

Miroslav CHUPÁČ*

Current Development in the United States Case Law on Abortion and its Possible Impacts on the European Union and Continental Legal System

ABSTRACT: *This article aims to acquaint readers with the role and decision-making practice of the (Federal) Supreme Court of the United States of America in the matter of artificial abortion and a woman's right to abortion in general. Special focus is placed on jurisprudential development in 2022, as a landmark decision was issued in 2022, which significantly interferes with the right to abortion throughout the United States. Abortion and abortion policy is currently widely discussed across the United States. For several decades, it was clear beyond any doubt that abortion is, in essence, a fundamental human right arising from the Constitution itself (Fourteenth Amendment) and that a woman can – while respecting certain set rules – undergo abortion, particularly in the first trimester, at virtually any time, according to her will. However, what was regarded as a certain and fundamental women's right arising from the Constitution, has been overruled by the U.S. Supreme Court in 2022 for the first time in 50 years. In addition to the description of the current situation in the United States, this article briefly reflects on the possible effects of the current state of jurisprudence in the United States on the continental legal system. This article is created and reflects the legal status as of December 1, 2022.*

KEYWORDS: *Right to abortion, abortion policy, U.S. Supreme Court, the Constitution, landmark decision, human right, trimester, European Court of Human Rights*

1. Introduction

This article, which has also been presented in oral form at the international scientific conference 'I. ASCEA – Annual Scientific Conference of the Central European Academy' held from 6th to 7th October 2022, has got several goals. The article briefly

* Ph.D. student, University of West Bohemia, Faculty of Law, Pilsen, Czech Republic. Attorney-at-law based in Pilsen, Czech Republic. <https://orcid.org/0009-0000-8520-857X>.

focuses on the federal Supreme Court of the United States (U.S. Supreme Court), its composition and the general procedural rules of proceeding. Further, it deals with the current jurisprudential development in 2022, as a landmark decision was issued, which significantly interferes with the right to abortion throughout the United States of America (USA). Furthermore, the article includes possible impacts on the European Union (EU) and continental legal system, arising from the latest landmark case, by which the U.S. Supreme Court overruled its own legal opinions held for almost 50 years. This article is created and reflects the legal status as of December 1, 2022.

2. U.S. Supreme Court, its Composition and Significance

The U.S. Supreme Court is the supreme judicial authority, superior to all state and federal courts. There are currently 9 judges in the U.S. Supreme Court. Each of them is appointed directly by the President and confirmed by the Senate. Judges are appointed for life.¹

As the court itself states:

The Court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution. The Supreme Court consists of the Chief Justice of the United States and such number of Associate Justices as may be fixed by Congress. The number of Associate Justices is currently fixed at eight. Power to nominate the Justices is vested in the President of the United States, and appointments are made with the advice and consent of the Senate.²

Congress generally determines the jurisdiction of federal courts. However, in some cases, as in the example of a dispute between two or more U.S. States – the Constitution grants the Supreme Court its original jurisdiction, a power that Congress cannot deprive. The courts only hear real cases and controversies – to sue, a party must prove that he/she has been harmed. This implies that courts do not issue advisory opinions on the constitutionality of laws or the lawfulness of

1 Article III, section 2 of the Constitution of the United States of America.

2 U.S. Supreme Court website. *About the Supreme Court* [Online]. Available at: <https://www.supremecourt.gov/about/about.aspx> (Accessed: 28 November 2022).

proceedings if the decision has no practical effect. Cases brought before the courts are transferred from the district court to the appellate court and may even reach the U.S. Supreme Court, although the U.S. Supreme Court hears relatively few cases each year. Federal courts have exclusive jurisdiction to interpret the law, determine its constitutionality, and apply it to individual cases. Similar to Congress, courts can force evidence and testimony by subpoena. Lower courts are limited by U.S. Supreme Court decisions – once the U.S. Supreme Court interprets the law, lower courts must apply the U.S. Supreme Court’s interpretation to the facts of a particular case.³

Although the Supreme Court can hear an appeal on any point of law, provided that it has jurisdiction, it does not usually conduct legal proceedings. Instead, it is for the U.S. Supreme Court to interpret the meaning of the law, to decide whether the law is relevant to a particular set of facts, or to decide how the law should be applied. Lower authorities – lower courts and states included – are obliged to follow the precedent set by the U.S. Supreme Court when deciding cases.⁴

When the U.S. Supreme Court rules on a constitutional issue, that judgement is virtually final; its decision can only be changed by the rarely used constitutional change procedure or by a new U.S. Supreme Court’s decision. Therefore, the only authority which can change the U.S. Supreme Court’s previous binding legal opinion, expressed in historical cases, is the U.S. Supreme Court itself. However, when the court interprets the law, a new legislative measure can be taken in the meantime.⁵

In my perspective, this is similar to role of the Supreme Court of the Czech Republic in interpretation of law, decision making, and unification of court decisions at the highest level. However, unlike American court system, in the Czech Republic there is also the Constitutional Court of the Czech Republic, which assesses, for example, the conformity of court decisions with the constitutional order, or conformity of general laws with the constitutional order. Therefore, the U.S. Supreme Court is essentially similar to the Supreme Court of the Czech Republic and the Constitutional Court of the Czech Republic, united into one.

3 The White House internet pages. *The Judicial Branch* [Online]. Available at: <https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/> (Accessed: 28 November 2022).

4 The White House internet pages. *The Judicial Branch* [Online]. Available at: <https://www.whitehouse.gov/about-the-white-house/our-government/the-judicial-branch/> (Accessed: 28 November 2022).

5 U.S. Supreme Court website. *The Court and Constitutional Interpretation* [Online]. Available at: <https://www.supremecourt.gov/about/constitutional.aspx> (Accessed: 26 November 2022).

3. Right of Access to the U.S. Supreme Court, *Writ of Certiorari*, and a Brief Description of the Process

Parties who are not satisfied with the lower court's decision can apply to the U.S. Supreme Court to hear their case. The primary way to ask this court for a review is to ask for a *writ of certiorari*⁶ court order. This is a request for the Supreme Court to order the lower court to send the case report for review. The U.S. Supreme Court has no obligation to hear these cases and usually does so only if the case could be of national importance, could harmonise conflicting decisions of federal district courts, and (or) could have precedent value. The U.S. Supreme Court accepts only about 100-150 from more than 7,000 cases it has to review each year. The court usually hears cases that have been decided in either the relevant U.S. courts of appeal or the highest court in the state (particularly if the state court has ruled on a constitutional issue). The U.S. Supreme Court has its own set of rules. According to these rules, four of the nine Justices (U.S. Supreme Court's judges all called "Justices") must vote to accept a case. Five of the nine Justices must vote to grant a stay, for example, a stay of execution in a death penalty case.⁷

If the Justices decide to accept the case (the writ of certiorari is granted), the case is placed on the court file. According to the rules of the U.S. Supreme Court, the petitioner has an opportunity to write a short text, within 50 pages, to present his legal dispute concerning the issue decided by the court. Following the petitioner's application, the other party, known as the respondent, is provided a certain period of time to file the defendant's application. This short text should also not exceed 50 pages.⁸

The following oral arguments are open to the public. During the oral hearing, each party has approximately 30 minutes to present their case, however, lawyers do not have to use all the time. The petitioner argues first, and thereafter, the respondent.⁹

6 V. Knapp has already mentioned the system of *common law, equity* and the system of subjective rights of access to the court, called writs, from historical perspective. As it appears, some legal instruments, which continue to be used today, originate from the past times. Therefore, it is interesting that particularly in British-American law system there are legal instruments known (or used) for centuries of uninterrupted continuity. For more information, see: Knapp, V., 1995, pp. 96 – 97.

7 U.S. Courts website. *Supreme Court Procedures* [Online]. Available at: <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (Accessed: 26 November 2022).

8 U.S. Courts website. *Supreme Court Procedures* [Online]. Available at: <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (Accessed: 26 November 2022).

9 U.S. Courts website. *Supreme Court Procedures* [Online]. Available at: <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (Accessed: 26 November 2022).

When the oral arguments are closed, the Justices must decide the case. It is conducted at a judicial conference, where Justices discuss the certain case. When each Justice presents his/her opinion, the Chief Justice casts the first vote, and then each Justice casts the vote in descending order of seniority. If any Justice agrees with the outcome of the case, but not with the reasoning of the majority, that Justice may write a favourable opinion. Each Justice can write a separate opinion, called *dissent*.¹⁰

4. Roe v. Wade and Related Case Law on Abortion

Before discussing the *Roe*¹¹ v. *Wade* case, it is necessary to mention two fundamental amendments to the United States Constitution for a better understanding. These are amendments that are directly related to the right to life and thus to the issue of abortion and abortion policy.

The Ninth Amendment¹² to the United States Constitution dates from 1791 and concerns all rights which the American Constitution does not mention explicitly. In essence, it states that people have the rights that the Constitution directly lists, as well as those that are not enumerated in the list of rights of the Constitution and that it is not exhaustive. Therefore, it also grants people rights that are not directly stated in the U.S. Constitution or the Bill of Rights.¹³

The Fourteenth Amendment¹⁴ to the United States Constitution dates from 1868 and – among other things – in its first paragraph guarantees all people’s equality before the law, regardless of race, gender, age or religion. However, from the perspective of the right to life and abortion policy, the passage is particularly important, stating that: ‘... *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*’.

10 U.S. Courts website. *Supreme Court Procedures* [Online]. Available at: <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (Accessed: 26 November 2022).

11 *Roe* is a fictitious name used to protect the woman from the public. However, her identity was eventually revealed.

12 The Ninth Amendment reads as follows: ‘*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*’.

13 The White House website. *The Constitution* [Online]. Available at: <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/> (Accessed: 26 November 2022).

14 Fourteenth Amendment to the Constitution, paragraph one reads 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*’.

It is precisely this passage that is important for understanding the case of *Roe v. Wade* and subsequent decisions, set out below.

Now to the case of *Roe v. Wade* of 1973.^{15,16} This U.S. Supreme Court decision is fundamental from the point of human rights. The U.S. Supreme Court ruled that all women have a constitutional right to have an abortion under certain conditions. The U.S. Supreme Court derived this right from the Ninth and Fourteenth Amendments, aforementioned.

Recapitulation of the case:

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford.¹⁷

Based on these facts, the U.S. Supreme Court has made many substantial partial decisions in *Roe v. Wade* judgement, which justify in significant detail the text of its decision, considering previous court cases, medical knowledge, ecclesiastical and historical traditions, and opinions of several associations, for example, the Bar Association.

15 The full text in the original version from 1973 can be found on the website of The Library of Congress of the United States. *Syllabus Roe et al. v. Wade, District Attorney of Dallas County* [Online]. Available online at: <https://tile.loc.gov/storage-services/service/l1/usrep/usrep410/usrep410113/usrep410113.pdf> (Accessed: 26 November 2022).

16 The text of the new case law can also be found on website of the U.S. Supreme Court. *Roe v. Wade, 410 U.S. 113 (1973)* [Online]. Available at: <https://supreme.justia.com/cases/federal/us/410/113/> (Accessed: 28 November 2022).

17 Basic facts, *Roe v. Wade, 410 U.S. 113 (1973)*. Library of Congress of the United States [online]. Available online at: <https://tile.loc.gov/storage-services/service/l1/usrep/usrep410/usrep410113/usrep410113.pdf> (Accessed: 26 November 2022).

Regarding the substantive assessment, the U.S. Supreme Court concluded in this case that if the laws of the State of Texas exempt from criminalisation only the medical procedure of the child's mother, then such laws deny the *due process*¹⁸ under the 14th Amendment to the U.S. Constitution, which protects against state action the right to privacy.

As the U.S. Supreme Court explained, although the state could not override that right, it could have legitimate interests in protecting both the pregnant woman's health and the potential of human life, each of which interests grows and reaches a 'compelling' point at various stages of the woman's approach to term. Thus, the U.S. Supreme Court divided the options for abortion into three basic options (according to trimesters):

- a) in the first trimester, it is entirely up to the woman to decide whether to keep the child;
- b) around the end of the first trimester, individual states can select whether to regulate the abortion in a manner that is reasonably related to the mother's health;
- c) in the viable phase of the fetus, the state may, in the pursuit of its interests, regulate or even prohibit abortion, however, except where this is necessary based on a medical assessment to preserve the mother's life or health.

Regarding individual trimesters, the U.S. Supreme Court describes its opinion in detail on page 163 *et seq.* According to the U.S. Supreme Court, the fundamental difference is particularly the viability of the fetus outside the mother's body.

Simultaneously, the U.S. Supreme Court ruled that if the states' law always prohibits the abortion (or if the circumstances for abortion are extremely narrowed), then such law is to be declared unconstitutional.¹⁹

It is noteworthy that this decision was revolutionary at the time – particularly in the southern, traditionally Christian-oriented American states. More than 15 persons or organisations have provided their *amicus curiae*,²⁰ including Attorney Generals

18 Due process is the legal requirement that the state must respect all legal rights that are owed to a person within the court proceeding. Due process balances the power of law of the land and protects the individual person from it. At the most general level, it can be said that "due process" means compliance with all procedural rules during the conduct of court proceedings.

19 *Roe v. Wade*, 410 U.S. 113 (1973), p. 166. The full text in the original version from 1973 can be found on the website of The Library of Congress of the United States. *Syllabus Roe et al. v. Wade, District Attorney of Dallas County* [Online]. Available online at: <https://tile.loc.gov/storage-services/service/ll/usrep/usrep410/usrep410113/usrep410113.pdf> (Accessed: 26 November 2022).

20 Means a person or group who is not a party to an action, but has a strong interest in the matter, will petition the court for permission to submit a brief in the action with the intent of influencing the court's decision. *Amicus curiae* is a legal instrument used in an American or British legal system.

of several other states. Not all Justices of the U.S. Supreme Court were united in this decision (dissenting opinions can be found at the end of the written decision).

The *Roe v. Wade* case is further developed in more detail and followed by several other landmark decisions which, while modifying in some way the rules laid down in the *Roe v. Wade* judgement, never annulled the original decision, as a whole.

In the next case, *Planned Parenthood of Southeastern Pa. v. Casey*,²¹ in which the U.S. Supreme Court narrowed the possibilities of mothers for abortion (respectively supported the legislation of states in this area), it ruled that, although everyone has the right to abortion, based on the *Roe v. Wade* case, the state's convincing interest in protecting a viable fetus may outweigh the mother's interest in abortion, unless the mother's life is in danger.

In another case, *Whole Woman's Health v. Hellerstedt*,²² the U.S. Supreme Court found Texas law, which constituted binding and extremely strict rules for abortion, as unconstitutional. For example, that local legislation stipulated for a doctor performing an abortion to (must) have active admitting privileges at a medical facility no more than 30 miles from the place of the abortion. Further, the legislation set significantly much higher standards for facilities (surgical centres) in which abortion could be performed. After such provisions, the number of medical facilities that met the new requirements dropped from approximately 40 to 8 in entire Texas. Therefore, as the U.S. Supreme Court ruled, such conditions were undue burdens on access to abortion, and there was also no persuasive evidence that they protected women's health more effectively than existing laws.²³

In the case of *June Medical Services L.L.C. v. Russo*²⁴ the U.S. Supreme Court found Louisiana's state legislation as unconstitutional because it required an abortion doctor to have active admitting privileges at a medical facility no more than 30 miles from the scene of the procedure. Moreover, similar to the Texas law aforementioned, it enacted several new regulations for medical facilities and set up much higher medical standards for such centres to be able to conduct an abortion (this legislation was very similar to that of Texas mentioned above). It is noteworthy there was a six days bench trial during the district court proceeding

21 U.S. Supreme Court website. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) [Online]. Available at: <https://supreme.justia.com/cases/federal/us/505/833/> (Accessed: 26 November 2022).

22 U.S. Supreme Court website. *Whole Woman's Health v. Hellerstedt*, 579 U.S. ____ (2016) [Online]. Available at: <https://supreme.justia.com/cases/federal/us/579/15-274/> (Accessed: 26 November 2022).

23 Just to give an idea by comparison with European states, it should be mentioned that the United Kingdom is about a third of Texas in area. France is slightly larger than Texas.

24 U.S. Supreme Court website. *June Medical Services L.L.C. v. Russo*, 591 U.S. ____ (2020) [Online]. Available at: <https://supreme.justia.com/cases/federal/us/591/18-1323/> (Accessed: 26 November 2022).

where factual findings were presented. Later, the district court declared such legislation (Act 620) unconstitutional because it was not proved that such regulations would offer significant health benefit; it was also found that such provisions created substantial obstacles for women seeking an abortion (which was prohibited by *Roe v. Wade* case). The Fifth Circuit (court of appeal) reversed, disagreeing with those factual findings. The U.S. Supreme Court then reversed the legal opinion of the Fifth Circuit, as stated above.

Therefore, the decisions of the aforementioned cases summarise the following. The right to abortion cannot simply be restricted either at the federal level or at the level of individual U.S. states, because it is a fundamental right arising from the Constitution. It has been derived from right to privacy in *Roe v. Wade* case and later also from “liberty” protected by the Fourteenth Amendment’s Due Process Clause. Therefore, any limitation of such a right must be necessary and must have a substantial reason. The aforementioned conclusions persisted until 2022.

5. The Current Development of the U.S. Supreme Court’s Decision-Making Practice (in 2022)

Over 50 years there was a persisting opinion that a woman in the United States could undergo an abortion particularly within the first trimester without any significant problems or obstacles (see *Roe v. Wade*, *Planned Parenthood of Southeastern Pa. V. Casey*, and *Whole Woman’s Health v Hellerstedt* cases aforementioned). As the legal opinions expressed in these cases came from the U.S. Supreme Court, the states were supposed to follow them (legally binding conclusions).

However, what was regarded as a certain and fundamental women’s right arising from the Constitution, has been overruled by the U.S. Supreme Court in 2022. According to the latest landmark decision, the same U.S. Supreme Court, which insisted on its previous conclusions, has overruled its own long lasting case law on abortion.

In 2021 the U.S. Supreme Court began hearing the case of *Dobbs v. Jackson Women’s Health Organization*.²⁵ In this case, the laws of the State of Mississippi, passed in 2018, prohibited any abortions after the 15th week of pregnancy. Mississippi’s Gestational Age Act²⁶ provided that:

25 U.S. Supreme Court website. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ____ (2022) [Online]. Available at: <https://supreme.justia.com/cases/federal/us/597/19-1392/> (Accessed: 30 November 2022).

26 Justia website (US Law, Case Law, Codes, Statutes & Regulations). *2018 Mississippi Code, Title 41 – Public Health, Chapter 41 – Surgical or Medical Procedures; Consents Gestational Age Act § 41-41-191. Gestational Age Act*. [Online]. Available at: <https://law.justia.com/codes/mississippi/2018/title-41/chapter-41/gestational-age-act/section-41-41-191/> (Accessed: 30 November 2022).

*Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.*²⁷

This implies that there is no legal possibility to conduct an abortion apart from the two extremely narrow exceptions.

Although this legislation was in clear conflict with the binding legal opinions of the U.S. Supreme Court mentioned in *Roe v. Wade* and *Planned Parenthood v. Casey* legal cases, Mississippi lawmakers allegedly passed this law intentionally to reach the U.S. Supreme Court. Moreover, three of the nine U.S. Supreme court Justices, who are said to be conservative,²⁸ were appointed by President Trump, making the majority of conservative Justices the predominant part in the U.S. Supreme Court. By passing this law, the Mississippi lawmakers allegedly expected that it would reach the U.S. Supreme Court and that the court would change its original binding legal opinions, particularly in the *Roe v. Wade* and *Planned Parenthood v. Casey* cases.

Before the U.S. Supreme Court ruled over this matter, the Court of the Fifth Circuit (lower court) originally affirmed an injunction, thus prohibiting enforcement of the Mississippi's Gestational Age Act because it was contrary to the previous binding opinions of the U.S. Supreme Court.

The U.S. Supreme Court's judgement in this case was issued on 24 June 2022. In this decision, the U.S. Supreme Court explicitly mentions that it is overruling its own precedents and arriving at a new conclusion:

*We do not pretend to know how our political system or society will respond to today's decision overruling Roe and Casey. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly. We therefore hold that the Constitution does not confer a right to abortion. Roe and Casey must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.*²⁹

27 U.S. Supreme Court website. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022) [Online]. Available at: <https://supreme.justia.com/cases/federal/us/597/19-1392/> (Accessed: 30 November 2022).

28 Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.

29 U.S. Supreme Court website. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022) [Online]. Available at: https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf (Accessed: 30 November 2022).

Thus, the 'revolutionary' idea and the 'overruling' of the previous decisions resulted in the conclusion that the right to abortion does not arise from the Constitution and that the individual state can therefore regulate the right to abortion themselves. Therefore, U.S. Supreme Court originally derived a right to abortion from the Constitution; however, this idea has now been revoked with the result that the right to abortion does not arise from the Constitution (meaning from Fourteenth Amendment).

Considering the fact that the right to abortion does not newly arise from the Constitution and considering the fact that this right is no more guaranteed at a federal level, the individual U.S. states can now regulate the matter of access to abortion at its own legislative level.

The approach differs from state to state as the individual states have different historical backgrounds, favour different political party (the well-known difference between southern states and the rest of the U.S. are religious matters, whereas in southern states the religious matters and a question of protecting the life of the fetus arising from religion play much more important role in society in general, for example, as opposed to the State of New York where the more liberal access to abortion has prevailed). On the map,³⁰ the clear differences among states can be seen with the description of how liberal or against abortion each individual state is.

It is noteworthy that this landmark decision has not been accepted by all U.S. Supreme Court Justices. As stated in the U.S. Supreme Court official information:

*Alito, J., delivered the opinion of the Court, in which Thomas, Gorsuch, Kavanaugh, and Barrett, JJ., joined. Thomas, J., and Kavanaugh, J., filed concurring opinions. Roberts, C. J., filed an opinion concurring in the judgment. Breyer, Sotomayor, and Kagan, JJ., filed a dissenting opinion.*³¹

Therefore, as it follows from official information, the vote of the Justices was far from unanimous. Contrarily, this decision was taken by a narrow majority.

6. Possible Impacts on the EU and the Continental Legal System

This section discusses the possible impacts on the EU and the continental legal system. First, the author does not believe that the current case-law development in the U.S. will have any significant impact on the continental legal culture in near

30 Center for Reproductive Rights' website. *After Roe Fell: Abortion Laws by State* [Online]. Available at <https://reproductiverights.org/maps/abortion-laws-by-state/> (Accessed: 30 November 2022).

31 U.S. Supreme Court website. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022) [Online]. Available at: https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf (Accessed: 30 November 2022).

future, as the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights based on it does not have a direct connection (and are not even closely dependent) with the legislative development in the United States. Similarly, this ‘European’ development is not dependent on the jurisprudence of U.S. courts. The European Court of Human Rights monitors (only) compliance with the European Convention on Human Rights, it is not dependent on anything else.

The following paragraphs briefly describe the view of the European Court of Human Rights on the given issue. Article 2 (Right to life) and Article 8 (Right to respect for private and family life) of the European Convention on Human Rights are essential. It is noteworthy that the right to abortion does not arise from the European Convention on Human Rights. The specific circumstances for determining the conditions under which an abortion can be conducted under those two articles are entrusted to individual states (in this case, to contracting parties to the European Convention on Human Rights). In general, the state’s legal regulation of artificial abortion must not be in conflict with the European Convention on Human Rights, that is, it must not be in conflict with Article 2 or Article 8 of the European Convention on Human Rights. Therefore, legislation at the level of individual state should not contradict the jurisprudence of the European Court of Human Rights, as it is the only judicial authority authorised to interpret the European Convention on Human Rights. However, the European Court of Human Rights does not define specific requirements, as it does not have that authority, unlike the U.S. Supreme Court.^{32,33}

32 It is appropriate to recall that the European Court of Human Rights does not have the authority to annul the decisions of state courts. Thus, the European Court of Human Rights can only declare that a specific decision has violated the European Convention on Human Rights. The only statement that is directly binding for states (and is therefore legally constitutive) is the part of the decision of the European Court of Human Rights on the state’s obligation to pay the compensation. It is then up to the activity of the parties to the proceedings and the decision of the national courts whether – on the basis of the decision of the European Court of Human Rights – they proceed to cancel the original court decision. Based on this, further legal steps may be taken. For details, see KMEC, J., KOSARĚ, D., KRATOCHVÍL, J., BOBEK, M. (eds.) (2012) *European Convention on Human Rights*. Commentary. 1st edition. Prague: C.H. Beck, p. 323.

33 In the event that the European Court of Human Rights concludes that the decision of the state’s courts is in conflict with the European Convention on Human Rights, then it is up to the participants of the legal original legal dispute to – based on the decision of the European Court of Human Rights – demand annulment of the original decision through the national courts, for example, by renewal of the original proceeding or by a new trial (the specific procedural regulation depends on the legal system of the given state). Therefore, the European Court of Human Rights does not itself have cassation jurisdiction. Its authority results from the contractual agreement – from the European Convention on Human Rights. Therefore, the obligation to comply with the decision of the European Court of Human Rights is essentially a contractual obligation to which individual states (as contracting parties) have committed themselves. For details, see Articles 34, 41, 42, 43, 44, 45, 46 of the European Convention on Human Rights.

Jurisprudence of the European Court of Human Rights does not (and cannot) even comment whether individual states should accept abortion legislation in the national legal order, as the European Court of Human Rights does not have jurisdiction. Therefore, the European Court of Human Rights is in accordance with the European Convention on Human Rights, only authorised to assess whether there has been a violation of the European Convention on Human Rights in a given specific case. The European Court of Human Rights in its jurisprudence came to the conclusion that if states allow artificial termination of pregnancy, or if they allow to do so but under certain conditions, then they are obliged to adopt such measures that the women are really able to undertake abortion (therefore, if the state allows abortion under certain conditions, then it must ensure abortion will be available under such conditions). The legislative framework of states should be created such as to consider both the mother's interest in health and the child's interest in the protection of human life, and finally the interest of the given state in the protection of fundamental rights and freedoms, and simultaneously such as to respect the obligations of states arising from the European Convention on human rights.³⁴ This requirement has been present in European Court of Human Rights jurisprudence for several decades. Although such requirements may appear vague or general, with regard to the limited jurisdiction of the European Court of Human Rights, this is a relatively fundamental and important interpretation of the European Convention on Human Rights. It is essential for the reason that it results in direct (albeit more generally defined) obligations for individual states. Based on this interpretation, states are thus obliged to fulfil certain obligations to protect fundamental rights and freedoms. Otherwise, they expose themselves to the fact that the European Court of Human Rights, based on the applications, will repeatedly disagree with the decisions of the state courts and will impose an obligation on the state to provide adequate compensation.

As is clear from this extremely brief description, the roles and jurisdictions of the U.S. Supreme Court and the European Court of Human Rights are different. The jurisdiction of the U.S. Supreme Court follows directly from the U.S. Constitution and the Court can directly intervene in the decision-making practice of individual U.S. courts, but the jurisdiction of the European Court of Human Rights is based on a contractual consensus in the form of the European Convention on Human Rights, which does not have the direct power to intervene in the decision-making practice of national courts (and there are many other differences, not restricted to the matter of abortion).

³⁴ In details see ECHR, case of A, B and C v. Ireland, judgement of the Grand Chamber, application no. 25579/05, and EHCR, case of Tysiac v. Poland, judgement of the Fourth Section, application no. 5410/03.

Despite the above, it is noteworthy that the USA is one of the most developed countries in the world, where liberty prevails. Therefore, if the highest possible and respected court authority in one of the most developed countries concludes that right to abortion does not arise from the Constitution (and is not therefore protected by the Constitution), the national courts in any of the EU states (or even the European Court of Human Rights itself) may follow this idea in future.

Furthermore, the Constitutional Court of the Republic of Poland arrived at a conclusion with similar impacts (meaning widely restricting the access to abortion) in its decision file no. K 1/20 of 22 October 2020.³⁵

Such ideas have no physical boundaries, and therefore, there exists a possibility that they could be accepted one step at a time by courts of the individual EU states in future, or even by European Court of Human Rights.

The author believes such legal opinions would present a significantly incorrect and unwanted move towards ultra-conservatism in the relatively liberal EU, derived from absurd religious standards of human life protection at all costs even in situations where the fetus is not medically capable of existing on its own (particularly the first trimester of pregnancy). Such a way of thinking, i.e. legal opinions, where even a part of the arguments (thoughts) could come from religion and from the opinion that human life should be protected at all costs, sometimes without regard to the decision and the life of the mother, should not be widely accepted in author's personal opinion.

7. Conclusion

The U.S. Supreme Court is the highest judicial authority that can be reached within the United States judiciary. Its decision is final and irreversible. However, the U.S. Supreme Court has ruled in the past that it may change its previous decisions under certain circumstances. This approach is logical, because if a previous decision of the

³⁵ The Polish Constitutional Court has been discussing an abortion law which, in its original form, has severely restricted women's right to abortion. Until autumn of 2021, women were only allowed to undergo abortions in cases where they became pregnant as a result of rape or incest. Exceptions were also made for women who would endanger their health or life during pregnancy or if there was a suspicion of serious harm to the fetus. However, following a review of the abortion law, the Polish Constitutional Court concluded that abortion owing to fetal damage or developmental defects was contrary to the Polish Constitution. According to the Court's ruling, this would be a violation of the Constitution, even if it was such a serious case that the chances of the child's survival after birth would be minimal which resulted in country-wide demonstrations. The original text of this decision is available on the website of the Polish Constitutional Court, via bookmark 'Wyrok z dnia 22 października 2020'. Polish Constitutional Court website [Online]. Available at: <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?spoka z=dokumenty&sygnatura=K%201/20> (Accessed: 30 November 2022).

U.S. Supreme Court were once and for all binding and unchangeable even for the U.S. Supreme Court itself, the legal system could hardly evolve, and adapt to the right of the people and the times.

Abortion and abortion policy is currently widely discussed across the United States. For several decades, it was clear beyond any doubt that abortion is, in essence, a fundamental human right arising from the Constitution itself (Fourteenth Amendment) and that a woman can – while respecting certain set rules – undergo abortion, particularly in the first trimester, at virtually any time, according to her will. In the second and third trimesters, under current rules, the right to abortion decreases according to the stage of the woman's pregnancy (in general, the longer the fetus develops, the more American law protects life and the more difficult the abortion). The U.S. Supreme Court in the *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* cases, which was corrected by some other cases, concluded from the Ninth and Fourteenth Amendments to the U.S. Constitution that the right to abortion is a fundamental right, and therefore, must be granted adequate protection at the federal level. Thus, the legislatures of the individual states were forced to amend their legislation to comply with the *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* judgements.

However, what was regarded as a certain and fundamental women's right arising from the Constitution, has been overruled by the U.S. Supreme Court in 2022. According to the latest landmark decision, the same U.S. Supreme Court, which insisted on its previous conclusions, has overruled its own long lasting case law on abortion. Therefore, the 'revolutionary' idea and the 'overruling' of the previous decisions resulted in the conclusion that the right to abortion does not arise from the Constitution, and therefore, individual states can regulate the right to abortion.

According to the legal opinion of the U.S. Supreme Court, expressed in this decision, and as the right to abortion does not arise from the U.S. Constitution anymore, each U.S. state can now apply different rules regarding the right to abortion. Some of the states, particularly southern states, legally narrowed the right to abortion, whereas some have applied rules with exceptions. Contrarily, some of the states have set wider legal boundaries and made abortion more liberal than ever.

Nevertheless, *Dobbs v. Jackson Women's Health Organization* is one of the most important decisions of recent times, which will continue to give rise to many professional discussions.

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