

# ***The United States Abortion Controversy in the Context of Institutional Rivalry: The Interweaving of Justice, Politics, and Policy***

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**Abstract:** This paper delves into the decades-long debate on abortion rights in United States, pointing out that its roots lie in the contradictions within the United States system. These contradictions manifest themselves through three main conflicts: judicial, political, and policy. Judicial conflicts revolve around the question of whether constitutional privacy rights should extend to abortion, with typical cases encompassing the pivotal rulings of *Roe v. Wade* and *Dobbs v. Jackson Women's Health Organization*. At the political level, the debate has been further exacerbated by bitter opposition between Republicans and Democrats, with opposing ideological positions on reproductive rights. Finally, the conflict between law and policy is reflected in the increasing polarization of abortion laws at the state level, leading to fragmentation of the national legal landscape. By analyzing these interrelated conflicts, this paper argues that the inherent contradictions within the United States system make the issue of abortion rights an ongoing and unresolved social issue.

**Keywords:** Abortion, fetal rights, *Roe v. Wade*, *Dobbs v. Jackson*, Women's Health Organization.

## **1. Introduction**

As the 2024 United States presidential election approaches, the controversy over abortion rights has escalated dramatically. On the other hand, Republican candidate Donald John Trump is firmly standing on the side of the anti-abortion movement, while Democratic candidate Kamala Devi Harris firmly stands on the camp of Pro-Abortion and will promise to secure women's rights as far as their freedom about disposing with their bodies is concerned. This stark political divide encapsulates a deeper, more fundamental ideological struggle between conservatism and progressivism, in which both sides wrestle for influence over the future direction of United States law and society.

In 2022, the Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*. This nearly 50-year-old precedent set by the *Roe* case has dramatically changed the legal landscape. By giving back abortion regulation to states, courts have led to a fragmentation of a legal framework that has polarized and become ever more radical as to how states deal with abortion rights. Such draconian restrictions have been implemented in red states, while more liberal ones have worked to protect and even increase access to abortion. This divide underlines an axis of basic tension

between federal power and state sovereignty at the heart of the controversial United States federalist system.

The impact of the Dobbs case has not only had a huge impact in the United States but has also attracted widespread attention from the international community, which further reflects the uniqueness of United States exceptionalism. According to Bloomberg, world leaders such as Canada Prime Minister Justin Pierre James Trudeau, former United Kingdom Prime Minister Boris Johnson and France President Emmanuel Macron have expressed shock and concern about the reversal of abortion rights in United States [1]. Their strong reaction suggests that United States is increasingly divided on abortion rights with other Western democracies, most of which have enshrined abortion rights in law and treated them as established rights. This strong reaction from the international community underscores the uniqueness of the legal and political environment in United States, where deep-seated internal contradictions continue to fuel heated debates such as abortion.

Considering these developments, this paper explores the persistence and complexity of the United States abortion debate, arguing that this debate is driven by the inherent contradictions of the United States system—contradictions amplified through the lens of United States exceptionalism. By examining the interplay between judicial interpretation, political ideology, and state-level policy, the paper seeks to fully understand why abortion remains a central and unresolved issue in United States society, and how these internal conflicts continue to shape the country's legal and political trajectory.

## **2. Judicial Rivalry: Should The Constitutional Right to Privacy Extend to Abortion**

The Constitution of the United States does not expressly articulate a right to privacy, but the Supreme Court has gradually established the concept of privacy through multiple precedents and eventually extended it to the right to abortion. With the development of jurisprudence, the judicial controversy over whether the right to privacy should cover abortion in the United States has gradually formed the opposition between judicial activism and judicial restraint in the field of judicial philosophy, and the opposition between originalism and dynamic interpretation in the field of interpretation.

The right to privacy is not directly enshrined in the United States Constitution, but has been developed through the interpretation and case law of certain provisions of the Constitution, in particular based on the following amendments: First Amendment: To Protect the right to privacy, such as freedom of speech and religion; Third Amendment: To compel residents to quarter soldiers in their homes during peacetime is prohibited; Fourth Amendment: To Protect citizens from unwarranted searches and seizures; Fifth Amendment: To protect citizens from unjustified deprivation of life, liberty, or property; Ninth Amendment: To interpret the enumeration of specific rights within the Constitution as negating or diminishing other rights held by the people is cautioned against; Fourteenth Amendment: To Protect individuals from government interference without due process through due process clauses and equal protection clauses [2].

In the discussion of whether the constitutional right to privacy should be extended to the right to abortion, the opposition between judicial activism and judicial restraint in the field of judicial philosophy has become the focus. At the same time, the different interpretations of abortion rights in the field of interpretation can be boiled down to the opposition between originalism and dynamic interpretation.

### **2.1. Roe v. Wade Case (1973): Judicial Activism and Dynamic Hermeneutics**

In Roe case, the justices of the Supreme Court took a distinctly judicial activist judicial philosophical stance. They advocated that judges should be actively involved in shaping social policies in response to developments and changes in society, especially on issues involving individual rights and social justice. By broadening the scope of the right to privacy to encompass the right to abortion, these

justices demonstrate their keen response to society's needs, arguing that courts have a responsibility to ensure that constitutional principles can be adapted to the challenges of modern society. This attitude is not only an interpretation of the text of the Constitution, but also a broad and flexible interpretation of it in order to fill the legislative and executive gaps. Justice Harry Blackmun at Roe case's opinion expressed the negative consequences and impact of the ban on women's lives. "The potential harm that would be inflicted upon the pregnant woman if she is denied this choice by the State is evident. Even in early pregnancy, there may be identifiable and direct medical consequences. The prospect of motherhood or having more children could impose a distressing life and future on the woman. There is a possibility of imminent psychological damage. Taking care of a child can put a strain on both mental and physical health. Additionally, there is emotional turmoil for all parties involved when dealing with an unwanted child, as well as the challenge of bringing a child into a family that lacks the psychological and other resources to provide proper care. In certain situations, such as this one, unwed motherhood adds further difficulties and enduring social stigma to consider. All these factors are crucial considerations for both the woman and her responsible physician during their consultation [3]."

This decision in the Roe case also reflects the hermeneutic idea of dynamic hermeneutics. According to dynamic hermeneutics, the constitution should evolve over time to adapt to the needs and values of contemporary society. The Constitution is not a static legal text, but a "living document" whose interpretation should reflect the progress of society and modern values. Against this backdrop, Roe case's decision interpreted the right to privacy to include the right to abortion in response to the growing recognition of women's rights and autonomy at the time. This approach is a testament to the justices' judicial activism in expanding women's rights through the law to meet the needs of social change and progress.

## **2.2. Dobbs v. Jackson Women's Health Organization (2022): Judicial Restraint and Originalism**

With Judicial activism and dynamic hermeneutics in Roe case are opposed, and the majority opinion of the Supreme Court in Dobbs case represents a combination of judicial restraint and originalism. Judicial restraint holds the view that, in the process of judging, judges have to adhere as much as possible to the original text and intent of the Constitution and be very cautious in constitutionally stretching provisions. Justices who were for this position held that courts should show respect for the decisional powers of the legislative and executive branches, exercise the power of judicial review with great caution, and not meddle with the decision-making of the legislative and executive branches. Abortion, in particular, should not be granted a right through extending the right to constitutional privacy, according to judicial restraint, and the right to abortion is one which elected representatives should make as part of the legislative process, not one granted or constrained by unelected judges who interpret constitutions.

The verdict of the Dobbs case incorporates not just this judicial philosophy of judicial restraint; it also shows an attribute of the law interpretation of originalism. Originalism asserts that constitutions should be interpreted in the light of their original intent and context in which they were enacted, rather than reinterpreted according to modern standards or personal opinions. According to originalism, the right to abortion did not exist explicitly at the time of the constitution's enactment, and therefore the right to abortion should not be included in the constitutionally protected right to privacy. In this context, Justice Samuel Anthony Alito Jr. made it clear that the previous decision in favor of the right to abortion was "grossly wrong" and therefore should not continue to be used as a legal basis. On his initiative, the five justices categorically rejected the progressively improved approach to justice, which eventually eliminated the right to abortion from the Constitution [4]. Rather than adopting the more prudent approach proposed by Chief Justice John Glover Roberts, Jr, which is to adjust or

abandon the existing standard of fetal viability (i.e., the standard that the fetus can survive in vitro), the constitutional right to abortion is not completely abolished [4]. This also means that the three-stage framework established in Roe case no longer applies, and the right to abortion is no longer protected by the federal Constitution, resulting in a large geographical disparity in the legal situation on abortion in the United States.

In addition, Justice Clarence Thomas, who supported the majority opinion (i.e., the removal of the right to abortion from the Constitution), wrote a separate opinion making clear that he supported the elimination of other fundamental rights based on due process, including the rights to contraception, marital equality, and same-sex intimacy [4]. These rights were mainly progressively established in cases such as *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972). Lord Thomas's opinion is consistent with originalism, emphasizing that these rights should be reverted to the original understanding of the Constitution rather than being extended.

In their joint dissenting opinion, Justice Elena Kagan, Stephen Gerald Breyer, and Sonia Maria Sotomayor criticized the majority's insistence on interpreting the constitution in terms of the narrow historical conceptions of the 18th and 19th centuries, arguing that women were treated as second-class citizens [4]. In their view, this interpretation ignores the need for the Constitution to evolve with social progress, which clearly coincides with the judicial activism and dynamic hermeneutics embodied in Roe case.

### 3. Political Rivalry: Republicans vs. Democrats

In 1980, during the Ronald Wilson Reagan presidential campaign, abortion became a political issue and a typical Republican issue in United States, with the idea that life begins from the moment of conception. At that time, Jerry Falwell, a well-known televangelist and conservative activist in United States, and the moral majority, along with other evangelical leaders, became important drivers of Ronald Wilson Reagan's presidential victory. Jerry Falwell and his moral majority advocate and promote the idea of "anti-abortion, pro-traditional family, pro-morality, and pro-United States [5]." After the Roe case legalized abortion nationwide in 1973, Jerry Falwell began to lash out at abortion, calling it a "terrible decision" and even likening it to "Hitler's final solution to the Jews [6]." Jerry Falwell sees evangelical Christians as the foundation of political movements and wants to organize evangelical voters who have hitherto been apolitical to vote. Thus, Reagan's campaign began to make abortion a political issue. Through direct mail campaigns, national newspaper advertisements, and newspaper publications like *The Christian Voice*, Ronald Wilson Reagan is portrayed as the best candidate for Christian voters [7]. In contrast, the Democratic Party gradually strengthened its support for the pro-choice position in the 1980s and became the main political defender of abortion rights. Since then, Republicans and Democrats have taken opposing positions on the issue of abortion, making abortion rights an important part of the political struggle.

It is worth mentioning, however, that President Ronald Wilson Reagan did not have a strong anti-abortion stance when he joined the Republican Party in 1962. In addition, he was in the same situation (with a change of position before and after his presidency) by two other presidents: George Herbert Walker Bush and Joe Biden.

During his tenure as governor of California, Ronald Wilson Reagan signed the California Therapeutic Abortion Act in 1967, a law that legalized abortion in California and allowed abortion to be performed in certain circumstances, such as when the pregnancy would threaten the life or health of the mother, or if the pregnancy was caused by rape or incest. However, after being the Republican presidential nominee in 1980 and winning the presidential election that same year, he took a strong anti-abortion stance, appointing conservative judges to undermine impact of the Roe case. President Reagan changed the composition of the Supreme Court by appointing conservative justices such as Antonin Scalia and Sandra Day O'Connor.

President George Herbert Walker Bush, initially a Republican advocate of abortion rights, demonstrated strong support for Planned Parenthood during his early political career. Upon joining Congress in 1971, he was notably endorsed by Planned Parenthood, earning the informal nickname “Rubbers,” as noted by Gloria Feldt, who led the organization from 1996 to 2005. In a 1968 address to the United States House of Representatives, Bush, then serving as a congressman, articulated his endorsement of expanded family planning initiatives both domestically and globally. He argued for the widespread implementation of voluntary education and family planning programs in the U.S., emphasizing their potential to address poverty, reduce welfare costs, and alleviate the suffering of unwanted children and overburdened parents.

Notably, President Bush’s father, Prescott Sheldon Bush Sr., was a prominent supporter of Planned Parenthood in the 1940s and served as treasurer for one of their early fundraising events. “President Bush was a proponent of Title X of the Public Health Services Act, which continues to provide funding for family planning services for low-income women nationwide,” Feldt remarked. However, Bush’s stance shifted when he became Ronald Reagan’s vice-presidential candidate in 1980, aligning himself with conservative opponents of abortion. “It appears that President Bush abandoned the position long supported by his family for political reasons,” remarked Sarah Craven, director of the Washington office of the United Nations Population Fund (UNFPA) [8]. Since then, President Bush has made clear his opposition to abortion in a televised address: “I believe that abortion is wrong. I believe that we should work to overturn Roe case. And I believe that states should have the right to prohibit abortions.” President George Herbert Walker Bush continued the Reagan-era anti-abortion policies while in office, and he was more hawkish than President Ronald Wilson Reagan and supported conservative influence on the Supreme Court.

President Joe Biden, a Democrat, also held anti-abortion views early in his career. During the 1970s, Biden publicly opposed abortion and cast his vote in favor of the 1977 Hyde Amendment, which imposed restrictions on federal funding for abortion services. In 1981, he endorsed a proposed constitutional amendment aimed at allowing states to invalidate the Roe case’s decision, although the amendment did not succeed in being ratified. In the 1990s, Biden continued to support the Hyde Amendment, and in 1993 voted against including abortion services in health insurance for federal employees. During the 2019 presidential campaign, Biden announced that he would no longer support the Hyde Amendment, marking a significant change in his position. He said he did not support the Hyde Amendment because it restricts abortion rights for low-income women, a change in position in response to growing demands within the Democratic Party to remove financial restrictions on abortion. After becoming the 46th president of the United States, Biden is a staunch supporter of abortion rights. The Biden administration has taken a series of steps aimed at protecting and expanding women’s right to abortion, including reversing the Trump administration’s restrictions on abortion services.

It is not difficult to see from the change in the positions of the above three presidents on the abortion issue that the confrontation between the Republican Party and the Democratic Party on the abortion issue is not only a difference in policy, but also a deep ideological conflict. Both parties have used the issue of abortion as a political tool to mobilize voters, build partisan image, and fight for political gain. This dichotomy makes the issue of abortion an irreconcilable contradiction, and the two sides can hardly find a compromise point on this issue. Even politicians like George Herbert Walker Bush and Joe Biden, who held partisan positions early in their political careers, would abandon their positions for the sake of election and gradually adjust their positions to align with their party’s core ideas and policy direction when they were successfully selected as the eventual presidential candidates after gaining party support. In other words, the position of the presidential candidate ultimately decided by the two parties should not be shifted by their personal will but should

always be in line with the core position of the party they represent and the position of the target group that the party wants to support.

This extreme antagonism not only exacerbates the split between the two parties, but also affects society's perception of the abortion issue. Whether it is personal choice or policymaking, the issue of abortion has been deeply politicized and ideologized, becoming an unavoidable and deep-seated issue in the United States political system. This phenomenon shows that the extreme antagonism between parties has become an important feature of United States politics, making the issue of abortion not only a legal and moral issue, but also a tool of deep political struggle.

#### 4. Law vs. Policy: Polarization of Interstate Policies

After the U.S. Supreme Court overruled the decision in Roe case in the 2022 Dobbs case, the authority to legislate on abortion was completely returned to the state governments. This means that abortion is no longer protected across the United States, and states can decide whether and under what circumstances to allow abortion based on their policies and societal values. As a result, many states have begun to enact strict laws that not only threaten the survival of doctors in these fields, but also make the situation more difficult for women who need to have abortions, including questions about whether the federal government has the authority to administer abortion drugs.

As Elena Kagan, Stephen Gerald Breyer and Sonia Maria Sotomayor foretold in their dissenting opinions, the overturning of Roe case and Planned Parenthood v. Casey, a classic case that has been repeatedly affirmed by many former justices, can make the law confusing. This is indeed true in many states.

States impose different restrictions on abortion rights. Currently, as Table 1 shows, 41 states have implemented abortion bans, and abortions are only allowed in rare cases. Among them are 14 states that have banned abortion altogether. Twenty-seven states have restrictions on abortion based on the length of pregnancy. Eight states prohibit abortion at 18 weeks of pregnancy or earlier. Nineteen states prohibit abortion at some point after 18 weeks of pregnancy [9].

Table 1: State Abortion Bans and Gestational Limits, data from: Guttmacher Institute (July 2024).

	Total ban	Bans before 18 weeks	Bans after 18 weeks	No ban or gestational limit
State	Alabama Arkansas Idaho Indiana Kentucky Louisiana Mississippi Missouri North Dakota Oklahoma South Dakota Tennessee Texas West Virginia	6 weeks: Florida, Georgia, Iowa, South Carolina 12 weeks: Nebraska, North Carolina 15 weeks: Arizona 18 weeks: Utah	20 weeks: Ohio, Wisconsin 22 weeks: Kansas 24 weeks: Massachusetts, Nevada, New York, New Hampshire, Pennsylvania 3rd trimester (24-28 weeks): Virginia Depend on Viability: California, Connecticut, Delaware, Hawaii, Illinois, Maine, Montana, Rhode Island, Washington, Wyoming	Alaska Colorado District of Columbia Maryland Michigan Minnesota New Jersey New Mexico Oregon Vermont



States that severely restrict or completely ban abortion – Most pro-Republicans: Some states quickly passed or reinstated laws that severely restricted or even banned abortion altogether. These states usually only allow abortion in rare circumstances, such as those that threaten the life of a pregnant woman (e.g., Alabama, Arkansas, Idaho, Mississippi, Tennessee, Oklahoma). Abortion rights guaranteed states are most pro-Democrats. Some states have passed legislation to guarantee abortion rights and ensure that women have safe and legal access to abortion services in these states (e.g., Vermont, Oregon, Colorado, New Mexico, New Jersey, Maryland).

After overturn the Roe case, some states further tightened restrictions on abortion, while others protected and expanded abortion rights, and the differences in abortion policies between states of United States will be more pronounced. The availability and difficulty of women accessing abortion services varies greatly depending on the laws of their state. In states that severely restrict or prohibit abortion, women have to travel to other states that allow abortion for services. Abortion laws vary from state to state, resulting in significant disparities in medical resources, legal counseling, and social support services, with far-reaching implications for women's health and social equity. The formation of a kind of "abortion map" shows the extreme divergence of positions and policies of different states on the issue of abortion.

It is worth mentioning that although the Supreme Court has delegated abortion rights to the states, this does not mean that the abortion laws enacted by the states are completely unrestrictive. The president and his executive branch can still intervene in state abortion laws and policies through administrative measures to support and reflect the position of the party they represent.

Two weeks following the Supreme Court's decision to invalidate the Roe case precedent, President Joe Biden, representing the pro-choice Democratic Party, signed an executive order on July 8, 2022, aimed at safeguarding access to reproductive health services. This executive order expands upon previous governmental measures to uphold reproductive rights and encompasses several key initiatives: To ensure the availability of reproductive health services, such as abortion and contraception; To protect patient confidentiality while ensuring access to accurate and trustworthy information; To improve the safety and protection of patients, healthcare providers, and clinics; And to coordinate federal initiatives in safeguarding reproductive rights and promoting accessible healthcare services. These measures collectively demonstrate the administration's dedication to upholding reproductive freedoms following the Court's decision [10]. This executive order sparked legal action against Texas as the representative of the state that banned abortion altogether. While the lawsuit is still ongoing, it could be unsettling for medical abortion providers who need to decide whether to have an abortion in an emergency and who take the risk of relying on federal explanations for medically necessary abortions in states that prohibit abortion.

The conflict between the president's executive and the laws enacted by states that disagree on abortion has exacerbated the power struggle between the federal and state governments. This antagonism is not limited to the issue of abortion but could also spill over into other issues involving state and federal rights, further exacerbating tensions between the two. In addition, Congress can also pass legislation to reset the national abortion rule. For example, Congress could use its regulatory authority over interstate commerce to control abortion services or push for more lenient rules by tying federal funding to states' abortion policies or intervene with equal rights [11]. These methods may be legally effective, but they face formidable obstacles in their actual political operation. Because these measures apply to both opposing sides of the abortion issue, they can be used by both pro-abortion advocates and anti-abortion advocates to impose a nationwide ban on abortion, limiting the options of states that want to retain abortion rights. In this context, the issue of abortion has further exacerbated the social and political divisions in United States.

In conclusion, delegating the decision about abortion rights to states did not totally erase the conflict between the federal and state governments; instead, it produced a complex legal and political

game that is related to abortion but spills over into other issues regarding federal and state powers. Abortion policy can be affected both by administrative and legislative measures, contributing to a broader legal and political conflict over federal and state authority.

## 5. Conclusion

The ongoing debate over abortion rights in the United States is a direct product of the country's system contradictions, as evidenced by the persistent judicial, political, and policy conflict. There was much talk about a conflict within the judiciary, contrasting the fundamental tensions over constitutional protections' range and opposing decisions in Roe and Dobbs cases. This tension mirrors broader questions about the courts' role in extending or limiting the rights of individuals. The political battle that rages between Republicans and Democrats reveals the deep ideological division that drives America's abortion debate. This divide, now polarizing the country with opposing views on reproductive rights, will be furthered as this message from the 2024 presidential election becomes sent out. How the policy clash manifested in an increasingly polarized state-level abortion law speaks to a feature of the fragmented nature of legal governance in the United States. This fragmentation speaks back to the continuing struggle between federal power and state rights, further complicating the issue of abortion and making it an ongoing challenge in United States society.

In a nutshell, the long-standing debate on abortion rights in the United States is not simply a matter of disagreement but rather an issue that holds within it very basic contradictions nested within the United States system. These deeply set contradictions in judicial, political, and policy disputes ensure that the debate over abortion continues to shape legal and political dimensions at the core of the nation and remains firmly and definitively insolvable in the short run.

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