ABORTION IN THE U.S. AFTER DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION. A COMPARATIVE PERSPECTIVE*

EL ABORTO EN LOS EE.UU. TRAS EL CASO DOBBS CONTRA JACKSON WOMEN'S HEALTH ORGANIZATION. UNA PERSPECTIVA COMPARATIVA

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ABSTRACT: The essay aims to provide a critical insight into the legal status of abortion and reproductive rights in the US before and after Dobbs v. Jackson Women's Health Organization (2022). In this decision, the US Supreme Court famously found that the Constitution does not protect the right to choose to terminate pregnancy and affirmed that abortion is to be regulated by state legislators. In the face of the patchwork of laws governing abortion in the United States, the essay intends to explore the long-lasting impacts of Dobbs by conducting a comparative analysis. We argue that contrary to the expectations of the Court, Dobbs has not distanced abortion from judicial power and that even lacking a constitutional right to abortion, the interplay between legislators and courts is critical in securing women's reproductive rights nationwide.

KEY WORDS: Abortion; reproductive rights; comparative law; U.S. Supreme Court.

RESUMEN: *El ensayo pretende ofrecer una visión crítica de la situación jurídica del aborto y los derechos reproductivos en Estados Unidos antes y después del caso Dobbs contra Jackson Women's Health Organization (2022). En esta decisión, el Tribunal Supremo de EE.UU. declaró que la Constitución no protege el derecho a decidir la interrupción del embarazo y afirmó que el aborto debe ser regulado por los legisladores estatales. Ante el mosaico de leyes que regulan el aborto en Estados Unidos, el ensayo pretende explorar las repercusiones duraderas de Dobbs realizando un análisis comparativo. Argumentamos que, contrariamente a lo que esperaba el Tribunal, Dobbs no ha alejado el aborto del poder judicial y que, incluso en ausencia de un derecho constitucional al aborto, la interacción entre legisladores y tribunales es fundamental para garantizar los derechos reproductivos de las mujeres en todo el país.*

PALABRAS CLAVE: *Aborto; derechos reproductivos; derecho comparado; Tribunal Supremo de Estados Unidos.*

SUMMARY.- I. INTRODUCTION.- II. BEFORE DOBBS.- III. ABORTION LAWS AND REPRODUCTIVE RIGHTS: STATE OF THE ART BEFORE DOBBS.- IV. DOBBS V. JACKSON WOMEN'S HEALTH.- V. THE USE OF FOREIGN LAW IN DOBBS.- VI. THE FUTURE OF REPRODUCTIVE RIGHTS IN THE U.S.- VII. POST-DOBBS SCENARIO. VIII. CONCLUSIONS.

I. INTRODUCTION.

Over the last fifty years, abortion has shifted its legal nature in the U.S. From being a fundamental right secured nationwide, it is only a profound moral issue now, not even implicitly grounded in any federal constitutional provisions. The U.S. Supreme Court argued this in *Dobbs v. Jackson Women's Health Organization*[1], returning the states the full power to protect, rule or outlaw abortion at any stage of the pregnancy. As Justice Alito explained, in the past, "the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people"[2]. Such a power should be thus restored to the legitimate possessors, allowing each state legislator to meet its people's preferences on abortion[3].

Nearly one year later, however, the abortion legal landscape is highly fragmented, and almost all Americans expressed dissatisfaction with their state abortion policies[4]. Several states have reinforced their reproductive healthcare services by adopting over-permissive legislation allowing abortion even post-viability[5]. Others have totally or nearly banned abortion instead or introduced severe gestational limits[6]. In the face of such a patchwork of laws, which is highly variable[7], abortion requests are not ceased to exist, and women have continued seeking to terminate unwanted pregnancies by travelling out-of-state or completing abortion solely with pills through telehealth clinics[8]. The Biden presidency committed to uniformly

1 142 S. Ct. 2228 (2022).

2 Id., at 44.

3 Id., at 31-35 (Opinion of the Court) and 3-5 (Justice Kavanaugh's concurring opinion).

4 Gallup, *Dissatisfaction with U.S. Abortion Policy Hits Another High* (February 2023) at https://news.gallup.com/poll/470279/dissatisfaction-abortion-policy-hits-high.aspx.

5 See infra par. 7.

6 Id.

7 Abortion laws are rapidly changing in almost all states after *Dobbs*. Nearly 700 abortion bills were introduced only in the first semester of 2023: half expanding and half restricting access to abortion. See Guttmacher Institute, *The State Abortion Policy Landscape One Year Post-Roe* (June 1, 2023) at https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe.

8 Rosenberg, G.: *Abortion After Dobbs,* 32(2) *Law & Courts Newsletter* 18 (2022), at 34.

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protecting and expanding access to reproductive healthcare, including surgical and medication abortion[9]. Nevertheless, women reported having experienced severe disruptions in accessing such services, especially in low-income or marginalised communities[10].

Against this backdrop, the essay aims to provide critical insight into the current legal status of abortion and reproductive rights in the U.S., reflecting on *Dobb*'s long-lasting impacts from a comparative perspective. The comparison will be internal, i.e., aimed at assessing the effects of the U.S. Supreme Court's decision among the federated states, and external, as it will examine how foreign law influenced all the nine Justices either agreeing or dissenting on considering abortion a constitutional right.

The essay unfolds as follows. Section two retraces the evolution of the right to abortion in the U.S. Supreme Court case law before *Dobbs* as a fundamental right grounded in the 'penumbras'[11] of the Bill of Rights or, progressively, in the Due Process Clause. Section three explores the implications flowing from such a legal status of abortion in terms of protecting women's reproductive rights, providing an outline of the existing state laws pre-*Dobbs*. Section four enlightens the core of the Supreme Court's ruling in *Dobbs*, which denies constitutional foundation to the right to abortion. Section five focuses on the Court's use of foreign law in deciding such a purely national case as a practice embraced by the majority and the minority, both attempting to gain an advantage from foreign experience. In the last sections, the essay reflects upon the effects of the Supreme Court's landmark decision. Section six inquires how *Dobbs* may expand its impact beyond abortion, perhaps leading the Justices to overrule precedents protecting other reproductive rights. Section seven offers an accurate insight into the post-*Dobbs* legal scenario, looking at legislators' and courts' interplay, at statal and federal levels, in shaping the breadth of reproductive rights in the U.S. Finally, in section eight, the authors argue that contrary to the Court's expectations[12], relying on judicial power to address abortion issues is still necessary to allow women to control their reproductive lives.

9 White House, Executive Order on Protecting Access to Reproductive Healthcare Services (July 8, 2022) and Securing Access to Reproductive and Other Healthcare Services (August 3, 2022).

10 Society of Family Planning, *#WeCount Report: April 2022 to March 2023* (June 2023) at https://societyfp.org/wp-content/uploads/2023/06/WeCountReport_6.12.23.pdf

11 *Griswold v Connecticut*, 381 U.S. 479 (1965), at 484 (Justice Douglas).

12 *Dobbs v. Jackson Women's Health,* cit., at 65 (Opinion of the Court): "The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women (…) This Court has neither the authority nor the expertise to adjudicate those disputes (…) Our decision (…) allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power".

II. BEFORE DOBBS.

The right to abortion as a fundamental right protected by the U.S. Constitution had its clear-cut judicial origin in 1965, by a precedent that first began to devise the close connection between the right to privacy and the most inner individual decisions related to whether to bear or beget a child[13]. This case is *Griswold v Connecticut*[14], in which the Supreme Court invalidated the eighty-year-old Connecticut law proscribing to any person the use of "any drug, medical article or instrument for the purpose of preventing conception"[15] for violating the fundamental right to marital privacy, silently lying within the 'penumbras' of the Bill of Rights: as Justice Douglas explained in authoring the opinion of the Court[16], the right to privacy in marriage directly flows from the First, Third, Fourth, Fifth and Ninth Amendments as a whole. Their folds preserve the intimacy of the association made by husband and wife against governmental unnecessarily broad intrusions, such as blanket criminalising who uses birth control measures. The statal legislator should thus have adopted less intrusive measures to discourage extra-marital and nonreproductive sex, regulating, for example, the manufacture or sale of contraceptives[17].

The other six Justices concurring in the judgement, however, split on the foundation of the marital privacy right, arguing that it relied on the "liberty" protected by the Fourteenth Amendment, solely[18] or in conjunction[19] with the Ninth Amendment showing the non-exhaustive character of enumerated fundamental rights. In so doing, they did not anchor privacy to the first Eight Amendments as well as Justice Douglas did, but to the substantive Due Process Clause as a source of new fundamental rights that states can abridge only by showing a compelling interest and a less intrusive mean to pursue it, under so-called strict scrutiny[20].

In any case, what the Court introduced in *Griswold* was neither a fundamental right to personal autonomy in intimate reproductive choices nor to contraception[21].

13 Gormley, K.: *One Hundred Years of Privacy*, 1992 *Wis. L. REV.* 1335 (1992), at 1391-1406.

14 Cit.

15 General Statute of Connecticut (1958 rev.), §§53-32.

16 *Griswold v Connecticut,* cit., at 484.

17 Id., at 485.

18 See Justice Harlan and White's opinions at 499-507.

19 See Justice Goldberg's opinion, whom Justices Warren and Brennan joined, at 486 ss.

20 *Griswold v Connecticut*, cit., at 504. Justice Douglas refused to follow this approach since it echoed the highly criticised holding of *Lochner v New York* 198 U.S. 45 (1905), invalidating a law limiting the number of working hours in bakeries for infringing the individual liberty of contract under the Fourteenth Amendment Due Process Clause. As Justices Black and Stewart observed dissenting in *Griswold*, the unlashed recourse to such clause confers arbitrary supervisory power to the court and always appears highly suspicious, even beyond economic policy matters.

21 Hart Ely, J.: *The Wages of Crying Wolf: A comment on Roe v. Wade*, 82 *YALE L.J.I* 920 (1973), at 929-30.

By invoking the right to marital privacy, the judgment merely excluded the criminal relevance of the use of contraceptives for married couples[22] to protect the "sacred precincts of the marital bedroom"[23]. Privacy emerging by this case is thus still, so far, a relational and not individual right, mainly intended to guarantee a physically identifiable domestic sphere from governmental searches and seizures, in line with the Third, Fourth and Fifth Amendments.

The "leap"[24] to the right to privacy dealing with liberty of choice in childbearing was more decisively signed by *Roe v Wade*[25] in 1973. In this case, the Supreme Court invalidated the Texas law, substantially unchanged since 1854, proscribing procuring or attempting an abortion, except by medical advice for saving the mother's life[26]. Speaking for the Court, Justice Blackmun clarified that such legislation infringed the personal liberty embodied in the Due Process Clause of the Fourteenth Amendment. This provision protects the unenumerated-by-Constitution fundamental right to privacy, which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[27]. However, "the pregnant woman cannot be isolated in her privacy"[28]. Indeed, other legitimate statal interests, namely, to protect the mother's health or the fetus's potential life, are significantly involved in pregnancy and can even gradually prevail over the woman's choice to terminate it[29].

In regard, the Court provided some indications[30]. During the first trimester, women can freely seek abortion under their physician's advice. But once this initial term ends, the statal interest in protecting maternal health, given the exceeding mortality rate in abortion over normal childbirth, is compelling and can justify any regulation (except the ban) of the pregnancy termination procedure, as far as it is narrowly tailored for pursuing that interest. The statal interest in fetal life becomes compelling instead later, at viability, i.e., when the fetus is capable of life outside the mother's womb, around twenty-four and twenty-eight weeks. In the third trimester, states can thus rule and even outlaw abortion, respecting the above-described judicial strict scrutiny standard. However, they cannot prohibit therapeutic abortion necessary to protect maternal life or health.

22 In *Eisenstadt v Baird*, 405 U.S. 113 (1973), the Court extended under the Equal Protection Clause (XIV Am.) *Griswold* to the individual as such, married or single.

23 *Griswold v Connecticut*, cit., at 485.

24 Hart Ely, J.: cit., 929; Gormley, K.:cit., 1393.

25 410 U.S. 113 (1973).

26 Texas Penal Code (1961), Artt. 1191-1194 and 1196.

27 *Roe v Wade*, cit., at 153.

28 Id., at 159.

29 Id., at 154.

30 Id., at 163.

Although clear at first glance, such a trimestral framework showed its blur boundaries very soon. Advances in medical technology made abortion safer even in the second trimester, potentially reducing the strong statal interest in protecting the health of pregnant women. At the same time, new means to support fetal life outside the maternal body were introduced, forwarding the point of viability and possibly strengthening the statal interest in protecting fetal life. Not surprisingly, almost twenty years later, the Supreme Court rejected that trimester approach, holding that it is unnecessary to prevent states from regulating abortion procedures in the first twelve weeks to protect the women's right to choose to terminate or continue a pregnancy freely.

In *Planned Parenthood v. Casey*[31], even reaffirming *Roe*'s core, the Court argued that to afford constitutional protection to abortion does not follow that statal interests in safeguarding maternal health and the potential life of the foetus need to surrender in the earliest stages of the pregnancy. In the words of the plurality, abortion is guaranteed liberty under the Due Process Clause of the Fourteenth Amendment[32], allowing women to make "choices central to personal dignity and autonomy"[33], such as about reproduction and childbearing, being free from governmental intrusions. It does not mean, however, that states cannot pursue pro-life legitimate interests and regulate abortion, even in the first trimester. The only limit is not outlawing it before viability and not imposing "an undue burden on a woman's ability to make this decision"[34]. In other words, any restrictions on abortion need no more be narrowly tailored to serve a compelling interest but to refrain from introducing a substantial obstacle in the path of the woman's choice[35].

By relying on this new highly permissive standard, most of the challenged Pennsylvania Abortion Control Act of 1982 provisions passed judicial review smoothly[36]. It was considered constitutionally valid to impose the informed consent of the woman seeking an abortion or parental consent for a minor or a 24-hour waiting period before its performance, except in medical emergencies or requiring facilities to submit a report on every performed abortion. Indeed, such measures pursued a legitimate interest, i.e., defending fetal life, by ensuring women make a thoughtful choice without impeding pregnancy termination. The spouse

31 505 U.S. 833 (1992).

32 Id., at 846 (Justice O'Connor, Kennedy and Souter's opinion): "The controlling word in the cases before us is 'liberty'." However, Justice Blackmun argued in its concurring opinion that "The Court today reaffirms the long-recognized rights of privacy and bodily integrity" (at 926).

33 Id., at 851.

34 Id., at 874.

35 Id., at 877.

36 *Planned Parenthood v. Casey*, cit., at 881-887, 899-901. However, in concurring with the judgment, Justice Blackmun kept applying strict scrutiny, considering all these provisions invalid. Justice Stevens concluded instead for their unconstitutionality (except for the informed consent and the parental one) under the new undue burden standard.

notification requirement was the only one struck down[37]. The Court considered it deterred pregnant women engaged in extra-marital affairs, victims of abuse by their husbands or whose children are, seeking an abortion, introducing a sort of male veto over their personal choice[38].

III. ABORTION LAWS AND REPRODUCTIVE RIGHTS: STATE OF THE ART BEFORE DOBBS.

Casey had the immediate effect of overtly reassuring state legislators about the validity of those struck-down restrictions under *Roe*[39], directly intended (or having the effect of) to persuade pregnant women not to terminate their pregnancies without formally substantially impeding them from seeking it[40]. Indeed, from 1992 onward, several states conformed to the Pennsylvania Abortion Control Act by introducing mandatory waiting periods, state-prescribed counselling, parental consent, and reporting requirements.

Several restrictions aimed at protecting the unborn life passed, including the medically unnecessary "targeted regulations of abortion providers" (so-called TRAP laws), which were present (and still are) in nearly all the states[41]. For example, abortion clinics were required to meet standards for ambulatory surgical centres or to negotiate written transfer agreements with the state every two years. Likewise, to provide pregnancy termination services, doctors were mandated first to perform and show pregnant women an ultrasound, determine whether the fetus has a detectable fetal heartbeat, or have admitting privileges at a hospital within thirty miles[42]. The federal courts did not easily consider any such laws as undue burdened the women seeking abortions, although they have led, over time, to the closure of many abortion facilities[43].

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37 Id., at 887-898.

38 Id., at 897.

39 *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

40 On the misunderstanding of *Casey*'s undue burden standard, which could have been applied instead to meaningfully protecting the woman's dignity, see Wharton, L.J.-Frietsche, S.-Kolbert, K.: *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18(2) *Yale Journal of Law and Feminism* 317 (2006).

41 See https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

42 In 2013, for example, Texas passed a bill requiring physicians performing or inducing an abortion to have active admitting privileges at a hospital not further than 30 miles from the abortion facility and facility to meet minimum standards for ambulatory surgical centres. In 2016, in *Whole Woman's Health v. Hellerstedt* (579 U.S. 582 (2016), the Supreme Court invalidated the law, concluding that it did not cure a significant health-related problem or provide any health benefit outweighing its imposed burdens. The same conclusion was reached in 2020 in *June Medical Services v. Russo* 140 S. Ct. 2103 (2020), declaring the substantially identical Louisiana Act 620 unconstitutional.

43 Greenhouse, L.-Siegel, R.B.: *Casey and the Clinic Closings: When Protecting Health Obstructs Choice*, 125 *Yale L. J.* 1428 (2016).

To pursue the goal of pushing for Roe overturning, some states[44] went even further by adopting total or nearly-total abortion bans designed to be effective only when terminating the pregnancy would no longer be a constitutional right (so-called "trigger laws"). Other states[45] decided decided, instead, not to repeal the old pre-*Roe* laws criminalising abortion to make them come back into force after the hoped overruling (so-called dormant or zombie laws), with the advantage, compared to trigger laws, of avoiding potential constitutional challenges[46]. However, in 2021, Texas showed states even how to circumvent a judicial review by adopting trigger laws outlawing pre-viability abortion in breach of still effective *Roe*. Indeed, the Heartbeat Act (S.B. 8) prohibited physicians from performing or inducing an abortion at the fetal cardiac activity detection (usually at the sixth week), relying its enforcement (and, consequently, constitutional challenges) only on private citizens and not state officials[47].

This restrictive widespread post-*Roe* legislative trend did not spare the federal legislator, which banned some medically approved abortion second-trimester procedures without exception, namely, the intact dilate and extraction technique, known as partial-birth abortion[48]. In *Gonzales v. Carhart*[49], the Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003, arguing that if access to that specific procedure was allowed, "some women might regret their choices"[50]. Suddenly, it became clear that some blanket pre-viability abortion bans are permitted and, as Professor Siegel noted[51], that abortion restrictions do not protect only fetal life and maternal health but also women's autonomy and dignity, so offering the anti-abortion movement new powerful arguments.

44 Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming (see Aceves, W.J., *The Problem with Dobbs and the Rule of Legality*, 111 *GEO. L. J. Online* 75 (2022), at 91).

45 Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, West Virginia, and Wisconsin (Id., p. 90).

46 See Berns, M.: *Trigger Laws*, 97 *GEO. L.J.* 1639 (2009) (on the similarity between the two legislative instruments in manifesting state dissent to judicial decision and on the distance of zombie laws from trigger ones, enacted despite their patent unconstitutionality).

47 S.B. 8, §171.207(a) ("the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208"). S.B. 8, §171.208 states that "Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who: (1) performs or induces an abortion in violation of this subchapter; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion (…); or (3) intends to engage in the conduct described by Subdivision (1) or (2)". It also cleared that the court shall award the claimant injunctive relief, statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced, aided or abetted, costs and attorney's fees (S.B. 8, §171.208(b)).

48 Partial-Birth Abortion Ban Act 2003.

49 550 U.S. 124, 127 S. Ct. 1610 (2007).

50 *Gonzales v. Carhart*, cit., at 1634.

51 Siegel, R.B.: *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 177 YALE L.J. 1694 (2008) (speaking of gender-paternalistic justifications for restricting abortion).

In sum, by abandoning strict scrutiny in favour of the undue burden standard, the Supreme Court, contrary to what the Justices relied on in not overruling *Roe*[52] and some scholars suggested[53], did not settle the abortion war. Instead, *Casey* opened the floodgates to introducing restrictions allowing the pro-life community to gain ground without pro-choice realised. The pro-life community managed gradually erode women's reproductive rights through an incrementalist strategy[54] far from relying on merely demanding the overruling of *Roe v. Wade*. After all, regardless of the standard of judicial review adopted by the Supreme Court, there was a generous margin for undertaking such an operation within the constitutional foundation of abortion. Indeed, Roe and its progeny confined themselves primarily to preventing states from criminalising elective pre-viability and therapeutic post-viability abortion to protect the women's negative right, grounded on privacy or liberty, to choose to terminate the pregnancy. They did not require, instead, to guarantee that pregnant women could equally access it and control as men their reproductive lives[55].

Leveraging this, on the one hand, antiabortionists passed several constitutionally compliant TRAP laws, silently reducing the chance for women to freely decide to terminate their pregnancy, especially within low-income and minority communities. Perhaps not unduly burdening the right to seek an abortion in the judicial view, such laws dangerously enacted sex-based burdensome, expensive, not accessible, and publicly unfunded pregnancy termination procedures[56], driving women to bear children and commit their bodies "to make potential life into a person"[57]. On the other hand, pro life relied on such laws to silently prevent deconstructing the traditional legislative stereotyped vision of the role of women as mothers in society. As *Casey* recognised: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives"[58]. Therefore, by limiting this ability, states reaffirm the

52 *Planned Parenthood v. Casey*, cit., at 867: "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases its decision (…) calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution".

53 Devins, N.: *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, in 118(7) *Yale Law Journal* 1318 (2009), at 1342.

54 Siegel, R.B.: cit., at 1708 (also reporting the fight within the incrementalist and the purist wings of the anti-abortion movement about the best strategy).

55 West, R.: *From Choice to Reproductive Justice: De-constitutionalizing Abortion Rights*, 118 *Yale L. J.* 1394 (2009), at 1403; Bader Ginsburg, R.: *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *N.C. L. REV.* 375 (1985), at 384.

56 See *Beal v. Doe*, 432 US 438 (1977); *Maher v. Roe*, 432 US 464 (1977); *Poelker v. Doe*, 432 US 519 (1977); *Harris v. McRea*, 448 US 297 (1980); *Webster v. Reproductive Health Services*, 492 US 490 (1989).

57 Siegel, R. B., *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stanford Law Review* 261 (1992), at 348.

58 *Planned Parenthood v. Casey*, cit., at 856.

archaic but still embedded patriarchal conception that "the paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother[59]".

Unveiled the sex-based discriminatory nature of abortion restrictions, some scholars[60] suggested founding the constitutional basis of the right to abortion on the Equal protection clause of the Fourteenth Amendment. That would lead the states to act to remove any form of sex-based discrimination and the Supreme Court to trigger heightened scrutiny for any abortion restriction involving a gender-based classification. States would have to offer an "exceedingly persuasive justification"[61] – not relying on overbroad generalisation concerning inherent differences in roles, talents and capacities between males and females – that such measure substantially furthered critical governmental objectives[62]. The Court, however, over time and still in *Dobbs*, firmly refused to analyse abortion as an equality issue[63].

Other scholars[64] suggested instead de-constitutionalising the abortion issue, making it fully part of the women's equality victories gained through ordinary political means rather than by the Supreme Court. Relying on the constitutional adjudication system carried too many costs, leading, in the end, to weaken women's reproductive rights only. Now that *Dobbs* accomplished the demand for de-constitutionalising abortion, it is questionable if it has empowered women's reproductive rights.

IV. DOBBS V. JACKSON WOMEN'S HEALTH.

As anticipated, after nearly fifty years of considering abortion a constitutional right, the U.S. Supreme Court changed its mind in *Dobbs v. Jackson Women's Health*[65]. The law at stake was the Mississippi Gestational Age Act 2018, prohibiting abortion after fifteen weeks of pregnancy, except for medical emergencies or severe fetal abnormalities[66]. In a six-to-three decision, the Supreme Court found that the statute odds with the viability line was constitutionally valid, likewise any other pre-viability prohibitions on elective abortions. In other words, the Court

59 *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872).

60 See *ex multis* Law, S. A., *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955 (1984); Bader Ginsburg, R.: cit.; Siegel, R.S.: *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *EMORY L.J.* 81 (2007).

61 *United States v. Virginia*, 518 U.S. 515, at 533- 34 (1996).

62 Id., at 533.

63 See Yoshino, K.: *The New Equal Protection*, 124 *HARV. L. REV.* 747 (2011).

64 West, R.: cit., at 1403. See against Ziegler, M.: *The Price of Privacy, 1973 to the Present*, 37(2) *Harvard Journal of Law and Gender* 285 (2014).

65 142 S. Ct. 2228 (2022).

66 Later, Mississippi passed even more restrictive abortion bans prohibiting pregnancy termination after six weeks, in line with the Texas Heartbeat Act 2021 (supra, par. 3).

completely overturned the holding of *Roe* and *Casey*, which secured women the right to choose to terminate their pregnancies before viability without undue burdening state interferences.

Justice Alito, joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett, framed the question of whether the pre-viability abortion ban complies with the constitutional text, considering first whether the Constitution "properly understood"[67] confers a right to obtain an abortion and if it does not, whether the doctrine of *stare decisis* requires not to overturning *Roe* and *Casey* regardless they are "egregiously wrong from the start"[68].

In the majority's view, the Constitution makes neither express nor implicit reference to abortion. Not only does the text not mention it, but it also does not even protect it under the Fourteenth Amendment since neither the Equal Protection Clause nor the Due Process Clause does guarantee the right to choose to terminate a pregnancy. As to the former, the Court continued denying that abortion regulation is a sex-based classification in line with its precedents[69]. As to the latter, departing from its previous rulings, it argued that abortion does not flow from the concept of liberty, solely or incorporating, as in *Roe*, the right to privacy, be it found in liberty itself or a combination of many Amendments as in *Griswold*. The Due Process Clause protects only two types of substantive rights, namely, rights guaranteed by the first eight Amendments and deemed fundamental rights. And "In deciding whether a right falls into either of these categories, the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty'"[70].

After a lengthy historical analysis, the Court concluded that abortion is an unenumerated-by-Constitution right that cannot even be deemed fundamental. The vast majority of states have criminalised performing abortion post-quickening for centuries (i.e., at the first felt movement of the fetus in the womb between the sixteenth and eighteenth week of pregnancy) and even pre-quickening at the critical moment of ratification of the Fourteenth Amendment and until *Roe*[71]. Therefore, in the Court's view, abortion has no deep roots in the national tradition. At least, relying on tradition as a mere historical practice rather than – as

67 *Dobbs v. Jackson Women's Health*, cit., at 8 (opinion of the Court).

68 Id., at 6.

69 Id., at 10-11.

70 Id., at 12.

71 Id., at 23.

the dissenters in *Dobbs* suggested[72] – a "living thing"[73] or "inspirational principle"[74] guiding the court in balancing current individual needs and social demands over time. In other words, the Court did not consider that "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke"[75]. That happened, for example, for the right to use contraceptives or to marry across racial lines, both introduced broadening the established contours of liberty under the Due Process Clause. Joining the historical practice approach instead, the majority focussed only on traditions already existing when the Fourteen Amendment was ratified, moving backwards the contours of liberty so much to exclude abortion[76]. After *Dobbs*, abortion is no more a fundamental right but "just another interest to be resolved by political force"[77]. As the Court clarified, it is an interest corresponding to "one of the many understandings of 'liberty', but it is certainly not ordered liberty"[78] essential to the whole Nation. On the contrary, the people of each state can decide how to set abortion content and limits over other competing interests.

Whether the *stare decisis* should have refrained the Court from overturning *Roe* and *Casey*, the majority answered negatively because of five factors. First, such rulings were based on an erroneous interpretation of the Constitution, leading to usurping the people "the power to address a question of profound moral and social importance"[79]. Second, they were founded on weak reasoning lacking any constitutional grounding and persuasive justification for the rules, i.e., the trimestral framework, the viability line and the undue burden test they introduced[80]. Third, as the difficulty of the judges in coherently applying the undue burden standard showed, these precedents did not introduce workable rules[81]. Four, they have led to the distortion of several unrelated legal doctrines[82]. Five, their overruling will not compromise any reliance interests since "getting an abortion is generally unplanned activity"[83] and it is hard for the court "to assess, namely, the effect of the abortion right on society and in particular on the lives of women"[84].

72 See Justices Breyer, Sotomayor and Kagan's dissenting joint opinion at 17.

73 See Justice Harlan dissenting *Poe v. Ulmann* 367 U.S. 497, at 542 (1961).

74 McClain, L.C.-Fleming, J.E.: *Ordered Liberty After Dobbs*, 35 *Journal of the American Academy of Matrimonial Lawyers* 623 (2023).

75 *Poe v. Ulmann*, cit., at 542 (Justice Harlan's dissenting opinion).

76 As the dissenters pointed out, in strictly defining the Fourteenth Amendment, the Court followed Justice Rehnquist's approach in *Washington v. Glucksberg* (521 U. S. 702 (1997)) (see *Dobbs v. Jackson Women's Health*., cit., at 17).

77 Tribe, L.H.: *Deconstructing Dobbs*, *N.Y. Review* (September 22, 2022) (online).

78 *Dobbs v. Jackson Women's Health*, cit., at 31.

79 Id., at 44.

80 Id., at 45-56.

81 Id., at 56-62.

82 Id., at 62-63.

83 Id., at 64.

84 Id., at 65.

As the dissenters noted[85], it is sharp the distance from *Casey*, where the plurality considered unwise to overrule *Roe* "under fire in the absence of the most compelling reason"[86] "at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law"[87]. Only Justice Robert suggested refraining from overruling *Roe* and *Casey* and limiting to abandoning the line of viability they arbitrarily created[88]. The majority in *Dobbs* rejected any of such concerns instead and replied to the concurrence that it would not be possible to discard the viability line under the *stare decisis* ground, being it inextricably entangled with *Roe* and *Casey*'s holdings[89]. Therefore, they must be overruled, returning the authority to settle the abortion issue to the people and their elective representatives[90].

Such a decision followed that states could regulate and even outlaw it entirely at any stage of the pregnancy by enforcing laws enjoying a strong presumption of validity. Indeed, lacking abortion constitutional protection, the Court discarded the strict scrutiny and the undue burden standard applied to assess whether a law limiting fundamental rights is valid, using only a highly permissive rational-basis test instead[91]. It requires the citizen to prove that state laws do not pursue a legitimate governmental interest by means which are rationally related to doing so. Under this test, the Mississippi law banning abortion after fifteen weeks of pregnancy, except in case of a medical emergency or a severe fetal abnormity, smoothly passed the judicial review. Indeed, it furthered legitimate interests, namely, protecting the life of unborn human beings and avoiding barbaric procedures commonly used to terminate pregnancies from the second trimester onwards[92].

V. THE USE OF FOREIGN LAW IN DOBBS.

One of the most debated arguments the Court relied on to overturn *Roe* and *Casey* was that other countries nearly uniformly converged in eschewing the viability line allowing elective abortion only at earlier stages of pregnancy[93]. As the concurrence underscored, "only a handful of countries, among them China and North Korea, permit elective abortion after twenty weeks"[94]. The subtext was

85 Id., at 56 (Justices Breyer, Sotomayor and Kagan's dissenting joint opinion).

86 *Planned Parenthood v. Casey*, cit., at 867.

87 *Planned Parenthood v. Casey,* cit., at 869.

88 *Dobbs v. Jackson Women's Health*, cit., at 7 (J. Robert's opinion).

89 Id., at 73.

90 Id., at 69 (opinion of the Court).

91 Id., at 77.

92 Id., at 78.

93 Id., at 53.

94 Id., at 5 (J. Robert's concurring opinion).

clear that the U.S., until *Dobbs*, aligned with nations which do not excel in being models of democracy and a firm commitment to human rights protection.

Somewhat ironically, also the dissenters stressed the worldwide convergence in foreign abortion laws as a relevant fact for deciding whether to keep affording constitutional protection to the right of the woman to choose to terminate a pregnancy until viability or not. Contrary to the majority, they answered positively, pointing out that, for the past twenty-five years until the present day, liberalising abortion laws and helping women to access it and even cover its costs was the global trend[95]. Overturning *Roe* and *Casey*, therefore, would have made the U.S. an international outlier among the Western democracies, including New Zealand, the Netherlands and Iceland – overtly mentioned by Justices Breyer, Sotomayor and Kagan[96] – permitting on-demand abortion until the twentieth week of gestation and beyond.

None of the majority and minority offered a legal justification for using foreign law to decide a purely internal constitutional case. All the Justices in *Dobbs* limited themselves indeed to substantially assert that a given policy or principle concerning a controversial matter like abortion, still lacking an American consensus, is generally widespread abroad[97]. Of course, the implicit theory behind the voluntary use of foreign law could be that this improves judicial reasoning by offering new insights for solving common legal problems, as Justice Breyer suggested in the past[98]. However, as some scholars pointed out[99], such an explanation would not be exhaustive anyway since it fails to address per se some basic questions, such as what the level of authority of foreign sources and the areas of law cases are, in which it is correct to cite them, or what foreign legal systems select.

Moreover, in *Dobbs*, neither the majority nor the minority tried to understand any foreign judicial legal reasoning underlying the application of abortion laws outside the U.S. Quite the opposite, all the Justices, far from embarking on any such in-depth legal comparison, used foreign law only superficially, focussing solely on longer or shorter gestational time limits adopted in those legal systems

95 Id., at 43 (Justices Breyer, Sotomayor and Kagan's dissenting joint opinion).

96 Id., at 42.

97 On the use of foreign law for "consensus identification", i.e., to support the application of a rule for which there was not already an American consensus, by merely referring to a particular policy or principle prevalent in other countries generally see Simon, S.A.: *The Supreme Court's Use of Foreign Law in Constitutional Rights Cases*, 1(2) *J.L. & Cts.* 279 (2013), at 290-291.

98 See Justice Breyer in *Printz v. The United States* (521 US 989 (1997) at 977 (arguing that foreign experience "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem"); Id., *Keynote Address*, 97 *Am. Soc'y Int'l. L. Proc.* 265 (2003).

99 On the insufficiency of such a justification which avoids looking for a solid legal theoretical foundation of the practice, see Waldron, J.: *Foreign Law and the Modern Ius Gentium*, 119(1) *Harvard Law Review* 129 (2005); Calabresi, S.G.-Silverman, B.G.: *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, 1 *MICH. St. L. REV.* 1 (2015); Smorto, G.: *Il Giudice e il diritto straniero*, in L. Vacca (cur.), *Scienza giuridica e prassi*, Napoli, 2011, p. 291 ss.

selected by the judges to convey that the U.S., distancing or conforming them, would have been in line or not with the common trend of the liberal democratic countries. But such a trend, as the international and comparative scholars who authored an amicus brief suggested[100], should not have been devised primarily paying attention to gestational time limits of foreign state laws; instead, by looking at how, in liberal democratic countries, those laws are practically interpreted and applied within their respective legal systems, in consideration also of their interaction with all other internal and international rules. Europe, for example, has a highly-fragmented situation, which – unlike the minority wanted to let intend – offers not only permissive[101] but also restrictive[102] recent trend examples in abortion state laws. Against this backdrop, it could have been helpful to explore how other supranational courts have managed such diversity in abortion state laws, lacking any transnational constitutional women's right to choose to terminate their pregnancies[103]. Indeed, the long experience of abortion federalism in Europe could have cast a light on the opportunity for the U.S. Supreme Court to strike a balance between the statal interest in protecting unborn lives and the interest of the women to terminate a pregnancy[104] to ensure at least that any abortion ban, or nearly-ban, does not turn in inhuman or degrading treatment[105] and preserves free speech[106] and free movement rights[107]. In other words, focussing on the legal reasoning of the ECHR and the ECJ, the Court in *Dobbs* could have noted that even by allowing each state to rule on abortion enjoying a wide margin of appreciation, the judicial power could be asked to set checks and balances to prevent that any restrictive statal regulation violates women's fundamental

100 Brief of International and Comparative Legal Scholars as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. (2022) (No. 19-1392), p. 5.

101 For example, in 2018, Ireland adopted the Health Regulation of Termination of Pregnancy Act, overturning its restrictive abortion law. It permitted elective abortion until the twelfth week of pregnancy and after only in case of risk to women's health and life or fatal fetal abnormality.

102 In 2020, Poland *de facto* nearly totally banned the right to abortion. Indeed, the Polish Constitutional Tribunal declared unconstitutional an exception in the Family Planning Act of 1993 allowing abortion in case of "severe and irreversible foetal defect or incurable illness that threatens the foetus's life".

103 On this issue, see Fabbrini, F.: *The 'European' Future of American Abortion Law: Dobbs, Federalism and Constitutional Equality*, *VANDERBILT J. TRANSNAT'L L.*, 2023 available at https://ssrn.com/abstract=4384264.

104 ECHR, *A, B and C v. Ireland*, No. 25579/05, 16 December 2010 (stating that while the right to respect women's private life under Art. 8 of the Convention cannot be interpreted as conferring a right to abortion, the State has a positive obligation to coherently shape effective and accessible procedures which allow women to establish whether they are eligible under domestic law to a lawful abortion on the ground of a relevant risk to a woman's life).

105 ECHR, *R.R. v. Poland and P & S v. Poland*, No. 27617/04, 26 May 2011 (affirming that the failure to provide adequate procedures for accessing prenatal genetic testing, being a prerequisite for legal abortion on the ground of fetal abnormality under statal law, amounts to a breach of private life and inhuman or degrading treatment under Articles 8 and 3 of the Convention).

106 ECHR, *Open Door and Dublin Well Woman v. Ireland*, no. 14234/88; 14235/88, 29 October 1992 (finding that the restraint from receiving or imparting information concerning the identity and location of abortion clinics outside the jurisdiction of the state forbidding abortion constituted an unjustified interference with the right to freedom of expression in breach of Article 10 of the Convention).

107 ECJ, Case C-159/90, *Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan*, 4 October 1991 (considering medical termination of pregnancy constitutes a service within the meaning of Article 60 of the Treaty although allowing a Member State forbidding abortion to prohibit distributing information about the identity and location of abortion clinics in another Member State).

rights, regardless of whether abortion lacks constitutional protection under the substantive Due Process Clause. However, as we have already mentioned, the judges in *Dobbs* did not carry out such a thoughtful comparative legal investigation, merely leveraging some rough information about abortion laws abroad to convey "a sort of consensus among judges, jurists, and lawmakers around the world"[108].

Such overseas information helped the Justices to support their judgment in one way or another[109]. In particular, the minority relied on foreign law to preserve the post-*Roe* legal landscape on abortion in the U.S. The majority used foreign law instead to innovate the current situation and eschew the right to abortion from any constitutional protection. As some scholars noted[110], this last fact seems surprising per se, having been conservative Supreme Court Justices highly critical of using foreign law. Justice Thomas, for example, joining Justice Alito's opinion in *Dobbs*, went back on his own past words in *Foster v. Florida*[111], where he said to allow only the Congress, as a legislature, not the Supreme Court, to "wish to consider the actions of other nations on any issue it likes"[112]. He also appeared to have distanced from Justice Scalia's opinion in *Roper v. Simmons*[113], who argued that "the basic premise of the Court's argument - that American law should conform to the laws of the rest of the world - ought to be rejected out of hand"[114]. But upon closer inspection, the recurse to foreign law by the majority is not surprising at all, rather ideally in line with the ambivalence of American lawyers towards such a controversial issue as the opportunity of voluntarily using external sources in the courtroom. As Markesinis and Fedtke noted, "occasionally, even an 'anti-foreign law' judge may himself have recourse to the 'condemned' practice"[115], and, after all, even Justice Scalia sometimes did[116].

In our view, what is genuinely striking in *Dobbs* is that conservative justices used external sources in "one main area of American constitutional law - judicial review"[117]. In so doing, *Dobbs* rebutted the thesis that the judges' hostility toward foreign law was "consistent with the view that restricting the sources of legal ideas and the ultimate authority of constitutional interpretation is essential to the

108 Waldron, J.: cit., at 132.

109 On using foreign law to help judges to make moral judgments, see Waldron, J.: cit. and Tripkovic, B.: *The morality of foreign law*, 17(3) *Int'l J. Const. L.* 732 (2019).

110 Kalantry, S.: *Foreign Law in Dobbs: The Need for a Principled Framework*, 14 *ConLawNOW* 37 (2022).

111 537 U.S. 990 (2002).

112 Id.

113 543 U.S. 551(2005) (sentencing juveniles under eighteen to death violates the Eight Amendment).

114 Id.

115 Markesinis, B.-Fedtke, J.: *The Judge as Comparatist*, 80(1) *Tulane Law Review* 11 (2005), at 24.

116 Id., 24 (mentioning Scalia's dissenting opinion in *Mcintyre v Ohio Elections Commission,* 514 U.S. 334,371 (1995), at 381-382.

117 Id., 152.

maintenance of a coherent body of law"[118]. Indeed, in mentioning foreign law to corroborate their constitutional interpretation excluding the right to abortion from the Fourteenth Amendment, the *Dobb*'s majority was prone to enrich its structural constraint reasoning, grounded on the original understanding of the U.S. Constitution[119], with foreign sources. In so doing, the Supreme Court did not expand rights. But it reduced them[120], marking a breaking point from cases like *Atkin v. Virginia*[121], *Lawrence v. Texas*[122] and *Roper v. Simmons*[123]. There, by underscoring a global consensus, the Supreme Court appealed to the aspiration of the U.S. to ensure, on an international scale, a high level of protection of human rights. In *Dobbs*, instead, foreign law was invoked by judges to narrow rather than broaden constitutional interpretation, renouncing, in the end, any leading American position in the field of women's reproductive rights.

VI. THE FUTURE OF REPRODUCTIVE RIGHTS IN THE U.S.

Abortion is just an aspect of reproductive autonomy, which includes several substantive Due Process rights involving intimate and personal reproductive choices other than deciding to terminate a pregnancy, namely, the right not to have a child and the right to have one and to parent under the desired conditions[124]. Over time, the Supreme Court afforded constitutional protection to all such reproductive choices, in line with emerging societal needs to free people from any form of reproductive oppression existing at the Nation's founding[125]. In other words, *Roe* and *Casey* have not come out of a vacuum being, on the contrary, at the peak of a long series of judicial efforts contributing to recognising privacy-derived rights equally to all men and women[126]. *Meyer v. Nebraska*[127], for example, guaranteed the right to parent, allowing decide how to raise and educate children free from any statal interferences in 1923. The right to procreate was recognised in 1942 in *Skinner v. Oklahoma*[128], which prohibited forced sterilisations securing the choice

118 Id., 153.

119 On the originalist approach of the majority in *Dobbs*, see Siegel, R.B.: *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101(5) TEXAS L. REV 1127 (2023) (arguing that Dobbs' originalism does not employ the methods of academic originalists since it accepts substantive Due Process Clause, so being living constitutionalism. Dobbs' originalism is instead a goal-oriented political practice making constitutional order less democratic).

120 Kalantry, S.: cit., p. 37.

121 536 U.S. 304 (2002) (sentencing a mentally disabled individual to death violates the Eighth Amendment).

122 539 U.S. 558 (2003) (criminalising same-sex intimate acts violates the liberty protected by the Fourteenth Amendment's Due Process Clause).

123 Cit.

124 Ross, L.J.-Solinger, R.: *Reproductive Justice: An Introduction*, University of California Press, Oakland, 2017, p. 9.

125 Soohoo, C.: *Reproductive Justice and Transformative Constitutionalism*, 42(3) *Cardozo Law Review* 819 (2021)

126 Sanger, C.: *The Rise and Fall of a Reproductive Right: Dobbs v. Jackson Women's Health Organization*, 56 *Family Law Quarterly* 117 (2023), at 121.

127 262 U.S. 390 (1923).

128 316 U.S. 535 (1942).

to have a child. In 1965, *Griswold v. Connecticut*[129] protected the opposite right, i.e., not to have children, by guaranteeing the marital right to use contraceptives (then extended to any individual)[130]. Shortly later, *Loving v. Virginia*[131] kept defending sexual intimacy, declaring unconstitutional statal interracial marriage bans. Culminated with the right to abortion in *Roe* and *Casey*, the expansion of reproductive rights has not been arrested. By relying on its precedents, the Supreme Court has also opened constitutional protection to same-sex couples' rights to sexual intimacy and marriage, respectively, in 2003 with *Lawrence v. Texas*[132] and in 2015 with *Obergefell v Hodges*[133].

After *Dobbs*, all these intertwined reproductive rights seem at risk. Indeed, by overruling *Roe* and *Casey*, the Supreme Court did not merely exclude abortion from any constitutional protection but also dangerously enlightened a path to potentially overturning several other rights, which – like abortion – the text neither explicitly mentions nor implicitly considers among the deeply-rooted national historical liberties protected under the Due Process Clause at its drafting time. The majority overtly addressed the issue, arguing that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion"[134] since "what sharply distinguishes the abortion right from the rights recognised in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life'"[135]. Such peculiarity follows that overruling *Roe* and *Casey* would not imperil other not deeply-rooted-in-national-history rights to sexual intimacy, familiar relationships and procreation.

From their part, the dissenters objected that to look at all these rights as "hermetically sealed containers"[136] differing from abortion is of any reassurance since "They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions"[137]. Therefore, if the majority's legal reasoning is correct, they are all close to overruling. And, after all, even Justice Thomas expressly admitted such an intention in his concurring opinion, saying that "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*"[138].

129 Cit.

130 *Supra*, par. 2.

131 388 U.S. 1 (1967).

132 Cit. (right to engage in private, consensual sexual acts).

133 576 U.S. 644 (2015) (right to marry same-sex person).

134 *Dobbs v. Jackson Women's Health*, cit., at 66.

135 Id., at 32.

136 Id., at 23 (Justices Breyer, Sotomayor and Kagan's dissenting joint opinion)

137 Id., at 5.

138 Id., at 3 (Justice Thomas's concurring opinion).

However, despite doubts about how the Court would reconsider the substantive Due Process Clause in future cases, *Dobbs* itself can already significantly restrict women's reproductive rights, not only by obstructing their choice to not have a child by abortion but also by using contraceptives. Ironically, as we will see, it can also affect the right to choose to have a child.

Dobbs's first immediate effect is consenting states to strictly regulate and even outlaw, at any pregnancy stage, abortion, now excluded from any federal constitutional protection. Overruling *Roe* and *Casey* does not formally mean that women can no longer choose to terminate their pregnancies in the U.S. They still can - as Justice Kavanaugh pointed out[139] - either if their states consider abortion legal or by travelling to those states that do it. However, such a view looks pretty narrow, neglecting considering several issues hindering, in practice, women's choice to terminate the pregnancy. Firstly, not all women can afford to travel to states that do not ban abortion. Some pre-viability restrictions and abortion bans are thus highly disproportionate for those women living in poverty or with disabilities. The state will force them to continue their unwanted pregnancies, compelling them to make a new generation of citizens and workers enriching society without compensation for their sacrifices[140]. Secondly, women may even travel out of their state to seek a therapeutic abortion, risking their health or life. Indeed, after *Dobbs*, states may ban abortion entirely without exceptions[141] or press physicians to perform legal abortion until an actual state of emergency due to the fear of being prosecuted[142]. Thirdly, some states could seek to impose abortion restrictions beyond their borders, exposing providers helping non-resident women and women themselves to be sanctioned[143]. The rise of telehealth for medication abortion, allowing women to terminate pregnancies at home with pills, cannot solve these problems but only temper them. In 2021, the Food and Drug Administration (FDA) modified the mifepristone's Risk Evaluation and Mitigation System (REMS), removing the requirement that the abortive pill for intrauterine-within-ten-weeks pregnancy was dispensed in person, so allowing its remote prescription and by mailed delivery by certified providers. In 2023, also certified pharmacies were allowed to sell abortion medication under the

139 Id., at 11 (J. Kavanaugh's concurring opinion).

140 Suk, J.C.: *A World Without Roe: The Constitutional Future of Unwanted Pregnancy*, 32 *WILLIAM & MARY L. REV.* 443 (2022) (affirming that conscripting women to carry their pregnancies to term unwillingly is unjust enrichment of the state, giving rise to a duty of restitution).

141 Gilles, S.G.: *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?*, 92 *Miss. L. J.* 271 (2023) (arguing that even after *Dobbs*, a mother's life-preserving abortion is secured, being a deeply-rooted-in history fundamental right. Mother's health-preserving abortion has been abolished instead).

142 Petersen, C.J.: *Women's Right to Equality and Reproductive Autonomy: The Impact of Dobbs v. Jackson Women's Health Organization*, 45 *U. HAW. L. REV.* 305 (2023), at 344.

143 On the interstate implications of *Dobbs*, see Appleton, S.F.: *Out of Bounds? Abortion, Choice of Law, and Modest Role for Congress*, 35 *J. Am. Acad. Matrim. Law* 461 (2023); Cohen, D.-Donley, G.-Rebouché, R.: *The New Abortion Battleground*, 123 *Columbia Law Review* 1 (2023).

prescription of accredited prescribers[144]. Such liberalisation appeared particularly advantageous for low-income populations, people of colour and with disabilities who cannot, physically or financially, afford to travel to clinics. However, all of them are still required to do that if the pregnancy is already over the tenth week or it is an ectopic one needing a surgical abortion[145] or if they live in states prohibiting telemedicine[146]. Moreover, such women may not have access to the internet or electronic payment means or be unfamiliar with the digital market leading to resorting to unsecured pills[147]. Finally, they may be more easily subjected to prosecution if they need post-abortive care by suspicious doctors reporting their conduct to the authorities[148].

A further effect of *Dobbs*, other than restricting women's access to abortion care, is limiting their right to contraception. As the majority stressed, overturning *Roe* and *Casey* will allow states to protect "potential life" even deciding when life begins[149]. As some scholars noted[150], none of the Justices pointed out this could raise serious concerns about the distinction between abortion and contraception, especially regarding emergency contraceptives, like the Plan B pill or intrauterine devices (IUDs). The reason is twofold and traced back not only to their religious-based assimilation to the abortion-inducing drugs but also to the vast misunderstanding about their deemed capacity to prevent the implantation of a fertilised egg[151]. In Kansas, for example, the health system temporarily stopped

144 US FDA, *Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation* (March 2023) at https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

145 The Emergency Medical Treatment and Labor Act 1986 (EMTALA) consider emergency medical conditions "ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features (…) Stabilizing treatment could include medical and/or surgical interventions (e.g., dilation and curettage (D&C), removal of one or both fallopian tubes, anti-hypertensive therapy, etc.)" (see, Department of Health & Human Services - Centers for Medicare & Medicaid Services, *Memorandum on Reinforcement of EMTALA Obligations specific to Patients who are pregnant or are Experiencing Pregnancy Loss* (Sept. 17, 2021 – revised Oct. 3, 2022), at https://www.cms.gov/files/document/qso-21-22-hospital.pdf).

146 Indiana, for example, bans telehealth and requires an in-person visit for abortion (Guttmacher Institute, Medication Abortion (June 1, 2023) at https://www.guttmacher.org/state-policy/explore/medication-abortion

147 Upadhyay, U.D.-Cartwright, A.F.-Grossman, D.: *Barriers to abortion care and incidence of attempted self-managed abortion among individuals searching Google for abortion care: A national prospective study,* 106 *Contraception* 49 (2022) (showing that most common methods used to attempt self-managing abortion are: herbs, supplements, or vitamins (52%); emergency contraception or many contraceptive pills (19%); mifepristone and/or misoprostol (18%); and abdominal or other physical trauma (18%)).

148 Petersen, C. J.: cit., at 341-342: "One thing is certain: the people who will be targeted for this type of investigation will be women living at or near the poverty line, and women of color. (…) The National Advocates for Pregnant Women has tracked 1,600 such cases since 1973 and found that the victims of this abuse were "overwhelmingly low income, and disproportionately Black and Brown".

149 *Dobbs v. Jackson Women's Health*, cit., at 38-39 (opinion of the Court).

150 Minow, M.: *The Unraveling: What Dobbs May Mean for Contraception, Liberty, and Constitutionalism*, *in Roe v. Dobbs: The Past, Present and Future of a Constitutional Right to Abortion* (Lee Bollinger and Geoffrey R. Stone, eds., Forthcoming 2023, Harvard Public Law Working Paper No. 23-09) available at https://ssrn.com/abstract=4343952 or http://dx.doi.org/10.2139/ssrn.4343952.

151 Frank, R.: *Miss-Conceptions: Abortifacients, Regulatory Failure, and Political Opportunity*, 129 *The Yale Law Journal* 208 (2019).

providing emergency contraception after *Dobbs* until a governmental clarification because of the ambiguity of the Missouri trigger law, banning abortion 'from the moment of conception'[152].

By allowing states to restrict abortion to prevent the destruction of potential life limitlessly, *Dobbs* has also affected the right to procreate for patients seeking in vitro fertilisation (IVF). Indeed, laws banning abortion from conception or the moment of fertilisation could not prohibit only pregnancy termination. Instead, they could apply to any practice affecting potential human lives, including embryos still outside a woman's body. In this case, any selection, freezing or destruction of in-vitro-fertilised human eggs within medically assisted reproduction treatments would be illegal[153]. In other words, *Dobbs* paved the way for states to criminalise IVF entirely[154], going further to the example of Louisiana, prohibiting the intentional destruction of a viable in-vitro-fertilised human ovum considered a legal person[155]. Such eventuality is far from hypothetical since states like Indiana have banned abortions, explicitly underscoring that in vitro fertilisation will be exempted[156].

Furthermore, some IVF practices are performed when in-vitro-fertilised embryos are already inside the uterus. An example is reducing multiple fetuses in one pregnancy, leaving others to complete gestation to prevent the mother and the offspring from suffering life and health risks. The multifetal reduction could already breach abortion laws in those antiabortionist states like Texas, which prohibit any act intended "to cause the death of an unborn child of a woman known to be pregnant"[157], regardless of whether the pregnancy is terminated[158].

VII. POST-DOBBS SCENARIO.

The future of women's abortion rights in the U.S. depends on how states react to *Dobbs* and implement their abortion policies. Statal legislators were indeed given back the power to regulate the women's interest in pregnancy termination with no limitations, thus deciding whether to continue to guarantee the right to pre-viability abortion or, on the contrary, restrict or forbid it. That has resulted in a legislative rift in the country, whose states group now in two opposite halves.

152 Whelan, A.M.: *Aggravating Inequalities: State Regulation of Abortion and Contraception*, 46 *HARV. J. L. & GENDER* 131 (2023), at 168.

153 Macintosh, K.L.: *Dobbs, Abortion Laws, and In Vitro Fertilization*, 26 *J. HEALTH CARE L. & POL'y* 1 (2023).

154 Greely, H.T.: *The death of Roe and the future of ex vivo embryos*, 9(2) *J Law Biosci* 1 (2022) (arguing that such a scenario is unlikely). See also the Author's updated view at https://law.stanford.edu/2023/02/27/slss-hank-greely-discusses-in-vitro-fertilization-post-dobbs/

155 LA Rev Stat § 9:129 (2022).

156 IN Code § 16-34-1-0.5 (2022).

157 TX Health & Safety Code § 170A.001, § 245.002 (2022).

158 Ward, M.: *How Abortion Bans Might Affect IVF*, POLITICO (May 23, 2022) at https://www.politico.com/newsletters/politico-nightly/2022/05/23/how-abortion-bans-might-affect-ivf-00034409

One-half of the states still consider abortion legal, although not uniformly. While some, the significant part, protect abortion until viability, throughout the second trimester, or even beyond, others allow it only in the first trimester or some weeks later[159]. However, the line between states with or without shorter or longer gestational limitations blurs whether considering the web of policies concerning, for example, health insurance plans or public funding covering abortion or provider requirements[160]. Like under *Roe*, several unnecessary restrictions to access abortion services still exist, even in states allowing women to seek elective abortion pre-viability[161]. Abortion-supportive states have nevertheless devoted significant efforts to reinforce protection afforded to women seeking to terminate their pregnancies, especially in the face of the expected increase of bans and restrictions in the aftermath of *Dobbs*. Several means were adopted to secure the right to abortion: from enshrining it explicitly in the statal constitutions[162], like California[163], Michigan[164] and Vermont[165], to overtly committing to broadening its access for all women in the U.S., regardless of the country they reside, even by a joint interstate program. The West Coast Governors launched the "Multi-State Commitment to Reproductive Freedom" to collaborate in expanding access to abortion procedures against out-of-state restrictive measures[166]. The initiative has recently extended, reaching twenty states[167]. In the same direction, other states headed by Connecticut[168] adopted so-called "shield laws" to protect providers helping non-resident women from the sanctions imposed abroad by states criminalising abortion[169].

159 McCann, A. et al.: *Tracking the States Where Abortion Is Now Banned*, The New York Times (June 26, 2023) at https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

160 Guttmacher Institute, *Interactive Map: US Abortion Policies and Access After Roe*, June 26, 2023, https://states.guttmacher.org/policies/montana/abortion-policies.

161 In Michigan, for example, patients are forced to wait 24 hours after counselling to obtain an abortion; parental content is required; only physicians, not other qualified health care professionals, can perform it; and state Medicaid coverage or private health insurance for abortion is nearly-total banned.

162 On November 8, 2022, in all three states, a proposal to amend Constitution to add the right to reproductive freedom was on the ballot and passed by 66.88% (California), 56.66% (Michigan), and 76.77% (Vermont) of the voters.

163 California Constitution, Article I, Section 1.1.

164 Michigan Constitution, Article I, Section 28.

165 Vermont Constitution, Chapter I, Article 22.

166 On June 24, 2022, California, Oregon and Washington signed the document available at https://www.gov.ca.gov/wp-content/uploads/2022/06/Multi-State-Commitment-to-Reproductive-Freedom_Final-1.pdf.

167 Roubein, R.: *Twenty governors are forming a new coalition to support abortion rights*, The Washington Post (February 21, 2023) at https://www.washingtonpost.com/politics/2023/02/21/twenty-governors-are-forming-new-coalition-support-abortion-rights/.

168 Stracqualursi, V.-LeBlanc, P.: *Connecticut governor signs law protecting abortion seekers and providers from out-of-state lawsuits*, CNN (May 5, 2022) at https://edition.cnn.com/2022/05/05/politics/connecticut-abortion-protection-law-out-of-state-lawsuits/index.html

169 Shield laws can, for example, forbid medical boards and malpractice insurance companies from negatively considering out-of-state lawsuits and complaints for providers helping non-resident women seeking abortions; or prevent interstate investigation and discovery into care provided to non-resident patients. However, no such laws "would protect the patients and helpers who stay in, or return to, an antiabortion state if a law targets their conduct" (see Cohen, D.-Donley, G.-Rebouché, R.: cit., p. 44-45).

The other half of states in the U.S. consider pregnancy termination illegal, prohibiting abortion entirely or after six weeks of pregnancy[170]. After *Dobbs*, some states have enforced their trigger laws, like the Heartbeat Act 2021 in Texas[171]; others, like Indiana[172] and West Virginia[173], have adopted new legislation. Until today, such abortion laws are fully enforced only in fourteen states, mainly in the South, since a significant part of these bans has been temporarily halted by the courts, pending a review of their validity by state high courts under the statal constitutions. In South Carolina, for example, a six-week abortion ban signed into law in May 2023 is currently paused, making abortion back legal up to twenty-two weeks of pregnancy under the pre-*Dobbs* law. The suspended statal law reflects the title and content of the Fetal Heartbeat and Protection from Abortion Act 2021 that the Supreme Court of South Carolina struck down just a few months before in *Planned Parenthood South Atlantic v. State of South Carolina et al*.[174] The Court held that the Act of 2021 violated Article I, Section 10 of the state Constitution protecting the right to privacy, which, unlike the federal Constitution, is explicitly mentioned in the text and implicitly includes abortion. Applying the strict scrutiny standard, the Court argued that the law banning pregnancy termination at the fetus's detectable cardiac activity at the six-week unreasonably invaded such a women's fundamental privacy right. First, it pursued fetal interests at a too-early stage, where fetuses cannot be considered their legal entity under statal law reflecting the viability line. Second, it furthered the interest in maternal health, allowing women to make informed choices by knowing the likelihood of the fetus surviving based on its heartbeat. However, by forbidding abortion at six weeks, when women are unaware of the pregnancy, the law makes their informed choice merely illusionary[175].

It is uncertain whether the newly (all-male) South Carolina Supreme Court will follow its precedent once Justice Kaye Hearn, the only female judge who authored the lead opinion declaring unconstitutional the 2021 Act, has retired[176]. The new

170 McCann, A., et al.: cit.

171 *Supra*, par. 3.

172 In the aftermath of *Dobbs*, the Indiana General Assembly passed Senate Bill 1 in September 2022, making the state the first to adopt an abortion ban after *Roe* and *Casey*'s overruling. Ind. Code § 16-34-2-1(a) states that "Abortion shall in all instances be a criminal act", except when abortion is necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life; when there is a lethal fetal anomaly; or when pregnancy results from rape or incest.

173 WV Code § 16-2R-3 (2022): "(a) An abortion may not be performed or induced or be attempted to be performed or induced unless in the reasonable medical judgment of a licensed medical professional: (1) The embryo or fetus is nonviable; (2) The pregnancy is ectopic; or (3) A medical emergency exists". The prohibition shall not apply in case of abortion within eight weeks (fourteen for minors and incompetent or incapacitated adults) in case of sexual assault or incest, as far as reported to the authorities at least 48 hours before the abortion is performed.

174 *Planned Parenthood South Atlantic v. State of South Carolina et al*., no. 28127, January 5, 2023.

175 Id., at par. V(D).

176 Bellware, K.: *Judge blocks South Carolina abortion ban so state high court can review*, The Washington Post (May 26, 2023) at https://www.washingtonpost.com/politics/2023/05/26/south-carolina-abortion-ban-blocked/?=undefined.

Court could change its mind and exclude that abortion is a fundamental right under the state Constitution since it does not mention such a right. After all, other high courts of other sister states have already followed this path. For example, on the very same day a nearly-total abortion ban was declared unconstitutional in South Carolina, the Supreme Court of Idaho upheld a state law equally restrictive[177], arguing that protecting privacy does not imply safeguarding the right to abortion: "Regardless of whether the overarching rights to 'privacy', 'bodily autonomy' and 'intimate familial decisions' exist — there is nothing to indicate that the particular 'right of abortion' is part of any of those rights" [178] under a state constitution lacking to mention it. In sum, the future of many statal abortion bans largely depends on the changeable opinion of the respective courts interpreting state constitutions. To overcome such uncertainty, however, some antiabortionist states have passed constitutional amendments excluding any protection for abortion. While in Tennessee[179], West Virginia[180], Alabama[181], and Louisiana[182], voters supported such proposals over the last years, surprisingly, after *Dobbs*, in Kentucky[183], voters did not, rejecting an amendment saying that no right to abortion exists. And that it was, even though total abortion-ban legislation has been in force in the Republican-led state since the day after *Dobbs*[184].

This fact is perhaps emblematic of a general interstate growing support for abortion among Americans after *Roe* and *Casey*'s overruling. As the results of the last mid-term elections[185] and recent polls[186] showed, people in the United States,

177 Idaho Code sections 18-622(2) ("Total Abortion Ban"), 18-8804 and -8805 ("6- Week Ban"), and 18-8807(1) ("Civil Liability Law").

178 *Planned Parenthood Great Northwest at al. v. State of Idaho,* no. 49615, 49817, 49899, January 5, 2023, at 25.

179 In 2014, 56.60% of voters endorsed providing that "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion." (See Tennessee Constitution, Article I, Section 36).

180 In 2018, 51.73% of the voters supported the proposal to specify that "nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion". See West Virginia Constitution, Article VI, Section 58.

181 In 2018, 59.01% of the voters passed the proposal to amend the Constitution to recognise and support the sanctity of unborn life, protect the rights of unborn children and exclude any protection as a right or funding for abortion. See Alabama Constitution, Article I, Section 36.06.

182 In 2020, 62.06% of voters supported denying constitutional protection to the right to abortion. See Louisiana Constitution, Article I, Section 20.1: "To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion".

183 In 2022, 52.35% of the voters rejected the proposal to add the Constitution that nothing in the state constitution creates a right to abortion or requires government funding for abortion.

184 KY Rev Stat, § 311.772 (2022) (adopted on June 27, 2019).

185 Schneider, E.-Otterbein, H.: *'THE central issue': How the fall of Roe v. Wade shook the 2022 election*, POLITICO (December 19, 2022) at https://www.politico.com/news/2022/12/19/dobbs-2022-election-abortion-00074426.

186 Gallup, *Dissatisfaction With U.S. Abortion Policy Hits Another High* (February 2023) at https://news.gallup.com/poll/470279/dissatisfaction-abortion-policy-hits-high.aspx; Pew Research Center, *Nearly a Year After Roe's Demise, Americans' Views of Abortion Access Increasingly Vary by Where They Live* (April 2023) at https://www.pewresearch.org/politics/2023/04/26/nearly-a-year-after-roes-demise-americans-views-of-abortion-access-increasingly-vary-by-where-they-live/. See also Zernike, K.: *How a Year Without Roe Shifted American Views on Abortion*, The New York Times (June 23, 2023) at https://www.nytimes.com/2023/06/23/us/roe-v-wade-abortion-views.html

for the most part, regardless of their being pro-life or pro-choice, do not embrace super-restrictive abortion policies without exceptions which, in practice, beyond the law in books, are very common. Indeed, although any absolute prohibition has been adopted formally by states considering abortion illegal, their laws very often act as if they were blanket bans due to the ambiguity and vagueness of the rules allowing pregnancy termination in cases of fatal congenital disabilities or for saving the mother's health and life and, although rarely, of rape or incest. Doctors are likely not to grant abortion to women entitled to legally interrupt their pregnancies, encouraging them to travel out-of-state instead to avoid any possible charge[187]. As we have seen above[188], that suggestion is not a solution for vulnerable poor women living in marginalized communities. Moreover, it does not prevent either patients or providers from being sanctioned respectively for accessing or performing abortion care services out-of-state[189]. And that is so also if such services are provided remotely from another state of the U.S. by doctors prescribing abortive pills via telemedicine and by providers online selling such drugs delivered to women's homes[190]. Indeed, antiabortionist legislators have tried to hinder women from seeking abortion abroad even by adopting restrictions on abortive pills conflicting with the FDA's regulation on mifepristone. Some states require that physicians provide medication solely (not allowing other certified health care providers to prescribe or certified pharmacies to dispense it), perhaps only after an in-person visit, or allow abortion medication until an earlier gestational stage than the tenth week of pregnancy[191]. Others, like Arizona, ban mailing pills to patients[192] or, like Wyoming, forbid abortive drugs per se, explicitly and separately from general abortion bans[193].

187 Schoenfeld Walker, A.: *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, The New York Times (Jan. 21, 2023) at https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html.

188 *Supra*, par. 6.

189 In Missouri, two amendments to abortion law expressly intended to sanction who helps, assists or induces abortion regardless of the place of performance were introduced in 2022. On the issue, Frelich Appleton, S.: cit., and Cohen, D.-Donley, G.-Rebouché, R.: cit.

190 Delivering abortive pills in states banning abortion is not illegal. The Assistant Attorney General in charge of the Office of Legal Counsel at the U.S. Department of Justice released a written opinion saying the mere mailing by the U.S. Postal Service ("USPS") or other senders of drugs that can be used to perform abortions to recipients in jurisdictions banning abortion does not violate the Comstock Act (i.e., section 1461, title 18, U.S.C., forbidding mailing of every article or thing, including drugs and medicines, designed, adapted, or intended for producing abortion or advertised or described in a manner calculated to lead another to use or apply them for producing abortion), lacking the sender the intent that the recipient of legally-multiple-use drugs will use them unlawfully (see *Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions*, December 23, 2022, at https://www.justice.gov/olc/opinion/application-comstock-act-mailing-prescription-drugs-can-be-used-abortions).

191 Alaska, Arizona, Florida, Georgia, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, Nevada, North Carolina, Ohio, Pennsylvania, South Carolina, Utah (see Guttmacher Institute, *Medication Abortion* (June 1, 2023) at https://www.guttmacher.org/state-policy/explore/medication-abortion).

192 AZ Rev Stat, § 36-2160 (2022): "A manufacturer, supplier or physician or any other person is prohibited from providing an abortion-inducing drug via courier, delivery or mail service".

193 The Wyoming law is currently suspended by the court, pending a lawsuit challenging its legality (see Belluck, P.: *Wyoming Judge Temporarily Blocks State's Ban on Abortion Pills*, The New York Times (June 22, 2023) at https://www.nytimes.com/2023/06/22/health/wyoming-abortion-pill-ban.html).

Whether states can hinder or prohibit abortion medication contrary to federal prescriptions is paramount. Indeed, from its positive or negative answer derives the actual breadth of abortion bans, significantly affecting women's reproductive lives in pro-life states. The issue is already on the table in the federal courts. An abortion pill manufacturer filed a lawsuit to the U.S. District Court for the Southern District of West Virginia, arguing that federal rules on mifepristone, as adopted by the FDA under a legislative mandate by Congress, preempt any conflicting statal regulations on such a drug[194]. Likewise, a physician challenged North Carolina laws on the same ground[195]. These cases have not been decided yet, but according to some scholars leveraging the preemption argument could be a successful strategy[196] since the congressional purpose of requiring the FDA to impose additional control on certain approved drugs is to uniformly balance the public interests in drug safety and drug access nationwide using the least restrictive means[197]. If correct, states can neither ban FDA-approved drugs nor more strictly regulate their providers' conduct, thus securing medical abortion availability nationwide.

So far, however, federal courts have shown some ambivalence in defining the authority of the FDA to rule abortive drugs. While the U.S. District Court for the Eastern District of Washington ordered the FDA not to restrict mifepristone distribution unduly[198], the District Court of the Northern District of Texas stayed the U.S. FDA's approval of mifepristone, arguing that since its first authorisation in 2000, there was insufficient information to evaluate its safety and effectiveness[199]. It followed that mifepristone would have been put out of the market in the U.S. altogether. However, the Court of Appeal for the Fifth Circuit partially stayed that order pending appeal on the merit, restoring the mifepristone regimen at the time of approval, from 2000 until 2016, which prescribed its use in the first seven weeks of pregnancy and in-presence providing[200]. A few days later, the Supreme Court stayed the order of the Texas District Court entirely[201], allowing again to sell medication abortion under the latest mild REMS conditions[202].

194 *Genbiopro, Inc., V. Mark A. Sorsaia et al.* (N.D.W. Va. 2023), No. 3:23-cv-00058, Complaint (January 25, 2023) at https://storage.courtlistener.com/recap/gov.uscourts.wvsd.235957/gov.uscourts.wvsd.235957.1.0.pdf

195 *Amy Bryant, Md, v. Joshua H. Stein et al.* (M.D.N.C. 2023), No. 1:23-cv-77, Complaint (January 25, 2023) at https://storage.courtlistener.com/recap/gov.uscourts.ncmd.94539/gov.uscourts.ncmd.94539.1.0.pdf

196 Cohen, D.-Donely, G.-Rebouché, R.: cit., at 53 ss.; Zettler, P.J.-Adashi, E.Y.-Cohen, G.: *Alliance for Hippocratic Medicine v. FDA — Dobbs's Collateral Consequences for Pharmaceutical Regulation*, 388 *N Engl J Med* e29 (2023).

197 Cohen, D.-Donely, G.-Rebouché, R.: cit., at 57.; Zettler, P.J.: Pharmaceutical Federalism, 92 *Indiana Law Journal* 845 (2017), at 875.

198 *State of Washington et al. v. FDA et al.* (E.D. Wash. 2023), No. 1:2023cv03026, Document 80 (April 7, 2023).

199 *Alliance for Hippocratic Medicine et al. v. FDA et al.* (N.D. Tex. 2023), No. 2:2022cv00223, Document 137 (April 7, 2023).

200 *Alliance for Hippocratic Medicine et al. v. FDA et al.* (5th Cir. 2023), No. 23-10362 (April 12, 2023).

201 *Danco Laboratories, Llc. v. Alliance for Hippocratic Medicine et al.,* April 21, 2023, 598 U.S.__ (2023).

202 *Supra*, par. 6.

Although such a decision was the most significant abortion case to reach the Court since *Dobbs*, the reasons for the stay order have not been disclosed. Only Justice Alito gave his dissenting opinion arguing that the applicants, the FDA and the first manufacturer of mifepristone in the U.S., failed to show that they were likely to suffer irreparable harm in the interim since the drug was still on the market, and the appeal on the merit was already scheduled soon[203]. But what was really at stake in the case was something else, namely, that women living in states banning abortion would have been definitively prevented from accessing out-of-state abortive pills even via telemedicine if the order was not stayed. Lacking any evidence, we can only hope that the Court's majority also relied on such consideration in deciding the case.

VIII. CONCLUSIONS.

As illustrated in these pages[204], by overruling *Roe* and *Casey*, the Supreme Court distanced from judicial power the abortion issue, arguing that its regulation "must be returned to the people and their elected representatives"[205]. However, the post-*Dobbs* intricated legal landscape clearly shows that such an issue, while unprotected under the U.S. Constitution, still needs settlement by the courts, both at statal and federal levels. Far from distancing abortion from judicial interventions, *Dobbs* has opened new grounds for the courts to protect women living in pro-life states, totally or nearly banning pregnancy termination. Indeed, many laws forbidding abortion have been challenged under state constitutions or for attempting to supersede some federal rules concerning mifepristone pills to prevent pregnancy termination either in or out of antiabortionist states' boundaries[206]. Consequently, after *Dobbs*, the right to have access to abortion health services nationwide depends precisely on judicial intervention. Lacking it, the future of women's reproductive rights in the U.S. is seriously imperilled.

The *Dobbs* majority firmly denied the Supreme Court such women's safeguard role beyond the states' authority. And neither the use of foreign law by the Justices helped them debunk such a belief, despite, in this regard, comparative law could have offered valuable teaching. Especially it could have indicated that affording state legislators broad discretion on some moral issues, like abortion, not protected by interstate constitutional sources, does not automatically exempt courts, whether national or supranational, from playing a relevant role. A transnational dialogue with the European Courts ECJ and ECHR could have been indeed helpful to realise that the U.S. Supreme Court could have ensured states weighting the

203 Id., at 4.

204 *Supra*, par. 4.

205 *Dobbs v. Jackson Women's Health,* cit., at 64 (Opinion of the Court).

206 *Supra*, par. 7.

interests involved in the abortion issue without jeopardising fundamental rights[207]. Such an interplay between legislators and courts could thus hopefully provide high protection of women's reproductive rights in the United States, even after *Dobbs*.

207 Supra, part. 5.

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