SCOTUS v. USA

# Introduction

As of 2022, differences in abortion policy and legislation persist. In some countries, like most of Western-Europe, abortion is legal on request, with limits before or after the first months of pregnancy, called gestational limits. In other countries, abortion is legally restricted to specific cases, like risk to the woman’s life and health or in the case of rape, fetal impairment, socioeconomic factors, or combinations of those. In a few countries, it’s completely forbidden. In the USA, abortion is legal nationwide, but it’s more complex. Each state can have his own abortion regulations and jurisprudence, as long as it doesn’t conflict with federal law and jurisprudence.

This is possibly about to change. In May 2022, a document of the Supreme Court of the United States (SCOTUS) was leaked, showing that the SCOTUS is considering to overrule its 1973 *Roe v. Wade* decision, a ruling which guaranteed the nationwide legal right to abortion. If that happens, it’s up to states to deal with the matter, possibly resulting in abortion-bans (Gerstein and Ward, 2022; Zurcher, 2022).

This essay argues that the Supreme Court of the United States of America should uphold the right to abortion. First this essay gives a factual overview of abortion and a historical overview of abortion specifically in the USA. Then the main arguments of the draft opinion of SCOTUS are presented. Lastly, the theory behind equality is defined and related to abortion.

The main argument lays out why the criminalization of abortion leads to inequality and noxious markets in a society, why that is a problem and why the government needs to prevent that. Then it will become clear why the judiciary is the government branch responsible for legalizing abortion. Those in favour of abortion might propose Mill’s harm principle or say that being pregnant is a poor choice. Yet, it will turn out that both arguments are too problematic to be convincing and thus cannot be taken seriously into account as counterarguments. As result, the right to abortion should be upheld by SCOTUS.

# Exposition

## Abortion

In this essay, abortion is the induced ‘’*termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus’’* (Mirriam Webster, n.d.). The World Health Organization (WHO) (2021) estimates that around 73 million induced abortions take place each year worldwide. Moreover, they write it’s a safe healthcare intervention when executed by recommended methods and by someone with the necessary skills, but when women are faced with barriers to attain this, they often resort to unsafe abortion. They also write that the lack of access to proper abortion and the stigma around it, poses risks to the physical and mental well-being of woman.

In addition, research by Ganatra et al. (2017) shows that the percentage of unsafe abortion is higher in countries with highly restrictive abortion laws than countries with less restrictive laws. Research from Baerek et al. (2020) shows that restricting access to abortion does not reduce the number of abortions, but it does reduce the dignity and safety of women and girls. Reagan (1997) writes that women always have had demand for abortion, controlling their reproduction. Although it was generally hidden from public view, it became an issue for legal and medical authorities.

## USA’s abortion history

In the USA, abortion was illegal between approximately 1867 and 1973. In the 18th and early 19th centuries, it was legal under common law. Reagan (1997) writes that it was possible to buy abortifacients and other medicine to induce abortion or ‘’quicken pregnancy’’. Abortion was even booming business: antiabortion laws were initially aimed to counter the commercialization of the practise and protect women from poisonous medicine. If not via medicine, abortion was done by a specialized practitioner.

In 1857, an antiabortion organization called AMA was initiated with the aim to make abortion completely illegal. Reagon (1997) writes that this movement was joined by physicians who wanted abortion to be exclusively legal for themselves, since future antiabortion laws allowed exclusively physicians to perform abortion if the woman was in danger. In the decade following, the antiabortion campaign turned antifeministic, and antiabortion became a tool to suppress the upcoming empowerment of women.

Eventually, the Illinois state legislature 1867 was the first to pass a bill criminalizing abortion, unless done for medical purposes (Reagan, 1997). In 1880, abortion was criminalized in the entire USA. Illegal abortion wasn’t continuous though. The politics and practise of abortion changed over time. Sometimes abortion was tolerated, sometimes severely repressed.

## The Supreme Court of the United States of America

Penalized abortion ended in 1973, when SCOTUS ruled on the *Roe v. Wade* case. This resulted in a constitutional right to abortion (Regan, 1979). In the 1992 case *Planned Parenthood v. Casey*, this right was maintained (Gerstein & Ward, 2022). In the current 2022 case, *Dobbs v. Jackson Women’s Health Organization*, SCOTUS is considering to dismiss both the *Roe* and *Casey* rulings. This came to light after the draft opinion of the court, written by Justice Samuel Alito, was leaked and ended up with the media. Since it’s not the final version, it’s verdict is possibly still subject to change.

Alito (2022) gives three main arguments for the court’s position: first, the American Constitution does speak about abortion at all, so it’s not a right which should be protected by the constitution. Second, the *Roe* ruling imposed a sudden restrictive regime on the entire country, whilst prior there were vast differences between states. This short-circuited the democratic process and thus caused much controversy and spoiled the political culture. The matter of abortion is a political one and should be decided by the people’s elected representatives. Third, the right to abortion is not deeply rooted in the history and tradition of the USA, because was abortion persistently prohibited from the early years of the USA until 1973.

## Equality

This essay’s arguments in favour of upholding the *Roe* and *Casey* rulings will be dealt with extensively in the argument section, but it’s important to understand the main concept behind the first argument: the right to abortion enhances gender equality. What’s equality and why is it important?

Equality comes in many forms – it can me equality in treatment, of outcome or opportunity (Parvin & Chambers, 2012). Equality doesn’t necessarily mean that people are the same, since talents and abilities differ. It does mean that despite these differences, efforts are made to compensate for the process, starting position or ending position. Equality of opportunity is compared to an level playing field: the aim is to compensate for circumstances or features one has no reasonable influence over, like sex, skin colour, religion, etc., so that individuals can equally pursuit their interests (Parvin & Chambers, 2012).

Equality can be valuable either intrinsically or instrumentally (Harb, 2022). The intrinsic view is that inequalities are not permissible at all, regardless of how they came about. The instrumental view is that equality is necessary for attaining some other outcome.

In the abortion case, the intrinsic value of equality could mean that abortion is either fully legalized or criminalized, since all women then have the equal right to not carry a child, or have an equal absence of right. The latter is problematic, because although rights may be equal between women, it’s not equal between women and men. Men have an implicit right to the condition to not be pregnant, since they can’t carry children on their own. If women don’t have the right to abortion, they don’t have the possibility to choose for the same condition, to not be pregnant.

The instrumental value could mean partial legalisation, since abortion could only be allowed if it saves people from harm. For example, if the pregnancy is a risk to the mother’s health or life. However, it can also mean full legalisation, since equality can serve as a tool to compensate for an unlevel playing field between men and women, while being pregnant or after when having an initially ‘’unwanted’’ child. The assumption here however, is that not having the right to choose for abortus would result in more inequality in opportunity, and that having the right to abortion would result in more equality in opportunity. Why is this? Let’s delve into it in the argument.

# Argument

## Inequality

Not having the right to choose for abortus would result in more inequality in opportunity, because having an (unwanted) child, whatever way is has come about, has implications for the level playing field between woman and man.

That women can have children is a biologically given, and a fetus has no ability to fundamentally change its sex after it has been concepted. It’s possible to alter your gender/sex to some degree, but it’s overkill to change your sex only to not become pregnant. According to Rawls (1971), a just society is not based on arbitrary factors like gender, which is reasonably not under one’s control.

In the current society, gender norms and roles play a huge role: women are expected to take care of their child once they give birth to them. This would withhold them from doing things they may find meaningful, like pursuing a career. If abortion is illegal, women are limited in their choice to do so, and like stated before, being a women, thus being able to get pregnant, is a circumstance which realistically cannot be helped. Giving woman the right to abortion is giving woman the possibility to compensate for her circumstances and harmful consequences from having an unwanted child, which are not only physically and mentally, but also socioeconomic in nature. So it’s only fair give women the tools to compensate for this arbitrary and severe inequality, and thus legalize abortion.

Having the right to abortion and thus more equality also has positive effects on society as a whole. Wilkinson and Pickett (2010) write that inequality has impact on the economic stability, social mobility, crime and trust in a country. Although the overruling of *Roe and Casey* doesn’t necessarily mean that abortion will be illegal in all states, it does mean there likely will be inequality between women nationwide. There are cases where abortion is legal, for example in case of rape or health risks to woman or child, but very few countries do take socioeconomic factors into account when legalizing abortion. This does not make it likely that the differences between state legislation will lead to equal opportunity or outcome for women.

In short, the women in the USA wouldn’t benefit from unequal and criminalized abortion, and the American society as a whole wouldn’t benefit from the nationwide inequalities neither. Hence, the equal right to abortion nationwide would be very valuable and something to be upheld.

## Black noxious markets

Another negative effect of the criminalization of abortion would the emergence of a (black) abortion market. Like Baerek et al. (2020) showed, even if abortion is illegal, it still happens. And if abortions are performed unsafely, like in places with highly restrictive laws on abortion, it poses physical and mental health risks to the women and girls involved. This could turn into a noxious market.

A market is an institution where individuals or collective agents can exchange goods or services (Herzog, 2021). Noxious means it has negative (side) effects to individuals and/or society (Satz, 2010. She writes that these markets need to be constricted. She has four criteria to distinguish noxious from healthy markets: first, it has harmful outcomes to individuals. Second, it has harmful outcomes to society. Third, it has very weak of highly asymmetric knowledge or agency. Fourth, it amplifies extreme vulnerability.

The unsafe and abortion market has at least two of above characteristics. It has harmful outcomes to individuals, because there is high risk that abortion is performed unsafely and thus the girls and women who need to have an abortion have to put themselves at great risk. Moreover, since girls and women sometimes have no choice other than to have abortion, they have weak agency when participating in the market. This market also amplifies extreme vulnerabilities. Women with unwanted pregnancy are already in a vulnerable position (Zurcher, 2022), having had for example weak means for anticonception, and being forced to enter the black market with unsafe abortions only amplifies the existing vulnerability. Those same weak means could make it hard for women to prove rape or other conditions which allow for abortion in some countries.

If the government wants to serve its country and the common good, the government should make sure that the black noxious market has no chance to appear, in this case by taking away the barriers to abortion and legalizing it. But why would SCOTUS be concerned with that?

## Expressing the common good

Alito (2022) argues that the right to abortion shouldn’t be decided by the court, but by political bodies, like individual states’ democratic representatives. Posner (2008) understands that the SCOTUS operates with political restraint imposed by public opinion and that the impact of their decision is great and very visible, but says that judges don’t only apply rules: they are also legislators. Especially at the SCOTUS, many cases of high societal importance have been ruled upon. He even says that the legislative character of the American judge is deeply imbedded in its legal and political system.

The work of the judge is political in the sense that the judiciary, like the other two branches of government, expresses the common interest and thus is involved in political representation (Lindahl, 2001). As Posner (2008) says, in soft cases they just apply the law, but in hard cases they are legislators. Stating that hard cases are not the jurisdiction of the SCOTUS is saying that judging is not part of the work of SCOTUS. Alito’s argument is too contradicting to be valid.

Especially when popular and majoritarian vote drowns the rights of minorities, like women’s right and the right to abortion, it’s the judge’s job to express these interests. After all, a society where minorities of majorities cannot be sure of their rights is a society prone to huge inequalities – including all negative side effects. It’s unrealistic to say that the right to abortion should be cancelled, just because it wasn’t an original constitutional right.

Alito (2022) also argues that historically, abortion in the USA is penalized. This history might however not as continuous and clear as presented. Abortion in the 18th and early 19th century was legal under common law, and the process of gradual criminalizing of abortion, including periods of repression and tolerance, form a far more complex story. So it’s unrealistic to say that the right to abortion should be cancelled, just because it’s not in the American tradition. The history of legal abortion is also present if you’re willing to look into it.

## Harm principle

One of the main arguments against abortion is that it hurts the fetus and intervenes with the right of life of the unborn child. Mill’s (1859) harm principle states that it is only permissible to interfere with another member of a community, against his will, when interference is necessary to prevent harm to others. In this case, it permissible to interfere with the abortion wish of the mother in order to prevent harm to the fetus. In this case, the fetus is an independent life form. Often, consciousness is the criteria in order to be regarded as a living human being and thus worth to be protected by others, but this is difficult to establish. Larmer (1995) for example states that from the moment of conception, a fetus has the potential for consciousness and personhood.

However, there are cases where having no abortion also causes harm to the mother. This harm can by physical, mental, but as we have seen also socioeconomic or to the level-playing field. Measuring whether mother or fetus have more harm in order to establish how happiness is maximized is not only very hard, but also very cruel. Therefore, using the harm principle to argue against abortion is not convincing enough to be taken into account.

## Luck egalitarianism

Dworkin (1981) criticizes Rawls’ Theory of Justice by saying that Rawls ignores individual responsibility. Dworkin suggests that brute bad luck is compensated, but not bad luck as caused as result of choice. Brute bad luck would be natural and social endowments, not ambition, which could be chosen. How does this work with pregnancy and abortion? One might argue that a pregnancy, except in the case of rape, is chosen – since the women choose to have (unprotected) sex. So these women must bear the consequences of their actions themselves. However, the will to be (sexually) intimate with another person however, is naturally occurring, and even beneficial to mental and physical health (Brody, 2010). Consider it a natural endowment to virtually all human beings. Moreover, the fact that women can have babies in the first place is a natural endowment: men do not have this ability and never have to bear the risks of (unwanted) pregnancy. Take into account that some girls of women may not have the means or knowledge to prevent pregnancy.

Therefore, it’s problematic to decide when pregnancy is a result of brute luck or poor choice. Nevertheless, giving women the right to abortion means that in either case, the bad luck can be compensated. Legalising abortion prevents serious suffering caused by the difference between bad luck and bad choice.

# Conclusion

Abolishing the right to abortion causes serious inequality, especially in level-playing field between women and men. It also leads to serious fragmentation and inequality between women’s right amidst the states. Inequality in any country is not desirable, since it has an impact on the economic stability, social mobility, crime and trust in a country. Criminalizing abortion would also lead to noxious markets. If access to abortion is obstructed, abortion will happen anyway, but in a unsafely way, posing amplified risk to pregnant girls and women. In addition, the right to abortion is essential, because it compensates for the arbitrary factor of being a women and being able to give birth.

Bad luck or choice is not a significant counterargument, since it’s too problematic to decide what constitutes bad luck or poor choice. Right to abortion annihilates the distinction by giving women the opportunity to avoid bad luck in any case. The other popular counterargument of the harm principle, stating that the fetus must not be harmed after its conception and that therefore abortion should be illegal, is impossible to keep up, since the carrier of the fetus is also subject to harm if the baby is not removed. Measuring how to maximize happiness is futile in this case, and therefore, the other arguments in this essay have more weight and significance.

As Alito (2022) states that abortion is a topic best decided by political institutions on state level, it ignores the fact that the judicial branch is a part of government which takes part in the process of political representation, because it’s partial purpose in hard cases is to express the common good. Minority rights, like women rights and specifically the right to abortion, is an example of the common good which judiciary should protect, whether there is a constitutional ground for that law or not. Overruling *Roe* and *Casey* using the argument that hard cases shouldn’t be decided by the SCOTUS is contradictive to the core function of the judiciary: expressing the common good through additional legislation.

For a government branch, the judiciary, to possibly sabotage its own country and institution by abolishing abortion is fundamentally cross-purpose and is therefore best to be avoided. The conclusion which remains is that, if SCOTUS is indeed a government institution for the welfare and common good of its people and society, it should uphold the nationwide right to abortion.

3289 words.

# Literature

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