

US Abortion Law

Abortion is a controversial issue in the United States. This paper does not advocate any political position. Its purpose is to assist non-Americans to understand the history and current state of the law in the US.

Before Roe

Before 1973, abortion was covered by state law which varied from state to state. In general, abortion was illegal unless it was necessary to save the mother's life or, less commonly, if the pregnancy was the result of rape. New York was the only state that allowed abortion upon request.

This changed in 1973 with the Supreme Court decision in *Roe v Wade*.¹ The Court had held in *Griswold*² that people have a right to privacy when seeking medical treatment. This right was found in the penumbra of the 1st, 3rd, 4th and 9th Amendments and meant that states could not monitor interactions between women and their doctors.

The Trimester Framework

The court acknowledged the public interest in potential life and balanced it against the competing interest of the mother and her health. The result was a trimester system. Laws affecting abortion in the first and second trimester (before viability) would attract strict scrutiny, while laws affecting abortion in the final trimester would attract the rational basis test.

Levels of Scrutiny

Under the doctrine of Strict Scrutiny,³ a law is presumed to be invalid unless the government can demonstrate three things:

1. that the law is necessary to achieve a compelling government interest,
2. that the law is narrowly tailored to meet that interest, and
3. that it uses the least restrictive means to achieve that purpose.

Under Rational Basis review, the court considers whether the law is 'rationally related' to a 'legitimate' government interest. If the court can hypothesize a 'legitimate' interest served by the challenged action, then it should withstand Rational Basis review.

Chipping Away

The court then had to subsequently determine what regulations were valid and which violated the right to abortion. Some people refer to this as 'chipping away' at the right.

¹ *Roe v Wade* 410 U.S. 113 (1973)

² *Griswold v Connecticut* 381 US 479 (1965)

³ *United States v. Carolene Products Company* 304 U.S. 144 (1938)

The court held that states could require informed consent, statistical reporting, collection of tissue samples for pathology, mandate that a second doctor be present and ban public funding. In 1989, the court held that the states could require counselling for the mother and viability testing but stopped short of requiring consent from the father.¹

The Undue Burden Standard

In 1992,² the court chipped away further at Roe. A 5-4 majority confirmed the right to an abortion but a 7-2 majority replaced the trimester framework with the viability standard. Strict scrutiny in the first and second trimester was replaced by the 'Undue Burden' standard (intermediate scrutiny) before viability. The rational basis test continued to apply after viability. An undue burden was defined as a "substantial obstacle in the path before the foetus attains viability."

Dobbs v Jackson Women's Health

Finally, in 2022,³ the court overruled Roe and all the precedents built on it. The court held that Roe was 'egregiously wrong' and there was no constitutional right to an abortion. This is because a right to abortion was neither 'deeply rooted in tradition' nor 'an essential component of our system of ordered liberty.' The result is that each state legislature can now regulate abortion without input from the Supreme Court.

Overturing a Super-Precedent

The doctrine of stare decisis requires the court to stand by its previous decisions, especially a super-precedent like Roe. Overturning Roe and its progeny was a big, though predicable, change. The court noted five factors that it considered when overruling Roe and Casey:

1. they short circuit the democratic process,
2. both lacked grounding in constitutional text, history or precedent,
3. the tests they established were not workable,
4. they caused distortion of law in other areas, and
5. overruling them would not upend concrete reliance interest.

The upshot is that the court overruled an entrenched precedent and abolished an unenumerated right. It follows that the conservative majority may overrule other precedents based on [substantive due process](#) and abolish other unenumerated rights like access to contraception, interracial marriage, consensual homosexual conduct and same sex marriage.

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¹ *Webster v Reproductive Health* 492 U.S. 490 (1989)

² *Planned Parenthood v Casey* 505 U.S. 833 (1992)

³ *Dobbs v Jackson Women's Health* 597 U.S. 215 (2022)