The US Supreme Court's decision in *Dobbs v. Jackson*: A step backward for constitutional law and women's rights

Stéphanie Wattier
Professor at UNamur

Geoffrey Willems
Professor at UCLouvain

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The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), a research centre located in the Institute for Interdisciplinary research in legal science (JUR-I) of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

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Introduction

The Supreme Court of the United States is, under the 1787 Constitution,[1] the cornerstone of the American judicial system.[2] It is composed of nine judges[3] appointed for life[4] nominated by the President and approved by the Senate[5] who, since the famous *Marbury v. Madison* decision of 24 February 1803,[6] have the power to censure legislative or executive acts that are incompatible with the Constitution. The Constitution was supplemented in 1791 by a Bill of Rights[7] but it contained no mention of privacy, the family or marriage. However, during the second half of the 20th century, American constitutional judges gradually empowered themselves to intervene in these areas, on the basis of the very general provisions of the XIVth Amendment, adopted in 1868,[8] which provides that "[no State shall] 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". [9]

American lawyers identify in this passage two essential constitutional guarantees: the "due process clause" and the "equal protection clause". The "due process clause" implies that the

[1] The Constitution of 1787, adopted ten years after the independence of the United States, replaces the Articles of Confederation, which were the first American constitutional text. It consists of seven articles that enshrine the principle of separation of powers and establish American federalism. See e.g. L. Greenhouse, *The U.S. Constitution. A very short introduction*, Oxford, OUP, 2012.
[2] According to Article III of the Constitution of 1787, "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish".
[3] *Judiciary Act* of 1869 (16 Stat. 44).
[4] U.S. Const. article III, Section 1 ("Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour").
[5] U.S. Const. article II, Section 2, ("[the President] [...] [...] by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court [...]).
[6] Marbury v. Madison, 5 U.S. 137 (1803).
[7] The first ten Amendments to the Constitution, adopted in 1791, together form the *Bill of Rights* and enshrine, among other things, freedom of speech, religion, association and assembly (I), the right to bear arms (II) and protection against search and seizure (IV).
[8] At the end of the Civil War (1861-1865), the three Reconstruction Amendments (XIII-XV) were adopted, abolishing slavery, enshrining the principle of equality (equal protection clause) and prohibiting the arbitrary deprivation of life, liberty or rights (due process of law clause).
[9] The complete section 1 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".

authorities, when they intend to deprive a citizen of his life, liberty or property, must, on the one hand, respect the procedures provided for by law (procedural due process) and, on the other hand, indicate sufficient reasons to justify this deprivation (substantive due process).[10] It is the protection of liberty by "substantive due process" that has served as the textual anchor for the creation and jurisprudential development of the right to "privacy" and – in its wake – for the constitutional protection of personal autonomy and family life. The "equal protection clause" calls for equal treatment of citizens in a more immediately intelligible way: formalised to enshrine equality between whites and blacks, it was first deemed compatible with segregation,[11] which was finally ended by the 1954 *Brown v. Board of Education* decision.[12] The clause was later used by the Court to challenge other forms of discrimination, such as that based on gender, residency status or birth.[13] The constitutional right to privacy under the due process clause and the equality requirement under the equal protection clause underpin most of the Supreme Court's decisions in the area of private and family life.

The Court first used the concept of "privacy" in a case that was already related to "reproductive rights" since it involved the right to use contraception. In *Griswold v. Connecticut* (1965),[14] the Court had to rule on the constitutionality of State regulations prohibiting the provision of advice or devices designed to prevent conception. In this case, the applicant had opened a birth control centre in New Haven, in clear violation of the law, and was subsequently arrested and convicted. On Mrs. Griswold's appeal, the Supreme Court ruled that the ban on contraception violated the Constitution, which included a right to privacy guaranteeing the right of spouses to use contraception. However, it should be noted that *Griswold* did not specifically anchor the right to privacy in the due process clause: for the Court, this right could be discovered in the "penumbras emanating from the provisions of the Bill of Rights"[15] and, in particular, from the right of association guaranteed by the First Amendment or the protection of the home provided for by the Fourth Amendment. In *Eisenstadt v. Baird* (1972),[16] the Washington Court expressly relied on the equal protection *clause* to clarify that the right to use contraception was not limited to married couples and extended to unmarried couples.

In the meantime, the Court had decided the *Loving v. Virginia* case (1967)[17] related to the prohibition on interracial marriage under Virginia law and affirmed that the right to marry was "one of the vital personal rights essential to the orderly pursuit of happiness by free men"[18] and that the disputed ban was therefore contrary to both the *due process clause* and the *equal protection clause.*

Immediately after these important precedents, the US Supreme Court was called upon to rule on the issue of abortion. The *Roe v. Wade* decision of 22 January 1973 affirmed the right to

[10] E. Chemerinsky, "Substantive due process", *Touro Law Review*, 1999, p. 1500. See also: N. Chapman and K. Yoshino, "The Fourteenth Amendment Due Process Clause", *National Constitution Center* (https://constitution- center.org/).
[11] Plessy v. Ferguson, 163 U.S. 537 (1896).
[12] Brown v. Board of Education, Brown v. Board of Education (1954).
[13] B.T. Fitzpatrick and T.M. Shaw, "The Equal Protection Clause", *National Constitution Center* (https://constitu- tion-center.org/).
[14] Griswold v. Connecticut, 381 U.S. 479 (1965).
[15] The Court specifically mentioned that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. [...]. Various guarantees create zones of privacy" (Griswold v. Connecticut, 381 U.S. 479, 484 (1965)).
[16] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[17] Loving v. Virginia, 388 U.S. 1 (1967).
[18] Loving v. Virginia, 388 U.S. 1, 12 (1967).

terminate pregnancy by reaffirming *Griswold*'s right to *privacy* and by anchoring it, this time, in the due process clause of the XIV[th] Amendment. It is necessary – we think – to analyse briefly this spectacular but controversial decision (**I**) as well as the subsequent *Casey* (1992) (**II**) and *Whole Woman* (2016) (**III)** decisions, in order to fully appreciate the scope of the reversal accomplished in June 2022 by *Dobbs v. Jackson* (**IV**). We then briefly consider the uncertain future of abortion in American states (**V**), before turning to the (possible) impact of the Supreme Court decision in Europe (**VI**) and, more specifically, in France (**VII**) and in Belgium (**VIII**).

I. *Roe v. Wade* (1973): privacy and the "trimester framework"

In 1973, the Court ruled in *Roe v. Wade*[19] on the case of Norma McCorvey,[20] a woman who was prevented from having an abortion in Texas and had no means to travel to another state.

At that time, it was headed by Chief Justice Warren Burger since 1969. Appointed by Richard Nixon, Burger promoted a more conservative approach than his very liberal predecessor Earl Warren.[21] But while the Burger Court was indeed less progressive than the Warren Court, this movement was not entirely consistent or unambiguous: the dramatic enshrinement of a constitutional right to terminate pregnancy is a significant example.[22] In Roe, seven justices, five Republicans and two Democrats, supported the "right to choose", including Chief Justice Burger.[23] Two Justices differed from the majority and considered that the Constitution did not protect the right to abortion: William Rehnquist (appointed by Nixon) and Byron White (appointed by Kennedy).

The judgment begins by highlighting the relatively late criminalisation of abortion, pointing out that it was used during Antiquity and was not a crime under the common law, at least if it was performed before the time of "quickening" (identified as the first perceptible movements of the foetus, between 16 and 18 weeks of pregnancy).[24] In fact, the prohibition of abortion was only gradually introduced in American states from the mid-19[th] century onwards, although by the end of the 1950s it was enacted in most American states.[25]

According to the majority, the right to abortion can be seen as an aspect of the right to privacy. This right is based on the "liberty" referred to in the XIV[th] Amendment of the Constitution and is "broad enough" to include the decision to terminate a pregnancy.[26] As to the scope of this new right, the Court rejected both the petitioner's argument that the right to abortion should

[19] Roe v. Wade, 410 U.S. 113 (1973). See, e.g. J. M. Balkin, "Roe v Wade: An Engine of Controversy", *in What Roe v. Wade Should Have Said – The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (ed. Jack M. Balkin), NYU Press, 2005, p. 3; J.H. Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade", *Yale Law Journal*, 1973, pp. 920-949; R.B. Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade",*North Carolina Law Review*, 1985, pp. 375-386.

[20] "Jane Roe" is a pseudonym given in the U.S. to female litigants who wish to remain anonymous.

[21] E.V. Heck, "Justice Brennan and the Heyday of Warren Court liberalism", *Santa Clara Law Review*, 1987, 1980, p. 841 ff.

[22] R.W. Galloway, "The Burger Court (1969-1986)", *Santa Clara Law Review*, 1987, sp. p. 40.

[23] William Douglas (Roosvelt), William J. Brennan (Eisenhower), Potter Stewart (Eisenhower), Thurgood Marshall (Johnson), Harry Blackmun (Nixon), Lewis F. Powell (Nixon), Warren Burger (Nixon).

[24] Roe v. Wade, 410 U.S. 113, 129-139 (1973).

[25] Roe v. Wade, 410 U.S. 113, 139 (1973).

[26] Roe v. Wade, 410 U.S. 113, 153 (1973).

be considered "absolute" or "unqualified"[27] and the District Attorney's argument that the foetus is a "person" whose right to life always prevails.[28] In its view, the right to terminate pregnancy was a "fundamental right" subject to strict constitutional scrutiny that could only be restricted on the basis of "compelling state interests".[29] In this regard, the Court accepted that states could legitimately seek to "safeguard health", "maintain medical standards" and "protect potential life" and that at a certain point in the pregnancy these interests were sufficiently compelling to justify restrictions on the right to abortion.[30]

The Court then proposed a "trimester framework" designed to achieve an appropriate balance between the right to abortion and competing state interests. In the first trimester, the decision to abort was to be left to the pregnant woman and the doctor. In the second trimester, it was open to the state to regulate the abortion procedure in a way that was reasonably related to the health of the pregnant woman. Finally, after the beginning of the third trimester, which was the threshold of foetal viability, states could regulate and even prohibit abortion to protect potential human life, unless there was a risk to the life or health of the woman.[31]

In the American society of the early 1970s, *Roe v. Wade* was obviously warmly welcomed by liberals and strongly disapproved by conservatives. To a large extent, the Supreme Court decision may be considered as the origin of the sharp divide in American society between "pro-choice" and "pro-life".[32]

The American constitutional doctrine – of both liberal and conservative leanings – has, for its part, heavily criticised the judgment for the weaknesses of its argument. On the one hand, *Roe* has often been criticised for providing too little explanation of how and why the right to abortion should be considered as an aspect of "privacy": the judgment does not even define privacy or explain why it was at issue; it merely "shapes and announces" a new right to terminate a pregnancy.[33] On the other hand, *Roe*'s critics argued that the development of something as specific as the trimester framework – which is more akin to medical guidelines or a detailed legislative scheme[34] than to a Supreme Court decision – was well beyond the prerogatives of the judiciary.[35]

Even the feminist icon Ruth Bader Ginsburg,[36] who sat on the Court between 1993 and 2020, considered that the Court had gone too far in virtually ruling out any state regulation in the first trimester and requiring states to allow abortion up to the point of viability. As a result, not only was the very restrictive Texas regime now unconstitutional, but also the regulations then in force in the least restrictive US states.[37] Similarly, Ginsburg considered that the Court's reasoning was incomplete, particularly in that, focusing on the right to privacy, it avoided the issue

[27] Roe v. Wade, 410 U.S. 113, 154 (1973).
[28] Roe v. Wade, 410 U.S. 113, 162 (1973).
[29] Roe v. Wade, 410 U.S. 113, 155 (1973).
[30] Roe v. Wade, 410 U.S. 113, 154 (1973).
[31] Roe v. Wade, 410 U.S. 113, 163-164 (1973).
[32] S. Ray, "Wading into Roe v. Wade", *Harvard Political Review*, 22 August 2022 (https://harvardpolitics.com/).
[33] In his dissent, Rehnquist argued that privacy was not at issue because the practice of abortion was not private in the ordinary sense (410 U.S. 113, 172). The other dissenter, White, stated that he saw nothing in the language or history ofthe Constitution to support the Court's decision, which in his view merely shaped and announced a new constitutional right for pregnant mothers (410 U.S. 113, 221).
[34] J.H. Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade", *op. cit.*, 1973, p. 922.
[35] P.A. Freund, "Storms over the Supreme Court", *American Bar Association Journal*, 1983, p. 1480.
[36] P. RICHÉ, "Ruth Bader Ginsburg, icône féministe de la Cour suprême, est décédé", *Le Nouvel Observateur,* 19 Septem ber 2020 (https://www.nouvelobs.com/).
[37] R.B. Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade", *op. cit.*, pp. 381 and 385.

of equality between men and women, which could have shed a different light on the case.[38] In sum, *Roe* was overly broad and poorly reasoned, creating an avoidable storm, and the liberal trend in access to abortion in the late 1960s was paradoxically reversed after the ruling: state legislators were now adopting measures designed to limit the impact of the decision and, thus, the right to abortion.[39]

During the 1970s and 1980s, the Supreme Court was called upon to rule on the issue of abortion rights on numerous other occasions. The Court's decisions in these cases generally applied the standards set out by *Roe*: the principle of a constitutional right to abortion did not appear to be under any real threat[40].

II. Planned Parenthood v. Casey (1992): the right to define one's own concept of existence and the "undue burden" standard

In 1992, however, *Planned Parenthood v. Casey*[41] reignited the debate about the very existence of the right to abortion, in the context of a more strongly conservative direction taken by the Supreme Court now led by William Rehnquist.[42] The case related to the abortion regime established by the Pennsylvania Abortion Control Act, which required that a woman seeking an abortion be given information about the procedure and its risks, and about the possibility of obtaining financial assistance from the child's father or the state (informed consent).[43] This legislation also provided that a married woman could not have an abortion without first notifying her husband (spousal notice)[44] and that a minor woman could not terminate the pregnancy without the consent of one of her parents (but with the possibility of a judicial waiver) (parental consent).[45]

Rehnquist and White, who had dissented in *Roe*,[46] as well as new justices Scalia and Thomas respectively appointed by Reagan and Bush, expressly supported a clear disavowal of the right to abortion.[47] However, a slim majority of five justices[48] preferred to uphold the "essential

[38] *Ibid.* pp. 381-383.
[39] *Ibid.* , p. 381.
[40] Planned Parenthood of Missouri v Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980); Akron v. Akron Center for Reproductive Health, Inc, 462 U.S. 416 (1983) (Akron I); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Webster v. Reproductive Health Services, 492 U.S. 490, 532 (1989); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 520 (1990) (Akron II).
[41] Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[42] S. Rosche, "How Conservative is the Rehnquist Court? Three Issues, One Answer", *Fordham Law Review*, 1997, p. 2685.
[43] Planned Parenthood v. Casey, 505 U.S. 833, 881 (1992).
[44] Planned Parenthood v. Casey, 505 U.S. 833, 881 (1992).
[45] Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992).
[46] See *supra*, pt. I.
[47] Chief Justice Rehnquist wrote, in his separate opinion endorsed by White, Scalia and Thomas: "We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases" and "In Roe v. Wade, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. We are now of the view that, in terming this right fundamental, the Court in Roe read the earlier opinions upon which it based its decision much too broadly" (Planned Parenthood v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist CJ, concurring in thejudgment in part and dissenting in part).
[48] Sandra Day O'Connor (Reagan), Anthony Kennedy (Reagan), David Souter (Bush), Harry Blackmun (Nixon) and John

holding" of the 1973 decision, i.e. the "right to choose" for women up to the beginning of the third trimester, while strengthening its legal underpinnings and narrowing its scope.[49]

Thus, on the one hand, *Casey* provides a much more elaborate explanation of how the right to abortion can be considered an aspect of the liberty protected by the XIV[th] Amendment. Elaborating on Justice Harlan II's famous opinion in *Poe*,[50] the three Republican Justices delivering the Court's opinion (Kennedy, O'Connor and Souter) emphasise that "due process has not been reduced to any formula" and that "no formula could serve as a substitute, in this area, for judgment and restraint". In their view, the scope of the due process clause cannot be defined by a "simple rule", but must be determined by the use of "reasoned judgment".[51] In this regard, they note that US law offers constitutional protection to personal decisions about marriage, procreation, contraception, family relationships and child support and education. They argue that "these matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment". Indeed, "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life".[52] The decision to have an abortion was, in many respects, the same as the decision to use contraception, and fell equally within the concept of freedom as it had just been reexplained: *Roe* had therefore legitimately affirmed the right to terminate pregnancy by "extension" of previous case law.[53]

Casey nevertheless differs from *Roe* with regard to the scope of the right to abortion. The "strict scrutiny" standard is replaced by an "intermediate scrutiny" level to be applied to state relevant interests, and the trimester approach is abandoned in favour of a new concept designed to clarify the range of acceptable restrictions to the right to abortion.[54] While, according to *Roe*, virtually no restriction was permitted during the first trimester, the *Casey* approach accepts that, even in early pregnancy, state regulations may make it more difficult to exercise the right to abortion, as long as they do not place an "undue burden" on women's liberty.[55] In the eyes of the majority, such a burden is "a state regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking to abort a non-viable foetus".[56] In light of this new standard, the Court struck down the spousal notification requirement,[57] but not the informed consent[58] and parental consent requirements.[59]

Despite its explicit intention to consolidate and clarify the legacy of *Roe v Wade*, *Casey* has

P. Stevens (Ford).

[49] Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

[50] *Poe* is a pre-*Griswold* contraception case in which the Court refused to censor the disputed legislation as it was not enforced. It remains famous mainly because of Justice John Marshall Harlan II's dissenting opinion, which defended and theorised the broad interpretation of the *due process clause* (Poe et al. v. Ullman, 367 U.S. 497).

[51] Planned Parenthood v. Casey, 505 U.S. 833, 848-849 (1992).

[52] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[53] Planned Parenthood v. Casey, 505 U.S. 833, 853 (1992).

[54] Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992).

[55] Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992).

[56] Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992).

[57] Indeed, "Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Womendo not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male orfemale, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family" (Planned Parenthood v. Casey, 505 U.S. 833, 898).

[58] Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992).

[59] Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992).

sometimes been seen as a further source of confusion. In particular, it has been argued that, while *Casey* clearly provides a right to a pre-viability abortion, it leaves unresolved the question of the scope of that right, "failing to provide a method for determining whether an undue burden exists".[60] In particular, the "substantial obstacle" test may have been unsatisfactory, as it merely took into account the constraints imposed on women, without considering the benefits (or lack thereof) of the disputed regulation.[61] It did not, according to its critics, indicate in substance how women's rights were to be balanced against the interests pursued by the states.[62]

Shortly after *Casey*'s pronouncement, Norma McCorvey – *Roe*'s applicant – converted to evangelicalism. She publicly regretted her involvement in the case and explained that she had been manipulated into it. She then campaigned alongside "*pro-life*" activists against abortion rights.[63] The story of this "conversion" is at the heart of her autobiographical book *Won By Love* published in 1997.[64]

III. *Whole Woman's Health v. Hellerstedt* (2016): a "proportionalist" approach to TRAP laws

Because of the uncertainties perpetuated by *Casey*, the constitutional status of abortion rights remained ambiguous at the beginning of the 21st century. In 2002, a University of Michigan professor judged that the right to abortion, while it had survived for almost thirty years, was now "barely alive" and only allowed to dismiss the most severe restrictions.[65] In 2009, another US human rights scholar found – in contrast – that *Casey* was able to end the "Abortion Wars" by endorsing the socio-political consensus emerging in the early 1990s on the principle of a limited abortion right.[66]

In the 2010s, "targeted regulations against abortion providers" or TRAP laws, were proliferating in American states. These regulations imposed stringent and unnecessary medical standards on medical abortion facilities in order to make it more expensive and difficult to access.[67] This conservative strategy aimed at obstructing the "right to choose" as much as possible, while staying within the (uncertain) limits of what *Casey* allowed. In 2016, in *Whole Woman's Health v. Hellerstedt*,[68] the Supreme Court was called upon to rule on one of these regulations: on this

[60] G.E. Metzger, "Unburdening the Undue Burden Standard: Orienting "Casey" in Constitutional Jurisprudence", *Columbia Law Review*,1994, p. 2025.
[61] *Ibid.*, p. 2034.
[62] Gillian Metzger notes that, with regard to the regulation examined in Casey, the Court does not really justify why "spousal consent" is an "undue burden" and not the requirements of "informed consent" and "parental consent". She even finds that the Court contradicts itself when it invokes empirical studies on the deleterious effects of the husband'sconsent requirement, but ignores comparable studies denouncing the harmful consequences of the parental consent requirement (G.E. Metzger, "Unburdening the Undue Burden Standard", *op. cit.* pp. 2035-2036).
[63] J. Prager, 'Seeing Norma: The Conflicted Life of the Woman at the Center of Roe v. Wade', *The New York Times*, 2 July 2022 (https://www.nytimes.com/); R.G. Shafer, 'Who was Jane Roe, and how did she transform abortion rights?', *The Washington Post*, 5 May 2022 (https://www.washingtonpost.com/)
[64] N. McCorvey and T. Gary, *Won by Love*, Nashville, Thomas Nelson Publishers, 1997.
[65] C. Whitman, "Looking back at planned parenthood v. Casey", *Michigan Law Review*, 2002, pp. 1980-1996.
[66] N. Devins, "How "Planned Parenthood v. Casey" (Pretty Much) Settled the Abortion Wars", *The Yale Law Journal*, 2009, pp. 1318-1354.
[67] M.H. Medoff and C. Dennis, 'TRAP Abortion Laws and Partisan Political Party Control of State Government', *The American Journal of Economics and Sociology*, 2011, pp. 951-973; R.J. Mercier, M. Bunchbinder and A. Bryant, 'TRAP Laws and the Invisible Labor of US Abortion providers', *Critical Public Health,* 2016, pp. 77-87.
[68] Whole Woman's Health v. Hellerstedt, 579 U.S. 182 (2016).

occasion, it sought to further clarify the concept of "undue burden" and the type of methodology it calls for.

In the mid-2010s, the composition of the Court had largely been renewed and was politically balanced. Stephen Breyer and Ruth Ginsburg, nominated by Clinton, formed the liberal wing with two Obama nominees, Sonia Sotomayor and Elena Kagan. Clarence Thomas and Antonin Scalia, dissenters in *Casey*, composed the conservative fringe with George W. Bush's two nominees, John Roberts and Samuel Alito. Between the two "clans", Justice Anthony Kennedy occupied the intermediate position of "swing justice".[69] He voted sometimes with the liberals, sometimes with the conservatives, and often determined the outcome of important cases by his vote alone.[70] In *Whole Woman*, he voted (again)[71] with the liberals in favour of abortion rights: the ruling was given by five votes to three, as Antonin Scalia,[72] who died in February 2016, had not yet been replaced by Neil Gorsuch, Trump's first nominee.[73]

The case related to the requirements imposed on abortion doctors by a new Texas law passed in 2013 (the "*House Bill 2*"). On the one hand, the "admitting privilege" requirement required them to have the option of immediately admitting their patients to a hospital within 30 miles of the abortion site. On the other hand, the "surgical centre requirement" provided that the abortion could only take place in a facility that met the standards for ambulatory surgical centres under Texas law.[74] The 5th Circuit Court of Appeal[75] found the Texas requirements constitutionally acceptable, as long as they did not "place a substantial obstacle in the path of a woman seeking an abortion of a nonviable foetus" and were "reasonably in the interest of the State".[76]

The Court, whose opinion was delivered by the universalist and Europhile Justice Stephen Breyer,[77] disagreed with this approach. In its view, on the one hand, the Court of Appeal had failed to take into account the existence or absence of medical benefit from the measures at issue. On the other hand, it had erred in applying the lowest level of constitutional review, namely a

[69] See e.g. K. McGaver, "Getting Back to Basics: Recognizing and Understanding the Swing Voter on the Supreme Court of the United States", *Minn. L. Rev.* 2017, p. 1247.

[70] Thus, in *Obergefell v. Hodges*, it was Kennedy's support for the four liberal justices that enabled the Supreme Court to enshrine - by a 5-4 majority - the right of same-sex couples to marry (Obergefell v Hodges, 576 U.S.___1). We have analysed this decision, comparing it to the approaches taken by the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACtHR), in a recent contribution: G. Willems, "Le droit de la famillerevu et corrigé par les juges des droits humains: Réflexions sur la diversité des stratégies juridictionnelles et les enjeuxdu dialogue interjuridictionnel au départ du cas du mariage homosexuel", *R.D.I.D.C.* , 2021/4, p. 445. On the specific role of Kennedy, see. M. Calabresi and D. Von Drehle, "The Decider", *Time*, 18 June 2012.

[71] Kennedy signed with O'Connor and Souter the majority opinion of *Casey*: see *supra* pt. II.

[72] M.D. Ramsey, 'Beyond the Text: Justice Scalia's Originalism in Practice', Notre Dame Law Review, 2017, p. 101; M. Kettle, 'Antonin Scalia: the judge whose conservatism shaped America', The Guardian, 14 February 2016 (https://www.theguardian.com/).

[73] One recalls the ideological "battle" over Scalia's seat: Obama's nomination of Merrick Garland was blocked by the Senate, allowing Trump to begin his term by nominating a Supreme Court justice (R. Bradley and J. Mazzone, 'The Garland affair: What history and the Constitution *really* say about President Obama's powers to appoint a replacementfor Justice Scalia', *New York University Law Review*, 2016, pp. 53ff; R. BARLOW, 'Should Trump's Supreme Court nominee be confirmed? LAW's Beermann assesses Neil Gorsuch's qualifications, record', *Boston University Today*, 8 February 2017 (https://www.bu.edu/articles/).

[74] Whole Woman's Health v. Hellerstedt, 579 U.S. 182, at 1-2 (2016).

[75] This federal court hears appeals from the district courts of Louisiana, Mississippi and Texas.

[76] Whole Women's Health v. Cole, 790 F. 3d 598 (5th Cir. 2015).

[77] Justice Breyer, who left the Court in June 2022, is a Doctor *Honoris Causa* of the UCLouvain. See his book S. BREYER, *The Court and the World: American Law and the New Global Realities*, Vintage, 2016. See also S. BREYER, "America's Courts Can't Ignore the World", *The Atlantic*, October 2018 (https://www.theatlantic.com/).

simple "rational basis review",[78] which is normally reserved – in American constitutional law – for situations where the State restricts prerogatives that do not fall within the scope of a fundamental right.[79] For Breyer's majority, the constraints imposed by the law on the right to abortion had to be "balanced" against the benefits that they were supposed to produce, such an evaluation of proportionality corresponding to the intermediate level of constitutional review (intermediate scrutiny) ordered by *Casey.*[80] It can thus be seen that *Whole Woman*'s renewed interpretation of *Casey* responds to the criticisms levelled at the "undue burden" criterion, which was considered too vague, by expressly recommending a form of "proportionality review" for its implementation.[81]

Based on this clarified constitutional standard, the Court held that the requirements at issue, which were shown not to improve patient safety, placed a disproportionate burden on the right of women to terminate pregnancy. Indeed, the introduction of the admitting privilege requirement had reduced the number of facilities performing abortions from 40 to 20.[82] The surgical centre requirement had not yet been implemented, but would have had the effect of further reducing the number of facilities from 20 to 7 or 8.[83] Abortion would then have been available in only five metropolitan areas of Texas, making it inaccessible or difficult to access for many Texas women.[84]

Justice Thomas, who had already denounced *Roe* as a mistake in *Casey*, wrote a dissenting opinion suggesting that *Whole Woman* had reshaped the "undue burden" test by misappropriating a "balancing test" that was the prerogative of the states. Justice Alito, who would soon wipe out fifty years of jurisprudential construction of abortion rights with the stroke of a pen, also wrote a dissent. Neither, however, called – at this stage – for the outright repudiation of the right to abortion.

Breyer's efforts to "revitalise" the right asserted in *Roe* and *Casey* have, in any case, been welcomed by liberal academics. More specifically, *Whole Woman* has been described as saving the right to abortion from becoming "theoretical"[85] or as ushering a "new era" in abortion jurisprudence.[86] Norma McCorvey died in February 2017 a few months after the ruling was handed down. In the documentary *AKA Jane Roe*, released in 2020, she "confessed" that she had never stopped being "pro-choice", but had been paid by the anti-abortion community to stage her supposed "conversion".[87]

[78] Whole Woman's Health v. Hellerstedt 579 U.S. 19-20 (2016).
[79] See T.B. Nachbar, "The rationality of rational basis review", *Virginia Law Review*, 2016, p. 1627
[80] Whole Woman's Health v. Hellerstedt 579 U.S. 19-20 (2016). See also *supra* pt. II.
[81] V.C. Jackson, "Constitutional Law in an Age of Proportionality", *Yale Law Journal*, 2015, p. 3094.
[82] Whole Woman's Health v. Hellerstedt 579 U.S. 24 (2016).
[83] Whole Woman's Health v. Hellerstedt 579 U.S. 32 (2016).
[84] Whole Woman's Health v. Hellerstedt 579 U.S. 32 (2016).
[85] B. Kendis, "Faute de Mieux: Recognizing and Accepting Whole Woman's Health for Its Strengths and Weaknesses", *Case Western Reserve Law Review*, 2019, p. 1055.
[86] M. Harper, 'Making Sense of Whole Woman's Health v. Hellerstedt: The Development of a New Approach to the Undue Burden Standard', *Kansas Law Review*, 2017, pp. 793-794.
[87] R. Graham, 'How the Anti-Abortion Movement Is Responding to Jane Roe's "Deathbed Confession"', *Slate*, 22 May 2022 (https://slate.com/).

IV. Dobbs v. Jackson Women's Health Organization (2022): the challenge to the constitutional right to abortion

The composition of the Supreme Court has changed considerably since *Whole Woman*: after the controversial nomination of Neil Gorsuch in 2017, two new justices appointed by Trump have joined *Capitol Hill*. First, Kennedy, the "swing justice", retired and was replaced by Brett Kavanaugh, considered very conservative. Then Ruth Ginsburg, died and Amy Barett, also considered very conservative, joined the Court. The positions of the new justices on *Roe* and its possible disavowal fuelled tense exchanges during the Senate confirmation process.[88]

The period of "ideological balance"[89] on the Supreme Court's bench is now obviously over. Thomas, Alito, Gorsuch, Kavanaugh and Barett are considered "staunch conservatives", while Chief Justice Roberts is seen as "moderate conservative".[90] All of them advocate a narrow reading of the Constitution, focused on the text and its context of adoption, reluctant to extend its scope, and at odds with the liberal favour for an "evolutionary interpretation" that adapts constitutional guarantees to changes in society.[91] When *Dobbs v. Jackson* came before the Court in 2020, the latter was thus dominated by a "conservative supermajority"[92] which saw a historic opportunity to overturn *Roe v. Wade* long awaited by the conservative right.

The case concerned the Gestational Age Act passed in the state of Mississippi in 2018, which prohibited the use of abortion beyond 15 weeks of pregnancy, except in cases of medical emergency or severe foetal malformation. Following its entry into force, Jackson's Women's Health Organization filed a lawsuit against the state health authorities. The District Court and the Court of Appeal for the 5th Circuit[93] found that the law violated the constitutional right to abortion by prohibiting abortion at a pre-viability stage. The representative of the Mississippi Department of Health, Thomas Dobbs, filed an appeal to the Supreme Court.

In May 2022, a draft decision written by Samuel Alito "leaked" and was published on the news website *Politico*:[94] the world discovered that the Supreme Court was prepared to disavow entirely the legacy of *Roe* and *Casey*. The decision was officially issued on 24 June 2022 and its content was mostly identical to that of the draft accidentally released in the spring: the US Constitution no longer protected the right to abortion.

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[88] J.C. Timm, 'What Supreme Court justices said about Roe and abortion in their confirmations', *NBC News*, 24 June 2022 (https://www.nbcnews.com/).

[89] D. Orentlicher, 'Politics and the Supreme Court: The Need for Ideological Balance', *University of Pittsburgh Law Review*, 2018, p. 411.

[90] E. Chemerinsky, "The New Supreme Court", *California Law Review Online*, January 2021 (https://www.californialawreview.org/the-new-supreme-court/).

[91] A.G. Rutkowski, "Constitutional Interpretation Styles of US Supreme Court Justices", in Open Judicial Politics (ed. R.S. Solberg and E. Waltenburg), 2nd ed., Oregon State University, Open Educational Resources, pp. 495-496 (https://open.oregonstate.education/open-judicial-politics/). On the evolutionary interpretation of the US Constitution and for a comparison with the dynamic and constructive interpretation of the ECHR by the European Court, see e.g. C. O'Mahony and K. Dzehtsiarou, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Courtof Human Rights and the US Supreme Court', *Columbia Human Rights Law Review*, 2013, p. 309.

[92] M. Ziegler, 'The Conservatives Aren't Just Ending Roe - They're Delighting in It', *The Atlantic,* 3 May 2022 (https://www.theatlantic.com/).

[93] This federal court hears appeals from the district courts of Louisiana, Mississippi and Texas.

[94] J. Morri, "La machine à remonter le temps : à propos de la « fuite » du projet d'opinion du juge Alito dans l'affaire du droit à l'avortement", *La Revue des droits de l'homme [Online]*, 13 June 2022 (https://journals.openedition.org/revdh/14665).

A narrow majority of five justices buried the constitutional guarantee of the "right to choose": Alito's opinion, which brings the "originalist" reading of the Constitution back to the forefront, was joined by the other four "hard-line" conservatives: Thomas, Gorsuch, Kavanaugh and Barett (**A**). The three remaining liberals on the Court – Breyer, Sotomayor, and Kagan – unsurprisingly dissented, deploring the abandonment of *Roe* and worrying about a likely ripple effect threatening other constitutional rights (**B**). In his concurring opinion, *Chief Justice* Roberts argued that it would have been possible, as a compromise measure, to uphold the Mississippi Act without entirely denying the right to abortion (**C**).

A. The Court's opinion: an originalist statement of faith

The majority opinion expressly endorses the narrowest view of constitutional interpretation, that had been revived in the 1997 *Washington v. Glucksberg* decision[95] refusing to affirm a right to assisted suicide.[96] Under this narrow approach, a new right can only be enshrined by the Supreme Court if it is "deeply rooted" in American history and tradition and if it is an "essential" aspect of the freedom guaranteed by the XIVth Amendment.[97]

Whereas *Roe* sought to establish that abortion had been the subject of relative tolerance from Greco-Roman antiquity until the independence of the United States, which only gradually came to an end in the mid-nineteenth century, Alito proposes a resolutely different reading, according to which there was an uninterrupted tradition of criminal sanctioning of abortion from the origins of British *common law* until the *Roe* decision in 1973.[98] Similarly, while *Casey* sought to demonstrate that "reasoned judgement" led to the view that the right to abortion was, just like the right to marry, the right to contraception or the right to educate one's children, an aspect of the personal dignity and autonomy inherent in the liberty guaranteed by the XIVth Amendment, Alito argues that there is a fundamental difference between these rights and the right to abortion, overlooked by liberals, which is that abortion destroys a potential human life.[99]

The majority affirms that it does not want to impose any particular view of the balance to be struck between the arguments advanced by the advocates of women's free choice and those put forward by the advocates of prenatal life.[100] They "only" consider that the Constitution does not confer on the Supreme Court the power to arbitrate the conflict of values that divides America.[101] From their perspective, the *Roe* majority, by arrogating to itself such a power, made a profoundly erroneous and prejudicial decision.[102] It follows, according to them, that whatever weight is normally given to the rule of precedent (*stare decisis*),[103] it is appropriate, fifty years later, to correct this error and return the issue to the legislators and people of the American states.[104]

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[95] Washington v. Glucksberg, 521 U.S. 702 (1997).
[96] See for a critique, cf. E. Chemerinsky, "Washington v. Glucksberg Was Tragically Wrong", *Michigan Law Review*,2008, p. 1501; for favourable assessments, see S.G. Calabresi, "Substantive due process after Gonzales v. Carhart", Michigan Law Review, 2008, p. 1517.
[97] Dobbs v. Jackson Women's Health Organization 597 U. S.____12 (2022).
[98] Dobbs v. Jackson Women's Health Organization 597 U. S.____16-25 (2022).
[99] Dobbs v. Jackson Women's Health Organization 597 U. S.30-32 (2022).
[100] Dobbs v. Jackson Women's Health Organization 597 U. S._____35 (2022).
[101] Dobbs v. Jackson Women's Health Organization 597 U. S._____38-39 (2022).
[102] Dobbs v. Jackson Women's Health Organization 597 U. S._____44 (2022).
[103] Dobbs v. Jackson Women's Health Organization 597 U. S.___43 et seq. (2022).
[104] Dobbs v. Jackson Women's Health Organization 597 U. S._65 et seq. (2022).

Alito's majority is all the more inclined to depart from *Roe* and subsequent decisions, that the standards proposed for the implementation of the right to abortion, whether it be the "trimester framework" (*Roe*) or the "undue burden" (*Casey*), have, according to the judges, proven to be entirely ineffective in practice. In their view, even as reexplained in *Whole Woman*, the "undue burden" test remains a source of legal uncertainty. In attempting to apply the *Casey* standard, the Courts of Appeal have issued conflicting decisions: its vagueness fuelled a proliferation of individual cases and placed a heavy and inappropriate burden on judges. In sum, retaining the reference to "undue burden" was detrimental to the impartial, predictable and consistent development of legal principles.[105] More fundamentally, while *Roe* and *Casey* presumptuously aimed at ending the American divide on abortion, these judgments had in fact fanned the flames of that divide, brutally short-circuiting the ordinary democratic process unfolding at state level. In this regard, Alito relies on the fact that Ruth Ginsburg herself criticised *Roe* in a 1992 article[106] writing that the 1973 ruling had "interrupted a political process", "prolonged the division" and "deferred a stable resolution of the issue".[107]

Thus, *Roe* is overruled and abortion is no longer a constitutional right. As a consequence, state laws regulating the possibility of terminating pregnancy must be subjected to the lower constitutional standard of "rational basis": restrictions are authorised as soon as they can be considered as pursuing reasonable objectives.[108] Applying this minimal rationality test to the disputed Mississippi legislation, the Court noted that the ban on abortion beyond 15 weeks was intended to protect prenatal life and the health and safety of women, to exclude medical procedures deemed horrific or barbaric, to preserve the integrity of the medical professions and to prevent discrimination. These were all legitimate interests: the Gestational Age Act therefore met the "rational basis" standard and could not be considered unconstitutional.[109]

While Alito's opinion has triggered an impressive global wave of popular and media indignation, it has also given rise to bitter criticism from American constitutional scholars. Some denounced a truncated reading of history that overemphasised the repression of abortion, without mentioning the many elements that testify to its relative acceptance.[110] Most deplore an "originalist",[111] "traditionalist"[112] or "narrow" reading[113] of constitutional rights, contrasting with the more open approach adopted not only in *Griswold* and *Eisenstadt*,[119] then in *Roe* and *Casey*, but also – more recently – in *Lawrence* (decriminalisation of homosexual acts)[114] or *Obergefell*

[105] Dobbs v. Jackson Women's Health Organization 597 U. S.___ 60-62 (2022).
[106] R.B. Ginsburg, "Speaking in a Judicial Voice", *New York University Law Review*, 1992, p. 1208.
[107] Dobbs v. Jackson Women's Health Organization 597 U. S._____67-68 (2022).
[108] Dobbs v. Jackson Women's Health Organization 597 U. S._____77 (2022). See *supra* pt. III.
[109] Dobbs v. Jackson Women's Health Organization 597 U. S._____78 (2022).
[110] D. Dinner, 'Originalism and the Misogynist Distortion of History in Dobbs', *Law and History Review* (https://lawandhistoryreview.org/); R.B. SIEGEL, 'Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism-and Some Pathways for Resistance', *Texas Law Review*, 2023, *forthcoming*, pp. 56 ff (available online at SSRN: https://papers.ssrn.com/).
[111] See C. Fercot, "Dobbs v. Jackson Women's Health Organization ou l'anéantissement du droit à l'avortement en tant que standard federal", *La Revue des droits de l'homme [Online]*, 4 July 2022, p. 5 (https://journals.openedition.org/revdh/14777); D. Dinner, 'Originalism and the Misogynist Distortion of History in Dobbs', *op. cit*; R.B. Siegel, 'Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism ...', *op. cit*.
[112] See C.R. Sunstein, "Dobbs and the Travails of Due Process Traditionalism", Harvard Public Law Working Paper No. 22-14.
[113] See S. Burns and S. Wheeler, "Dobbs Employs Narrow Framing to Narrow Fundamental Rights", *Oxford Human Rights Hub*, 18 July 2022 (https://ohrh.law.ox.ac.uk/dobbs-employs-narrow-framing-to-narrow-fundamental-rights).
[119] See *above*, Introduction.
[114] Lawrence v. Texas, 539 U.S. 558 (2003).

(marriage of same-sex couples).[115] In this sense, Harvard Professor Cass Sunstein writes that "the main weakness of the [majority] opinion – and probably its fatal flaw – is the rejection of the idea that moral progress can and should play a role in understanding constitutional rights".[116] Laurence Tribe even rejects the idea that *Dobbs* puts the issue of abortion in the hands of the American states: indeed, he points out, the destruction of the right to abortion opens the way not only to a tightening of state legislation, but also to the prohibition of abortion by federal law: the states would then be entirely dispossessed of the issue of abortion.[117]

B. The dissent: the prospect of a collapse of privacy

Justice Breyer, who has now retired and been replaced, signed the dissenting opinion with Kagan and Sotomayor. The three liberals criticise the approach of the majority insofar as it interprets the XIVth Amendment today in the light of conceptions prevailing when it was adopted in 1868 at the end of the American Civil War.[118] They note that in the late 19th century, women were not seen as full members of the political community and most of them probably could not even imagine having the right to control their own bodies.[119] Thus, the majority's approach amounts to "freezing" constitutional interpretation and consigns women to "second-class citizenship".[120] This "narrow" vision of the Constitution departs from the Court's previous case-law, which enshrined the principle of an evolving interpretation of the Constitution, based on the argument that this was the intention of its authors, who have worded the Constitution's provisions – in particular the XIVth Amendment – in sufficiently broad terms to allow its adaptation to changes in society and in the understanding of rights and freedoms.[121]

The dissenters also point out that the jurisprudential elaboration of substantive due process that led to the affirmation of the right to abortion also underpins the right to contraception, homosexual intimacy or same-sex marriage.[122] Overruling *Roe* then necessarily leads to the undermining of these other constitutional rights. While Justice Alito's opinion seeks to reassure by distinguishing the right to abortion from these other prerogatives,[123] Justice Thomas, in his concurring opinion, makes no secret of his desire to re-consider other constitutional guarantees associated with privacy.[124] For the minority, it is clear that the "right to choose" cannot be removed from American constitutional law without jeopardising "associated rights".To claim

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[115] Obergefell v. Hodges, 576 U.S. ____ 1. See e.g. K. Yoshino, "A New Birth of Freedom? Obergefell v. Hodges", *Harvard Law Review*, 2015, p. 157.

[116] C. Sunstein, "Dobbs and the Travails of Due Process Traditionalism", *Harvard Public Law Working Paper*, No. 22-14, p. 1 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4145922).

[117] L.H. Tribe, 'Don't believe those who say ending Roe v Wade will leave society largely intact', *The Guardian*, 23 May 2022 (https://www.theguardian.com/). See also D. Payne and K. Mahr, "The federal abortion ban bill is here - and it has some Republicans stunned", *Politico*, 14 September 2022 (https://www.politico.com/).

[118] Breyer, Sotomayor and Kagan JJ, dissenting, 14.

[119] Breyer, Sotomayor and Kagan JJ, dissenting, 14-15.

[120] Breyer, Sotomayor and Kagan JJ, dissenting, 15-17.

[121] Breyer, Sotomayor and Kagan JJ, dissenting, 15-17.

[122] Breyer, Sotomayor and Kagan JJ, dissenting, 19 et seq.

[123] Dobbs v. Jackson Women's Health Organization 597 U. S._66 (2022). Here is the precise explanation given byAlito: "the Solicitor General suggests that overruling [Roe and Casey] would 'threaten the Court's precedents holdingthat the Due Process Clause protects other rights. [...] That is not correct for reasons we have already discussed. As even the Casey plurality recognized, "[a]bortion is a unique act" because it terminates life." [...]. And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our "life or potential decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion".

[124] Thomas J, concurring, 3. Thomas is unambiguous in this regard: "[In] future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is 'demonstrably erroneous'".

otherwise, they say, is like playing "Jenga" and promising that the Jenga tower will "simply not collapse".[125]

The fear that the disavowal of *Roe* is merely a test run for a broader recusal of the rights affirmed in the wake of *Griswold* through successive reinterpretations of the concept of liberty is shared by many commentators.[126] Cass Sunstein draws attention to the fact that the challenge to the evolving interpretation of the Constitution will not necessarily be limited to the field of private life: other fundamental questions have been decided by the Court without an explicit textual basis, such as segregation, school prayer or affirmative action. How, he asks, should such issues be addressed in the post-*Dobbs* context?[127]

The concerns seem all the more justified that the "conservative supermajority" on the Supreme Court is likely to last. President Biden has just appointed "his" first Supreme Court justice, Ketanji Brown Jackson,[128] who took office a few days after *Dobbs* was pronounced. She is, however, taking the place of another liberal – Stephen Breyer – so her appointment does not correct the current imbalance. There is no reason to believe that the Democrat President will have any other appointment options in the coming months or years, although there can always be surprises in this area.[129]

C. Roberts' concurring opinion: the ignored compromise

A more moderate conservative than his colleagues, John Roberts took a middle ground by endorsing the Court's decision (the approval of the Gestational Age Act) without embracing the reasoning behind it (the overruling of *Roe v. Wade*).

The Chief Justice considers that the scope of the right to abortion as affirmed in *Roe* and *Casey* is too broad as it guarantees the possibility of resorting to abortion up to the beginning of the third trimester and the viability line. In his view, the constitutional right to terminate pregnancy should allow each woman "a reasonable opportunity to choose", but should not extend any further. Since pregnancy is usually discovered around six weeks of pregnancy and the GAA provided for the possibility of abortion up to fifteen weeks, it undoubtedly provided an "adequate opportunity" to terminate the pregnancy.[130]

Roberts' proposal is based on the principle of "judicial restraint", according to which judges should not decide beyond what is necessary for the resolution of the case before them. In this case, he points out, one must be all the more cautious because "deciding broadly" implied both

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[125] Breyer, Sotomayor and Kagan JJ, dissenting, 19.

[126] See e.g. C. Fercot, 'Dobbs v. Jackson Women's Health Organization ...', *op. cit.* p. 6; C. Harris, "The Draconian Future Following the Dobbs Decision", *University of Cincinnati Law Review - Blog*, 20 July 2022 (https://uclawre- view.org/); R.B. Siegel, "Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism ...", *op.cit.*, pp. 69-70.

[127] C. Sunstein, "Dobbs and the Travails of Due Process Traditionalism", *op. cit.* pp. 10-11. See also, in the same sense, the alarming observations of Laurence Tribe: "*attempts to minimize the huge retrogression this would represent must be dismissed as little more than shameful efforts to camouflage the carnage the supreme court of the United States is about to unleash both on its own legitimacy and, even more importantly, on the people in whose name it wields the power of judicial review*" (L.H. TRIBE, "Don't believe those who say ending Roe v. Wade will leave society largely untouched", *op.cit.*).

[128] Justice Brown is the first African-American woman appointed to the Court. See E. Macardle, "One Generation ... from Segregation to the Supreme Court", *Harvard Law Bulletin*, Summer 2022 (https://hls.harvard.edu/).

[129] D.S. Cohen, G. Donley and R. Rebouché, "Rethinking Strategy After Dobbs", *Stanford Law Review Online*, Au-gust 2022 (https://www.stanfordlawreview.org/).

[130] Roberts CJ, concurring in judgment, 1-2.

challenging a precedent and undermining a constitutional right.[131] In his view, it was possible to dismiss only the reference to the viability threshold, the relevance of which had never really been demonstrated and which did not take into account the legitimate interests that States may have in excluding abortion before the third trimester. Indeed, it appears that regulations worldwide generally allow abortion only approximately between 12 and 20 weeks.[132]

In response to the majority's objections that the Court had no choice but to "reaffirm" or "overrule" entirely *Roe*, Roberts recalls that the Court had already made "partial overrulings". In his view, this was the appropriate way here: the reference to the viability threshold and the principle of the right to abortion were not inseparable, and it was therefore possible (and necessary with regard to the principle of judicial restraint) to validate the disputed legislation without overruling *Roe* "all the way down".[133]

There is undoubtedly a sense of proportion in the position taken by Justice Roberts. By suggesting a new reconfiguration of the balance to be struck between the fundamental right affirmed in *Roe* and the legitimate interest in protecting potential life around the new notion of "reasonable opportunity", he sought to give the right to choose another chance. If he had been able to convince one of his conservative colleagues,[134] the outcome of *Dobbs* would have been entirely different, as only four out of nine justices would then have voted in favour of overruling *Roe*. However, his efforts were not sufficient and he appeared quite isolated in his search for a compromise between conservatives and liberals. This is probably, as an article in the *Wall Street Journal* puts it, "a sad loss for the Court and for the country".[135]

V. The future of abortion rights in the United States

From a legal point of view, *Roe v. Wade* certainly deserved criticism as it was somehow marked by a problematic form of liberal radicalism. Indeed, by affirming the right to abortion without a rigorous legal demonstration of its anchoring in due process and by applying it the highest level of constitutional scrutiny, it disregarded all the dogmas of constitutional conservatism concerned with fidelity to the original meaning of the Constitution and strong deference to state sovereignty.

The *Dobbs v. Jackson* decision of 24 June 2022 is certainly no better, as it is permeated by a conservative radicalism that is the exact opposite but is just as questionable. By promoting a static reading of the Constitution referring to a bygone and fantasised past and degrading women's reproductive rights to mere interests protected only by the minimal requirement of governmental and legislative rationality, it rejects entirely the liberal vision favouring an evolutive interpretation the Constitution and a committed federal protection of fundamental rights.

[131] Roberts CJ, concurring in judgment, 5.
[132] Roberts CJ, concurring in judgment, 2.
[133] Roberts CJ, concurring in judgment, 6-10.
[134] According to the American press, John Roberts in particular sought - unsuccessfully - to convince his colleague Brett Kavanaugh, with whom he is said to be very close and who had expressed his respect for *Roe* during his confirmation, to endorse his moderate views (J. BISKUPIC, 'The inside story of how John Roberts failed to save abortion rights', *CNN politics*, 26 July 2022 (https://edition.cnn.com/).
[135] D.J. Garrow, "On Abortion, John Roberts stands alone", *Wall Street Journal*, 26 June 2022 (https://www.wsj.com/).

The above should not be understood as implying that *Roe* and *Dobbs* would be, in a way, equal as each of them reflects one of the opposite poles of American constitutional doctrine. The June 2022 decision has the very significant additional defect of ignoring the efforts that the Court made during nearly fifty years after *Roe* – particularly in *Casey* and *Whole Woman* – to strengthen the conceptual foundations of the right to abortion and to define its scope in a more measured way. At the end of this (re)conciliatory process – in which Republican judges played an important role – the right to terminate a pregnancy appeared as an "ordinary" fundamental right requiring "intermediate" constitutional scrutiny in the form of balancing.

It is this progressive, collective and virtuous search for a satisfying balance between the very different conceptions that coexist in the United States concerning constitutional interpretation and abortion that *Dobbs* has just brutally ended. The *Chief Justice* was the only conservative to show temperance and modesty by following *Casey* and *Whole Woman* in proposing a further refinement of constitutional standards rather than the outright overruling of *Roe*: its isolation is particularly regrettable and significant. By disdaining a possible conciliatory path, the five "hard-line" conservatives – Alito, Thomas and the three Trump nominees – added fuel to the fire of a harmful partisan divide.

The future of abortion rights in the United States is now uncertain. The *New York Times* reports that there are fifteen states where abortion is now almost entirely prohibited, concentrated in the so-called "Bible belt" area. They may soon be joined by other states, such as Montana[136] or Wyoming,[137] where state supreme courts have temporarily "blocked" the enactment of laws banning abortion.[138] The question ultimately arises as to whether the constitutional right to travel freely within the US, which – like the right to abortion – is not expressly enshrined in the Constitution, will allow women, at the very least, to travel to another state to have an abortion.[139]

VI. The impact of *Dobbs* at European level

This contribution cannot be concluded without relating this tragic episode of American constitutional history to the European situation.

First, let us not forget that, while some express concern about the "decline of America",[140] the European Court of Human Rights has never taken the step of affirming the right to abortion. In its *A., B. and C. v. Ireland* judgment of 16 December 2010, it ruled that the virtually total ban on abortion then provided for in Irish law was compatible with the ECHR by giving precedence to the "profound moral values of the Irish people concerning the nature of life" over women's right to respect for their private life (Article 8 ECHR).[141] This lack of European recognition of the

[136] S. RAGAR, « State Supreme Court upholds block on new anti-abortion laws », *Montana Public Radio*, 10 août 2022 (https://www.mtpr.org/).
[137] W. Walkey, 'Abortion to remain legal in Wyoming until lawsuit questioning state's 'trigger ban' is resolved', *Wyoming Public Media*, 10 August 2022 (https://www.wyomingpublicmedia.org/).
[138] X., 'Tracking the States Were Abortion is Now Banned', *The New York Times*, 23 September 2022 (https://www.nytimes.com/).
[139] N. Cahn, J. Carbone and N. Levitis, "Is it Legal to Travel for Abortion after *Dobbs*?", *Bloomberg Law*, 11 July 2022 (https://news.bloomberglaw.com/).
[140] M. Picard, "Droit à l'avortement: le déclin de l'Amérique", *Le Soir*, 24 June 2022 (https://www.lesoir.be/).
[141] ECtHR, A., B. and C. v. Ireland, 16 December 2010. See in particular S.K.CALT, "A., B. & C. V. Ireland: Europe's Roe v. Wade?", *Lewis & Clark Law* Review, 2010, p. 1189; P. Ronchi, "A., B. and C. v. Ireland: Europe's Roe v. Wade still has

right to terminate pregnancy certainly raises questions, as further restrictions on access to abortion have just been adopted in Hungary[142] and as the new neo-fascist leader of the Italian government has publicised her intention to steer women away from abortion.[143]

The *Dobbs v. Jackson* ruling has already prompted several European reactions. In particular, the European Parliament suggests – in direct and explicit reaction to the US Supreme Court ruling – that the right to abortion be included in the EU Charter of Fundamental Rights.[144] Moreover, while three Polish cases relating to abortion are currently pending before the ECtHR,[145] legal scholars invite the Court to take the opposite view to *Dobbs* by choosing – for its part – to abandon the excessively deferent approach of *A., B. and C.* and clearly take the side of women's rights.[146]

VII. Will the right to abortion be included in the French Constitution?

In France, there was no need to wait for the US Supreme Court's *Dobbs* decision for a constitutional bill to protect the fundamental right to voluntary interruption of pregnancy to be tabled in the National Assembly. The text in question – which dates from 1st July 2019 – already mentioned its concerns about the American situation at the time, stating that "for several years, there have been attempts to reverse this fundamental right, driven by extremist political currents or those close to traditionalist religious movements. Whatever we think of the anti-abortion demonstrations or the shock media actions of certain political groups, we can see that the legitimacy of this right is constantly being called into question. This is also the case in the world, for example in the United States with the suppression of aid to associations that accompany women in their procedures or the implementation of anti-IVG legislation in several states".[147]

This French proposal aimed to complete the Constitution with a Title VIII in which a new Article 66-2 would be inserted, reading as follows: "No one may hinder the fundamental right to voluntary interruption of pregnancy". However, the proposal was not included in the Assembly's agenda and was dropped.[148]

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to wait", *Law Quarterly Review*, 2011, p. 365; E. Wicks, "A, B,C v Ireland: Abortion Law under the European Convention on Human Rights", *Human Rights Law* Review, 2011, p. 556; C. Cosentino, "Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence', *Human Rights Law Review*, 2015, p. 569; C. Ryan, 'The Margin of Apprecia-tion in A, B and C v Ireland: A Disproportionate Response to the Violation of Women's Reproductive Freedom', *UCLJournal of Law and Jurisprudence*, 2014, p. 237.

[142] W. Strzyzynska, "Hungary tightens abortion access with listen to 'fetal heartbeat' rule", *The Guardian*, 13 September 2022 (https://www.theguardian.com/).

[143] D. Aquaro, "Aborto, proseguono le polemiche. Anche dalla Francia un alert a Giorgia Meloni", *Il Sole 24 Ore*, 26 September 2022 (https://www.ilsole24ore.com/).

[144] European Parliament, 'MEPs want to include abortion rights in the EU Charter of Fundamental Rights', *News - European Parliament*, 7 July 2022 (https://www.europarl.europa.eu/); European Parliament, Resolution of 7 July 2022 on the US Supreme Court decision to challenge the right to abortion in the United States and the need to protect this right and women's health in the European Union (2022/2742(RSP)) (https://www.europarl.europa.eu/).

[145] K.B. and Others v. Poland (Appl. No. 1819/21), K.C. and Others v. Poland (Appl. 3639/21) and A.L.-B. and Others v. Poland (Appl. 3801/21).

[146] K. Szopa and J. Fletcher, "The Future of Abortion Rights under the European Convention on Human Rights in Light of Dobbs", *UK Constitutional Law Association*, 30 June 2022 (https://ukconstitutionallaw.org/).

[147] Constitutional bill no. 2086 to protect the fundamental right to voluntary interruption of pregnancy, registered at the Presidency of the National Assembly on 1 July 2019 (free translation).

[148] S. Hennette-Vauchez, D. Roman et S. Slama, « Pourquoi et comment constitutionnaliser le droit à l'avortement », *La Revue des droits de l'homme [Online]*, Actualités Droits Libertés, 2022, p. 3 (http://journals.openedition.org/

Following the *Dobbs* ruling, no less than four new constitutional bills were tabled in the National Assembly – on 30 June 2022,[149] 6 July 2022,[150] 7 October 2022[151] and 13 October 2022[152] – and two in the Senate, on 27 June 2022[153] and 2 August 2022.[154] The proposals tabled in the Assembly all have very similar wording. Their explanatory memorandum begins with an explicit reference to the American situation: "On June 24, 2022, the Supreme Court of the United States overturned a decision of January 22, 1973, recognising the right to abortion at the state level. As a result, a state will be able to ban abortions today".[155] To ensure that no one is ever prevented from having an abortion in France, both texts propose the insertion of a new Article 66-2 stating that "[n]o one may be deprived of the right to voluntary interruption of pregnancy".

The deputies of the Parliamentary Assembly adopted, on November 24, 2022, a compromise text by 337 votes to 32, in the hope of obtaining the approval of the Senate, which is essential for a constitutional reform. The compromise wording adopted is as follows: "The law shall guarantee the effectiveness of and equal access to the right to voluntary interruption of pregnancy".[156]

The difficulty is that the Senate seems rather reluctant to enshrine the right to abortion in the French Constitution. In fact, the proposal submitted on 2 August was rejected. It proposed to insert the following two paragraphs in Article 1 of the Constitution: «The law guarantees autonomous decision-making in reproductive matters as well as access to health care and services. Everyone has the right to appropriate contraception and to universal, unconditional and free access to voluntary termination of pregnancy, within a period of not less than fourteen weeks of amenorrhea". A reading of the discussions among the senators shows that one problematic aspect was the relevance of Article 1 of the Constitution for inserting a provision on abortion, with some saying that it would be more appropriate to insert it later in the constitutional text. Others pointed to the unproblematic aspect of voluntary termination of pregnancy in France, while others emphasised that the feminist battles were elsewhere.[157]

If the text voted in November 2022 by the Assembly was also adopted by the Senate, it would then still have to be submitted by the President to a referendum, in accordance with Article 89 of the French Constitution.

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revdh/14979).

[149] Constitutional Bill No. 8 to protect the fundamental right to voluntary interruption of pregnancy, registered at the Presidency of the National Assembly on 30 June 2022.

[150] Constitutional Bill No. 15 to protect the fundamental right to voluntary interruption of pregnancy, registered at the Presidency of the National Assembly on 6 July 2022.

[151] Constitutional Bill No. 293 to protect the fundamental right to voluntary interruption of pregnancy, registered at the National Assembly on 7 October 2022.

[152] Constitutional bill no. 340 to protect the fundamental right to voluntary interruption of pregnancy, registered at the Presidency of the National Assembly on 13 October 2022.

[153] Constitutional bill no. 736 to enshrine the right to voluntary interruption of pregnancy in the Constitution, registered at the Presidency of the Senate on 27 June 2022.

[154] Constitutional bill no. 853 aimed at protecting and guaranteeing the fundamental right to voluntary interruption of pregnancy and contraception, registered at the Presidency of the Senate on 2 August 2022.

[155] Explanatory Memorandum, Constitutional Bill No. 8 to Protect the Fundamental Right to Voluntary Termination of Pregnancy, registered with the Presidency of the National Assembly on 30 June 2022; Explanatory Memorandum, Constitutional Bill No. 340 to Protect the Fundamental Right to Voluntary Termination of Pregnancy, registered with the Presidency of the National Assembly on 13 October 2022 (free translation).

[156] See : AFP, "L'Assemblée vote en faveur de l'inscription du droit à l'avortement dans la Constitution", 24 November 2022 (https://www.france24.com/fr).

[157] Explanatory Memorandum, Constitutional Bill No. 340 to Protect the Fundamental Right to Voluntary Termination of Pregnancy, registered with the Presidency of the National Assembly on 13 October 2022 (free translation).

VIII. Should the right to abortion be included in the Belgian Constitution?

The worrying situation of women's rights in the United States following the *Dobbs* case has also prompted reactions among Belgian members of parliament. On 14 July 2022, a proposal for a revision of the Constitution was tabled with a view to revising Article 22 of the Constitution to include "the right to voluntary interruption of pregnancy".[158] This proposal fully respects the current declaration of revision of the Constitution, as Article 22 is one of the articles that are currently open to revision.[159]

In essence, the proposal is concerned about the fragility of human rights "when they are not explicitly protected by the Constitution" and stresses that, even if the situation in Belgium differs from that in the United States, "it must be noted that the right to voluntary interruption of pregnancy remains extremely vulnerable in Belgium as well" since, being only protected "by an ordinary law, it can also be abolished by an ordinary law".[160]

This argument has also been highlighted in the French context described above by prominent authors such as Stéphanie Hennette-Vauchez, Diane Roman, Serge Slama and Lisa Carayon. In their view, "the formal constitutionalising of the right to abortion would make it more difficult to abolish abortion altogether".[161] However, some will probably question the usefulness of enshrining the right to abortion in the Belgian Constitution since abortion is already permitted by law up to 12 weeks of pregnancy (which is – incidentally – less than the 15 weeks period provided for by the Mississippi Act at issue in *Dobbs*).

Drawing upon the lessons of *Dobbs*, we favour the idea of a new specific constitutional guarantee, for two main reasons. First, we endorse the arguments for consolidation mentioned above as women's rights seem, more than other rights, never genuinely or permanently acquired. This is spectacularly illustrated by the *Dobbs*-revolution in the US and by the current developments in Poland and Italy, and – as regards Europe – things could get worse considering the rise of extremist political parties that promote views that are harmful to women's rights and even anti-feminist.[162]

A second argument concerns the role that the law – and especially the Constitution – should play in society. In this regard, it will be recalled that following the Dutroux case and the

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[158] Proposition de révision de l'article 22 de la Constitution en vue de reconnaître le droit à l'interruption volontaire de grossesse, déposée par déposée par Claire Hugon, Kristof Calvo et consorts, *doc. parl.*, Ch. repr., sess. ord. 2021-2022, n° 2832/001 (free translation).

[159] Adopted in 2019, the Declaration of Revision of the Constitution allows for the revision of its provisions until the end of the legislature in May 2024, unless the House of Representatives and the Senate are dissolved early (Declaration of Revision of the Constitution, *M.B.*, 23 May 2019).

[160] Proposal to revise Article 22 of the Constitution to recognise the right to voluntary interruption of pregnancy, tabled by Claire Hugon, Kristof Calvo and others, *doc. parl.*, Ch. repr., sess. ord. 2021-2022, n° 2832/001, pp. 3-4 (free translation).

[161] S. Hennette-Vauchez, D. Roman et S. Slama, « Pourquoi et comment constitutionnaliser le droit à l'avortement », *La Revue des droits de l'homme [Online]*, Actualités Droits Libertés, 2022, p. 10 (http://journals.openedition.org/revdh/14979).

[162] See among others: C. WERNAERS, « Antiféminisme et extrême droite : un cocktail dangereux », *Politique. Revue belge d'analyse et de débat*, 8 mars 2022, disponible sur https://www.revuepolitique.be/antifeminisme-et-extreme-droite-un-cocktail-dangereux/ ; N. Chetcuti-Osorovitz et F. Teicher, « De ''La Manif pour Tous'' au rap identitaire et dissident. Circulation des discours antiféministes, hétérosexistes et antisémites en France », *Cahiers de littérature orale [En ligne]*, 82, 2017 ; C. Fourest, « Du délire anti-féministe de la droite américaine au double langage de Tarik Ramadan », *Après-demain*, 2007, pp. 38-42.

subsequent Parliamentary Inquiry Commission, Belgium amended its Constitution in 2000 to include a new Article 22bis which states that "every child has the right to respect for his or her moral, physical, psychological and sexual integrity". This did not mean that children had no rights before, but:

> "by enshrining the rights of the child in its Constitution, Belgium made the choice of a more explicit protection of fundamental rights for children. This was a strong political and symbolic signal of a social vision of the child and his or her position in our society".[163]

Other examples of strengthened protection of rights and strong political and symbolic signals include – even if not in the Constitution – the recent enshrinement of the offence of incest[164] in the Penal Code and the likely adoption of a framework law on feminicide[165].

These examples show the importance of going beyond pure positivism or radical Kelsenian model and to instead recognise the societal nature of law. This type of approach, which is linked to sociology of law and the "law in context" approach,[166] tends to view law and society as two interrelated elements rather than two impermeable spheres. From this perspective, the symbolic affirmation of a new right can have an extremely important impact on the perceptions and behaviours prevalent in society.

Finally, the scope of the potential new constitutional right may be discussed: should only the right to abortion be enshrined or should all reproductive rights, or even all rights related to reproductive health, be enshrined?

The latter have been defined for the first time in in 1994 by the Programme of Action of the International Conference on Population and Development, in paragraphs 7.2 and 7. 3 as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity in all matters relating to the reproductive system and to its functions and processes" and therefore imply "that people have the opportunity to have a satisfying and safe sex life, the capacity to reproduce and the freedom to decide if, when and how often to do so".[167] Enshrining the full range of reproductive rights or reproductive health could be preferred on grounds of equality.

Foreign experience shows that countries that have opted for constitutional entrenchment (mainly Latin American states) have done so in favour of reproductive rights and not just the right to abortion. For example, Article 66 of the Bolivian Constitution states that "women and men are guaranteed the exercise of their sexual and reproductive rights".[168] Article 32 of the Ecuadorian Constitution provides that the State must guarantee "permanent, timely and non-

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[163] See: *Vingtième anniversaire de l'inscription des droits de l'enfant dans la Constitution*, 26 mars 2020, disponible sur : https://www.senate.be/event/20200326-Children_s_rights/20200326-Children_s_rights_fr.html (our translation).

[164] Article 20 of the Act of 21 March 2022 amending the Criminal Code about sexual criminal law inserted a new Article 417/18 on incest.

[165] Preliminary draft law on the prevention and fight against feminicide, gender-based homicide and the violence that precedes it, November 2022, unpublished.

[166] J. RINGELHEIM, « Droit, contexte et changement social », *Revue interdisciplinaire d'études juridiques*, 2013, pp. 157-163.

[167] Programme of Action of the International Conference on Population and Development, §§ 7.2-7.3, Cairo, 5-13 September 1994.

[168] Constitution of Bolivia, Art. 66 (free translation).

exclusive access to sexual health programmes, actions and services [...]" and Article 332 states that "the State shall ensure respect for the reproductive rights of workers [...]".[169] Article 61 of the Paraguayan Constitution states that "special reproductive health programmes shall be established for the poor".[170]

Considering the equality argument and these Latin-American experiences, a wider constitutional protection including reproductive health could – arguably – be preferred, even if in our view a specific mention of the right to abortion being one of the aspects of reproductive health should be maintained.

[169] Constitution of Ecuador, Art. 32 and 332 (free translation).
[170] Constitution of Paraguay, Art. 61.