abstract**

Throughout time, the United States' legal system has nurtured a well-deserved identity of being the most progressive structure comprising brilliant judicial minds. One such radical position was *Roe vs. Wade*, where the court delivered a far-reaching interpretation of substantive due process by recognizing women's right to abortion. However, recently the court's observation in *Dobbs v. Jackson* has put the long-standing progressive attitude of US courts in question as the issue of abortion now belongs to the state's discretion instead of women. While critiquing *Dobbs's* decision, this article takes into account *Roe's* significance and *argues how* disproving the constitutional basis of the right to abortion through *Dobbs v Jackson* may lead to the repudiation of some other rights, which not only concerns women but others as well.

## **1. Introduction**

Women have always been struggling for their right to abortion, a right that always stirs a legal brawl concerning its criminalization while grappling with the debate on pro-choice v pro-life. A significant number of countries across the world have either criminalized abortion absolutely or provided access to abortion health care with substantial restrictions. Only a few countries, like the US, attempted time and again to change the fate of the right to abortion for women. One such attempt, so to speak, was *Roe v Wade*, which recognized women's constitutional right to abortion by (re)affirming women's bodily autonomy and self-regulation. Considered a milestone in the progressive development of women's rights, the decision, however, has been upended lately by the U.S. Supreme Court in *Dobbs v Jackson Women's Health Organization* resulting in a public outcry. This note argues that the overturning of women's right to abortion can potentially be a serious setback for the further

development of women's rights and beyond by comparing the two decisions of the U.S. Supreme Court.

## **2. *Roe* and the Right to Abortion as a Constitutional Right**

In *Roe*, the court was tasked with dealing with a right not explicitly grounded in the constitution of the US, that is, the right to abortion. The silence of the right, along with the process of weighing the compelling interests of states against the pregnant women's right to privacy rather, led the court to adopt an innovative approach to defend the right in question. In the process of doing so, the court recognized women's right to abortion within the right to privacy by justifying it on the ground of "ordered liberty" under the Fourteenth Amendment.<sup>1</sup>

While interpreting the due process clause of the fourteenth amendment, the court resorted to a substantive approach. Substantive due process aims to find out if a sufficient purpose backs the deprivation of life, liberty, or property.<sup>2</sup> Courts usually attempt to implement substantive due process when the concerned rights are not enumerated within the Constitution.<sup>3</sup> The Supreme Court in *Roe vs Wade* adopted a similar strategy. The court recognized the right of privacy within the liberty right of the fourteenth amendment while focusing on certain psychological, economic, and social factors leading the court to adopt the substantive approach.<sup>4</sup> The court did not fail to address the complex issues such as; unwanted motherhood and the social stigma of unwed motherhood.<sup>5</sup> Considering the delicate needs and challenges detected in the existing society, the court decided to resort to substantive due process; however, it discarded the arguments on behalf of the appellant that the right to privacy allows a woman to perform an abortion at any stage of her choice without any interference.<sup>6</sup> As a result, the right to abortion was recognized as a qualified right instead, leaving room for the exercise of a state's discretion.

Accordingly, the court established the absolute exercise of the right to abortion only prior to the end of the first trimester of the pregnancy while taking into account the medical judgment of concerned practitioners.<sup>7</sup> In the subsequent stage to the end of the first trimester, the court prioritized the interest of maternal health and assigned the state the authority to regulate abortion procedure reasonably when it concerns maternal

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<sup>1</sup> *Dobbs vs Jackson Women's Health Organization* 597 US (2022).

<sup>2</sup> Erwin Chemerinsky, 'Substantive Due Process, [1999] 15(4) *Touro Law Review* 1501, 1534.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Roe v Wade* 410 US 113 (1973) [77].

<sup>5</sup> *Ibid.*

<sup>6</sup> *Roe* (n 4) 78.

<sup>7</sup> *Ibid* 101.

health.<sup>8</sup> At a later stage, the court allowed the state even to disallow abortion, considering the potentiality of human life and for the sake of protecting maternal health.<sup>9</sup> In adopting the trimester approach, the court relied on a common law principle that considered abortion conducted in the “pre-quickening” period” (the first identifiable development of a fetus) as not being a criminal offense.<sup>10</sup> Common law has derived this notion from long-standing theological, philosophical, and canon law perceptions. Each of these branches has provided ideas regarding the formation, conception, and animation of human life- when a person comes into being while focusing on the period till which the fetus remains part of the mother’s body. Therefore, its destruction should not be considered a homicide.<sup>11</sup>

The reasons for the demonstration of the court’s confidence in common law could be located in the silence of the domestic statutes of the US on women’s right to privacy or personal choice relating to abortion. Relying on common law does not appear to be a peculiar choice, especially when the US courts are assumed to implement common law to interpret the existing norms and develop the national jurisprudence leading to the fulfillment of the original aim of the United States as a nation.<sup>12</sup> The US courts have always depended on the notions deriving from common law if the clarification is not found in the local laws.<sup>13</sup> Therefore, it is not surprising that in *Roe vs. Wade*, the Supreme Court followed a similar trend with enthusiasm to locate the hidden answers, thereby establishing the right to abortion as a constitutional right.

### **3. Overturning *Roe*: One Step Forwards, Two Steps Back?**

As much as the overturning of *Roe* has come as aghast to people around the world, it was much-anticipated, followed by the earlier leak of the court draft predicting the strong likelihood of overturning the decision.<sup>14</sup> And everything fell into place when the U.S. Supreme Court on the 24<sup>th</sup> of June finally overruled the historic *Roe v Wade* by uttering the decision as “egregiously wrong” and granted the absolute autonomy to

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<sup>8</sup> Ibid 102.

<sup>9</sup> Ibid 103.

<sup>10</sup> Ibid 40.

<sup>11</sup> Ibid.

<sup>12</sup> Alton B. Parker, ‘The Common Law Jurisdiction of the United States Courts’[1907] 17 The Yale Law Journal 20.

<sup>13</sup> Ibid.

<sup>14</sup> Josh Gerstein & Alexwander Ward, ‘Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows’ (US 05 February 2022), available at <<https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>> accessed 20 July 2022.

regulate abortion “to the people and their elected representatives” by relinquishing the women’s one.

In justifying how *Roe* went wrong, the court has relied, quite strikingly, on the history and traditions of the Americans, which are “deeply rooted” in nature, to repudiate the unenumerated rights such as the right to abortion. And these grounds are fundamental, as the court has emphasized, to attain the recognition of being a ‘liberty’ within the Due Process Clause if the rights in question are implied rights.<sup>15</sup> American history has proven not to put any restrictions on states to regulate abortion, nor has there been any treaty, precedent, or constitutional provision in the pre-*Roe* era.<sup>16</sup> The constitutional basis of the right to abortion in *Roe* has, therefore, been found to be erroneous as it has failed to find the right on the grounds of the ‘text, history or precedent’ of the nation.<sup>17</sup> This eventually leads, even if it is at the expense of women’s right to make their personal decision vis-à-vis their body, to protecting the state’s interest in the fetus within a woman’s body.

While the court has curtailed women's freedom to make extremely personal choices, it has done so while overlooking the complexities and challenges that a woman might face regarding forced pregnancy. The victims of rape and incest, for instance, will embark on a perilous journey by putting their life and health at stake to seek an abortion if the states pass a law prohibiting all kinds of abortion. This might lead them to be involved, as indicated by the physicians, in the process of self-managed abortion either by self-inflicted physical harm or by ingestion of “toxic substances,” especially in medically underserved areas in the United States.<sup>18</sup> The dissenting opinion of the judgment has noted this peril and pointed out that some states have already passed a law without accommodating any exceptions, leaving women with no choice but to bear the child of the rapist or incest.<sup>19</sup> It is worth noting that while clarifying the right to life UN Human Rights Committee, in its GC No. 36, sets forth that “states parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl are at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest,” among others.<sup>20</sup> It would not be, therefore,

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<sup>15</sup> Dobbs (n 2) 44.

<sup>16</sup> Ibid 43.

<sup>17</sup> Ibid 53.

<sup>18</sup> The Guardian, ‘Surge in Complications from Unsafe Abortions like Post-*Roe*, Doctors Warn’, (The Guardian, 30 June 2023), available at <<https://www.theguardian.com/us-news/2023/jan/30/us-unsafe-abortion-rise-doctors-warn>> accessed 24 February 2023.

<sup>19</sup> Ibid 150.

<sup>20</sup> UN Human Rights Committee (HRC), General comment no. 36, Article 6 (Right to Life), 3

too speculative to say that a blanket prohibition on abortion would endanger women's right to life and health. In this regard, the judges' dissenting opinion clearly put forward the possible ramifications emanating from a clear-cut ban on abortion.

The history of state abortion restrictions is a history of heavy costs exacted from the most vulnerable women. It is a history of women seeking illegal abortions in hotel rooms and home kitchens, of women trying to self-induce abortions by douching with bleach, injecting lye, and penetrating themselves with knitting needles, scissors, and coat hangers. It is a history of women dying.<sup>21</sup>

In certain contexts, the UN working group on the question of forced pregnancy adds that criminalizing abortion might also tantamount to cruel or inhuman treatment when denying abortion results in severe mental and physical suffering.<sup>22</sup> Prohibiting abortion can, moreover, be a breeding ground of gender oppression and discrimination as, ultimately, the decision to embrace motherhood will be regulated by states, therefore, denying women the opportunity to make a profoundly intimate or personal decision like the right to be a mother.<sup>23</sup>

Now, the historical justification (with a significant reference to the criminal status of abortion in common law jurisdiction) to deny the right to abortion puts potential severe dangers not only to the rights incidental to reproductive health but also to the rights that have historically been downtrodden and subordinated, however, gained recognized over the time founded on the principle of equality, human dignity, and freedom.

The right to same-sex relationships or marriage warrants particular attention in this regard. The right to same-sex relationships or marriage is not a constitutionally enumerated right but rather an implicit one. Throughout history, same-sex relationship has been overtly recognized as a crime of sodomy, especially in the common law jurisdiction. The same scenario prevailed in the US until 2003, when it

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September 2019, CCPR/C/GC/36.

<sup>21</sup> Dobbs (n 19) 51.

<sup>22</sup> United Nations Office of the Human Rights Commissioner, 'Denial of abortion services and the prohibition of torture and cruel, inhuman and degrading treatment', available at <<https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/AmicusBrazil.pdf>> accessed 25 February 2023.

<sup>23</sup> Charles G Ngwena, 'A Commentary on LC v Peru: The CEDAW Committee's First Decision on Abortion' (2013) 57 *Journal of African Law* 310, 324.

decriminalized the same-sex activity between consenting adults (*Lawrence v Texas*)<sup>24</sup> and later in 2015, when the U.S. Supreme Court, in its historic judgment (*Obergefell v Hodges*),<sup>25</sup> recognized the right to same-sex marriage within the Due Process Clause by emphasizing utmost importance on the autonomy of a person to make crucial choices such as marriage.<sup>26</sup> Considering the recent originalist approach of the court<sup>27</sup> with regards to the constitution in *Dobbs* that the constitution cannot justify implied rights, especially when the rights are bereft of deep historical roots, it should not come as a surprise if the court, in the future, overrules the right to same-sex marriage adopting the same approach.

#### 4. Conclusion

A radical judicial pronouncement such as *Roe* which provided effective protection against precarious abortion procedures because of unwanted pregnancy, has undoubtedly been altered and brought drastic changes to the whole protection system of abortion by *Dobbs*. The activist and progressive attitude of the judges of *Roe* in recognizing women's right to abortion has apparently been absent in the recent judgment. In turn, the conservative approach defining the right to abortion has potentially opened the door for the criminalization of abortion in states that have not done so yet and will reinforce the existing criminalization of abortion prevailing across the world. As states are ultimately left with absolute discretion to regulate abortion, it leaves no space for doubt that women will submit themselves to unsafe and unhealthy abortion procedures by risking their life and liberty if the states are unwilling to provide a healthy and safe one. Besides, the non-recognition of the right to abortion, especially with the justification of history and culture, might put the rights of the LGBTQ community, such as the right to same-sex relationships, at risk in the future if in no time.

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<sup>24</sup> *Lawrence v Texas* 539 US 558 (2003).

<sup>25</sup> *Obergefell v Hodges* 576 US 644 (2015).

<sup>26</sup> *Ibid.*

<sup>27</sup> Morgan Marietta, 'A Revolutionary Ruling-and not just for Abortion' (Global, 24 June 2022), available at <<https://theconversation.com/a-revolutionary-ruling-and-not-just-for-abortion-a-supreme-court-scholar-explains-the-impact-of-dobbs-185823>> accessed 22 July 2022.