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THE REGULATION OF ABORTION: REFLECTIONS ON THE *DOBBS* OPINION*

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Abstract

The debate on abortion often entails great moral, political and legal disagreements. This article provides a number of philosophical, political and, above all, legal thoughts around the recent and controversial opinion of the US Supreme Court on *Dobbs*, which overrules the famous *Roe v. Wade* decision. It looks at the different opinions of the justices and the possible significance of religion in explaining this brusque jurisprudential change, while recalling the importance of the separation between Church and State. As *Dobbs* has returned to State legislatures the law-making powers they had lost with *Roe*, we explore the relationship between federalism and the role of the courts. Next, we address the question on who is legitimately entitled to adopt a "theory of life": some might say the legislatures and the voters as a whole, whereas others would answer the courts and pregnant women as individuals. Given that *Dobbs* represents a radical departure from one of the most well-known cases in the history of the United States of America, we also reflect on the binding nature of judicial precedent. As a final consideration, the paper warns that a regulation downplaying the value of life may lead to a normalisation and banalisation of abortion and, progressively, infanticide too.

Keywords: abortion; right to choose; right to life; Supreme Court; judicial precedent; infanticide.

LA REGULACIÓ DE L'AVORTAMENT: REFLEXIONS ENTORN DE LA SENTÈNCIA DOBBS

Resum

El debat sobre l'avortament sol desfermar una forta controvèrsia moral, política i jurídica. Aquest article ofereix un conjunt de reflexions filosòfiques, polítiques i, sobretot, jurídiques entorn de la flamant i polèmica sentència Dobbs *del Tribunal Suprem dels Estats Units d'Amèrica, la qual revoca la famosa sentència* Roe v. Wade*. Veurem les diferents opinions dels membres del tribunal i la possible rellevància de la religió per a explicar aquest brusc canvi jurisprudencial, tot evocant la importància de la separació església-estat. Com que* Dobbs *retorna als parlaments estatals el poder de regulació que havien perdut amb* Roe*, explorarem la relació entre el federalisme i el paper dels tribunals. Tot seguit, ens preguntarem qui està legitimat per a adoptar una teoria sobre la vida. Hom respondria els parlaments i votants en conjunt, mentre que altri contestaria els tribunals i les embarassades de manera individual. Atès que* Dobbs *s'aparta radicalment d'una de les sentències més cèlebres de la jurisprudència nord-americana, tractarem la vinculació del precedent judicial. Com a reflexió final, s'adverteix que una regulació que desmereixi el valor de la vida pot conduir a normalitzar i banalitzar l'avortament i, progressivament, també l'infanticidi.*

Paraules clau: avortament; dret a decidir; dret a la vida; Tribunal Suprem; precedent judicial; infanticidi.

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Contents

1 Introduction: the turnaround

Recognition of a broad right to abortion has often been associated with advanced liberal democracies, but this association does not seem necessary nor free from controversy. China and North Korea have the most permissive abortion regulations known in comparative law. Along with Vietnam, Singapore, the Netherlands, Iceland and Canada, they are among the few countries that allow non-therapeutic abortion after twenty weeks of gestation.[1]

The United States of America has been part of this vanguard but, after the recent *Dobbs v. Jackson Women's Health Organization* (hereinafter, *Dobbs*) ruling of the federal Supreme Court, abortion regulation essentially returns to the hands of the voters in each State, and their elected representatives. Indeed, this new ruling of June 24, 2022 rejects the famous *Roe v. Wade* decision of 1973 (hereinafter, *Roe*), which is probably the best-known case of the US Supreme Court: not only in the USA, but also in the rest of the world (Dworkin, 1994, p. 102). In essence, *Roe* prevented abortion until the third trimester of pregnancy, when the court estimated that the fetus became viable outside the mother's womb.

In liberal democracies, the debate on abortion tends to spark strong moral, political and legal controversy. With the *Dobbs* decision, this debate has regained interest and intensity inside and outside the USA. In general, the main ideas behind the case law of the US Supreme Court usually cross oceans. With agility, Moreso (2022) wondered about the influence *Dobbs* could have on the Spanish Constitutional Court and its judgment regarding the Organic Statute 2/2010 on the voluntary interruption of pregnancy, a case that has been pending to be decided for more than a decade.[2]

While the Spanish Constitutional Court should long ago have faced this debate (which contrasts with the celerity with which it has confronted many of the cases related to the Catalan process of independence)[3], the US Supreme Court has upheld the constitutionality of the 2018 *Gestational Age Act* passed by the legislature of the State of Mississippi, considering that the federal Constitution does not take a particular stand on abortion.

Despite not being responsive to public opinion as politicians tend to be, courts do seem to be attentive and sensitive to the social impact of their rulings and the social capital they enjoy. In other words, they are influenced, conditioned or concerned by the level of acceptance or rejection of their decisions, and seek to preserve the authority of the institution and its members. Although courts are usually conceived to be independent or counter-majoritarian bodies, they do not live in isolation from the citizens and their elected representatives.

2 Five opinions, three solutions

Through five different narratives leading to three different paths, the nine members of the Supreme Court embark the reader on the endless but exciting discussion about abortion regulation. Over more than 200 pages, important historical, empirical and theoretical arguments on the protection and punishment of abortion are addressed.

The opinion of the Supreme Court is delivered by Justice Samuel A. Alito and joined by Amy Coney Barrett, Neil M. Gorsuch, Brett M. Kavanaugh and Clarence Thomas. The latter two express concurring opinions that, broadly speaking, also consider that the famous *Roe* decision is to be overruled, as well as its most important follower *Planned Parenthood of Southeastern Pennsylvania v. Casey* of 1992 (hereinafter, *Casey*).[4] These rulings had recognized a constitutional right to abortion, but all of the aforementioned justices deny that the

1 In western Europe, there is a convergence towards free abortion during the first trimester of pregnancy, a trend that also seems global. These data are contained in the *Dobbs* decision (part I of the opinion of the court and, more specifically, note 15). See also The World's Abortion Laws.

2 On May 9 2023, the plenary session of the Constitutional Court dismissed the constitutional challenge against this organic statute, which had been amended by Organic Statute 1/2023. This ruling and its circumstances are significantly different from both *Roe* and *Dobbs*, and yet these cases might have had certain influence in both the Spanish legislation and its constitutional review.

3 See, among others, Ferreres (2014) and Bossacoma (2018).

4 Note, however, that *Roe* was decided 7 against 2 but that, two decades later, the justices were divided 5 against 4 in *Casey*.

federal Constitution takes position on this controversial issue and therefore return full regulatory authority on this matter to the legislative branches of government.

By contrast, Justice Stephen G. Breyer, Elena Kagan and Sonia Sotomayor issued a dissenting opinion, in which they defend *Roe* and *Casey*. They call for the need to respect the doctrine of precedent (*stare decisis*), while rejecting the need to resort to history to identify the implicit constitutional rights, as the majority opinion does. We will deal with both issues in later sections.

Faced with these two antithetical solutions (completely abrogating *versus* faithfully maintaining the court precedent), Chief Justice John G. Roberts proposed an intermediate solution based on maintaining the constitutional right to abortion but giving more leeway to State legislators. More specifically, he suggested eliminating the "viability line" (which we will discuss later on) and thus accepting the constitutionality of the legislation under judicial consideration. His proposal is based on respect for the judicial precedent and the need for judicial restraint: "If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more."

Often the prudence and restraint of the courts of justice regarding the constitutional review of legislation are associated with the respect for and deference to political branches of government and particularly the legislative ones. A kind of deference in order to limit the excess of judicial activism, intervention or interference. Yet the opinion of the Chief Justice shows that judicial restraint can also operate within the judiciary and in the face of the precedents of the Supreme Court. His suggestion for judicial restraint would have, in fact, reduced the broad regulatory authority that *Dobbs* ends up returning to political branches of government and, more specifically, to State legislatures.

I would generally say that the passive virtues of the courts referred to by Alexander A. Bickel (1986) not only serve to protect the domains of the political branches of government, but they can also assist the judiciary to build or unbuild its jurisprudence in a gradual, prudent manner. Perhaps the progressive doing and undoing of the tenets behind its rulings is one of the key elements that ought to distinguish the judicial way of creating law from the political way to create it. As we shall see, integrity, coherence and stability are crucial to justify the doctrine of precedent, and these same ideas may well require or recommend graduality and prudence when revising significant aspects of case law.

3 To be or not to be Catholic: is this the question?

In general, citizens' views on abortion are often related to their religious beliefs. In particular, several commentators blame the judicial turnaround on the fact that the majority of members of the Supreme Court are Catholic.[5] But we should bear in mind that Justice Sotomayor, despite being Catholic (at least culturally), signs the dissenting opinion. Therefore, the religion of the Supreme Court judges does not seem to determine their legal opinions, nor does their sex, as shown by Justice Barrett.

In his opinion, Chief Justice Roberts, despite being a practicing Catholic, proposes to maintain the constitutional right to abortion and reject only the viability line. The opinion of the Chief Justice, more prudent than that of the majority, would have allowed to respect, to a large extent, the court precedent and, at the same time, grant more margin of appreciation and maneuver to State legislators.

After all, being Catholic (practicing or not) is compatible with respect for the controversial judicial precedent that establishes a constitutional right to abortion, despite being in their hands the power to overrule it. The combination that could explain, condition or significantly influence the judgement is when three elements coincide: being male, conservative, and a practicing Christian.

However, while a third of the members of the Supreme Court in *Dobbs* are women, all were men in *Roe*'s time and there was only one woman in *Casey*'s time. On the other hand, since the conservative label is linked to the opinion on abortion, it can lead to a certain degree of circularity. This is to say that being a conservative

5 See, among others, the blog post by Marcia Coyle (2022) and Manuel Ruiz's interview with Lawrence Friedman (2022).

increases the probability of arguing and deciding pro-life, but a pro-life approach in judgement often entails being labeled as conservative.

4 The separation of Heaven and Earth

The Supreme Court is undermining the separation of Church and State, argues Lawrence M. Friedman (Ruiz Rico, 2022). I am not sure that this is so in the case at hand and, more importantly, I am inclined to think that doing so is inconvenient for religious groups or confessions. This separation may well be one of the keys to understanding the triumph of religion and, specifically, of Catholicism in the United States of America, although historically there has been a certain distrust, suspicion and even hostility to the Catholic Church.[6]

A well-known Catholic from the old continent, Alexis de Tocqueville (1835, chapter XVII), after having conversed with various religious confessions in the USA and especially with Catholic priests, observed that there was broad consensus that the separation of Church and State contributed to the peaceful dominion of religion. This is part of the explanation that he offers: when religion seeks power that does not belong to it – for example, by forming an alliance with governments of the earth – it risks losing its legitimate sphere of authority, especially in the long term.

A religion, like any other comprehensive conception of the good, can demand great sacrifices and self-denial from its followers, which is something that a political morality based on a shared conception of justice should not do, let alone the constitutional law of a liberal democracy. Let me provide an example related to our topic. Catholicism may preach the moral obligation of its believers to bear a child born of rape or with serious malformations or disabilities, but I consider it excessive that political morality and the legal order demand such a sacrifice.[7] In general, when exceptional circumstances such as armed conflicts or natural disasters do not occur, the law should not compel us to behave like heroes, saints or martyrs.[8]

What political morality and the legal system should do is respect the different conceptions of the good and allow them to grow and flourish. It would lead to an impoverishment of the pluralism and diversity of liberal-democratic societies if the only possible morality was the public morality or, even worse, if the only existing rules were those of the current legal order. Freedom of expression, for example, tends to be constitutionally or legally shaped in a relatively broad way, but this does not exclude that various forms of expression that are protected under it can be morally rejected or blameworthy.

Catholics must therefore be allowed to preach about the moral evils of abortion. However, when their discourse or opinion has the direct target of establishing or changing the law of the land, they should appeal to shared political and legal principles, with acceptable and reasonable arguments that can be shared by many people across society, and not just those of this faith. By avoiding religious and moral arguments, the Catholic members of the Supreme Court, as well as the rest of justices, seem to have fulfilled this demand inspired by

6 As for historical anti-Catholicism in the USA, see, for example, Carroll (2015).

7 Unlike morality, legality often takes into account more institutional and practical reasons. While it seems morally reasonable to distinguish abortion after rape from abortion as a result of consensual sexual intercourse, using this distinction legally to ensure legal access to abortion would face two interlinked problems: (1) difficulties to prove rape and (2) generation of false accusations of rape.

8 See the philosophical debate between Judith Jarvis Thomson (1971) and John Finnis (1973). Historically, it seems that women's risks and sacrifices related to pregnancy are largely comparable to men's risks and sacrifices related to military obligations (see Sunstein, 1992). Currently, despite the difficulty of defending abortion under a principle of equality between men and women (among other reasons, because the restriction of abortion does not produce direct discrimination between sexes), this principle could demand some kind of fair distribution of obligations between sexes. Analogically, if a pandemic only affected women, it would not seem discriminatory to restrict certain activities only to them. This would not be an unjustified distinction, but a distinction based on a scientifically objective and reasonable justification. While it would seem unreasonable to compel men to endure the same restrictions, it could be reasonable to impose on them different burdens but of similar intensity that were socially useful (even in another sphere of social life). Some might consider one of these burdens the obligation of maintenance that the man who becomes a father, despite having had neither choice nor voice on the possibility of interrupting pregnancy, towards his children. In short, the principle of equality between sexes seems to require or demand a fair sharing of social burdens. We will discuss this further in Section 11.

the idea of public reason of John Rawls (2001),[9] even though, according to Donald Trump, "God made the decision".[10]

What kind of divine intervention does the former US president refer to? His egocentricity, coupled with the fact that he had appointed (with the consent of the Senate) three out of the five justices who make the majority opinion, could suggest that he considers himself God or some kind of representative of heaven on earth. The first two justices appointed by Trump replaced others also appointed by Republican presidents (who, since Reagan, had tried to appoint judges willing to overrule *Roe*). The replacement of the deceased Justice Ruth Bader Ginsburg by Amy Coney Barrett was the controversial appointment that changed the balance.

5 The federal perspective of the debate

In essence, the *Dobbs* decision considers that the federal Constitution is neutral in terms of abortion and, accordingly, that the Supreme Court must also be neutral in this regard. In this way, *Dobbs* moves away and rejects *Roe* and *Casey*, who had recognized an implicit constitutional right to abortion that States could not limit until the fetus was "viable". *Dobbs* does not ban abortion, but restores the regulatory capacity of State legislators. In fact, neither is it considered that the federal Constitution recognizes an implicit right to life that prevents States from establishing or abolishing the death penalty in their criminal law.

The USA remains a federation despite the strong process of nationalization and centralization experienced since the Civil War. As a result of the constitutional changes that triggered this war and especially through the Fourteenth Amendment, the Supreme Court extended the application of federal constitutional rights to the States and thus initiated a process of national homogenization and loss of State autonomy (Tierney, 2022, p. 270). When this court recognizes an implicit constitutional right and shapes it in such a way that it leaves little leeway to State legislatures, this entails even more questionable centralization and standardization.[11]

The judicial creation and development of constitutional rights may favor unity and uniformity at the expense of territorial autonomy and diversity.[12] *Dobbs* considers that *Roe* and *Casey* had usurped authority that the Constitution leaves for the citizens of States and their democratic representatives. In 2022, after a majority of 26 States had urged the Supreme Court to reject these precedents, the highest court of the US federation returned this matter to State politics, without excluding the possibility of federal political intervention.[13]

Ronald Watts (2008, p. 161), a giant of federal scholarship, wonders whether federation is a form of government that ultimately results in "the rule by judges rather than by elected representatives". While with *Roe* federalism seemed to lead to the government of judges, *Dobbs* shifts the balance in favor of the government of democratic representatives.[14]

9 In general, Rawls (2001, pp. 169-171) considers that pro-life arguments can be part of public reason, but warns that they should be carefully framed and articulated, since they may easily fall into religious reasons that can hardly be shared by the whole citizenry and, therefore, would not be acceptable reasons in the public debate for the establishment of coercive norms. Rawls's (1993, pp. 243-244) opinion on the specific issue of abortion seems to indicate that the value of life, once weighed with other values at stake, would only legally prevent the decision to have an abortion after the first trimester. See Lafont (2020, p. 208) and Moreso (2023).

10 See Olander (2022).

11 Indeed, centralization and homogenization are not only the result of regulations and decisions of central parliaments and governments, but also of rulings and decisions of central courts. See Bzdera (1993), Aroney and Kincaid (2017) and Bossacoma (2021).

12 However, the territorial pluralism that federalism protects can sometimes be detrimental to the protection of traditionally oppressed non-territorial groups such as women, the poor or racial minorities. On the interaction between federalism and gender, see Vickers (2013) or, as a specific case, *United States v. Morrison* of 2000.

13 There have been several attempts to pass a federal Freedom of Choice Act in order to protect through statutory legislation *Roe*'s case law. Both Hillary Clinton and Barack Obama supported this bill as members of Congress and presidential candidates. But once president, Obama quickly backed down given the sharp divide around the abortion issue. In commemoration of his first 100 days as president, he expressed: "Now, the Freedom of Choice Act is not highest legislative priority. I believe that women should have the right to choose. But I think that the most important thing we can do to tamp down some of the anger surrounding this issue is to focus on those areas that we can agree on. And that's where I'm going to focus."

14 Faced with disputes that may affect the territorial allocation of powers, courts, especially supreme or constitutional ones, should not feel part of the central tier of government, but part of an impartial and independent branch from any specific territorial layer. Conversely, courts often feel part of a specific level of government, making them likely to serve and bless national building, federal

6 The power of courts and the interpretation of constitutional clauses

Legislating and adjudicating are two ways, different in principle, of creating law. Yet *Roe*'s arguments and solutions seem more like those of a legislator than those of a court. That is why *Dobbs* reiterates that *Roe* is an exercise of "raw judicial power", somewhat of an abuse of judicial authority that can be illustrated with two issues.

The first is that *Roe* and *Casey* deduce the right to abortion from the constitutional clause of the *due process*, which proclaims that no State shall "deprive any person of life, liberty, or property, without due process of law". The deduction of substantive constitutional rights such as abortion and contraceptives under a constitutional provision that deals with the due process of law is controversial.[15]

I presume that many lawyers trained in other legal systems (and not contaminated by US law and jurisprudence) would understand, from a literal interpretation, that this constitutional clause provides that fair processes or procedures are necessary and with an adequate legal provision to be able to restrict or limit "life, liberty or property". Or, conversely, that the federal constitution prevents States from restricting or limiting these values if the process to do so is arbitrary or does not conform to law.

By contrast, the U.S. Supreme Court seems to have tended to disassociate the process from the values it must protect: life, liberty, and property. This controversial division of the clause has led to the distinction between *substantive due process* and *procedural due process*. The former is a contradiction in terms and the latter is redundant. Familiarity breeds inattention, warns John Hart Ely (1980, p. 18). Indeed, these terms surely attract more attention and probably generate more rejection of lawyers not trained in or accustomed to US constitutional law.[16]

In particular, Ely (1973, p. 947) considers *Roe* to be a "very bad decision" not because it is against his idea of progress, but because it is "bad constitutional law, or rather because it is not constitutional law". *Dobbs* specifies that it only overrules the constitutional right to abortion that *Roe* had established since it directly and singularly impacts on unborn human beings. Instead, dissenting justices warn that this case-law turnaround leads to questioning other implicit constitutional rights related to the right to decide on one's own body and the most intimate spheres of personal and family life against State regulations.

Certainly, the right to abortion has to do with the right to choose on one's own body, and restrictive abortion regulation could disrupt a woman's ownership and control over her body. But it is also worth putting on the balance the fact that, when a woman is pregnant, there is a potential life forming inside her womb.[17] It seems a rather shared idea or intuition that the fetus is not simply an organ, a tissue or a part of a woman's body, and its singularity, vitality and autonomy become progressively more evident.[18] Although this nuance weakens

homogenization or central empowerment.

15 With regard to the implied constitutional right to use contraceptives, see the 1965 *Griswold v. Connecticut* ruling. *Griswold* was a key decision to justify *Roe* a few years later. Although both contraception and abortion are based on a supposed right to privacy and, more specifically, on a right to reproductive autonomy, there is an important distinction: contraception aims to avoid pregnancy and, instead, abortion to interrupt it. In other words, the first prevents the beginning of a potential life, while abortion puts an end to the development of a potential life. *Griswold* was also based on the Fourth Amendment, which prohibits unreasonable searches and seizures, since the effective prohibition of the use of contraceptives would have led to draconian governmental attacks into the privacy of the home. In this respect, *Griswold* only invalidates a portion of the law that proscribed the use, as opposed to the manufacture, sale, or other distribution of contraceptives (Ely, 1973, pp. 928-930). Finally, it is different to strike down part of an anti-contraceptive law that is hardly enforceable than to invalidate the anti-abortion laws of the fifty States. Among other reasons, a broad consensus is presumable regarding *Griswold* but not, on the other hand, regarding *Roe*, which has not existed historically nor does at present (Calabresi, 2010, p. 155).

16 All this led, according to Ely (1980, p. 19), to a disaster in both theoretical and practical terms.

17 According to the European Court of Human Rights, the woman's right to respect for her private life must be weighed against other competing rights and freedoms including those of the unborn child (see, among other cases, *A, B and C v. Ireland* of 2010).

18 This is maintained by anti-abortion authors such as Finnis (1973, p. 141), but also sustained by liberal pro-abortion authors such as Ely (1973, p. 931) and pro-abortion feminists such as MacKinnon (1991, pp. 1314-1315). It may be necessary to differentiate, on the one hand, organ from organism and, on the other, organism from person. The fetus could therefore be an organism and even a human being in a biological sense without being regarded as a person in a moral or legal sense yet. More than a biological fact, personhood is a social fact derived from moral conceptions, political struggles and legal provisions. The expression "to be with child" to refer to pregnancy runs contrary to the belief that the fetus is simply a part of a woman's body with no moral subjecthood

the claim of a right to choose on one's own body as a defense of a broad right to abortion, it can limit the expansion of *Dobbs* case law in more clearly related cases to the right to decide on and exercise control over one's own body.

While dissenting justices concentrate on the present and show concern for the future, the majority of justices focus more on the past, offering a careful historical analysis of abortion regulations and doctrines before *Roe*. The need to resort to history to recognize implicit rights constitutes a limit to the expansion, if not the abuse, of judicial power. Yet historical argument does not seem conclusive nor ideal for recognizing implicit rights. When constitutional texts use open or vague concepts such as "liberty", their definition and extension should not be restricted to those meanings and conceptions of the time of their approval. The concept of liberty can hardly mean the same and operate in the same way as it did two centuries ago, when many women had no control over their private lives nor an equal basic right to participate in public affairs.

7 Who can legitimately adopt a theory of life?

The second issue illustrating a possible excessive exercise of judicial power in *Roe* is the establishment of the viability line, by which States can only protect the fetus, in the sense of restricting abortion, once the potential life is viable outside the womb of the mother – which *Roe* considered usually occurred at the beginning of the third trimester of gestation.

An interesting point of the viability line is that, if the fetus is viable outside the mother's womb, she could at most have a right to cause childbirth and not to exterminate the fetus. Another virtue would be to prevent States from imposing a conception of the intrinsic value of life on their citizens, conceptions that often have a strong religious component. That is why authors such as Ronald Dworkin (1994, p. 160) argue that the First Amendment, which prohibits the establishment of an official religion and protects free exercise of religion, also requires the recognition of a broad constitutional right to abortion.

However, the viability line is questionable since it is based on probabilities, which seem excessively dependent on the economic and health context and, in general, on the progress of science. Moreover, as recalled in *Dobbs*, to determine a fetus's odds of surviving outside the womb one must also consider several particular variables, such as fetal weight, gestational age and the health and nutrition of those involved in the pregnancy. Even if each fetus's probability of survival could be ascertained with certainty, what percentage of probability of survival makes a fetus viable? Should it be considered in individual terms by each physician or in aggregate terms? As some kind of aggregation and generalization is to be expected, why could not each State pass its regulation on viability?

Beyond these rather practical issues, as the development of the fetus is gradual, it is difficult to defend that a court can establish *viability* as the only constitutionally legitimate or acceptable criterion to the detriment of other criteria that we could call *potentiality* (to become a human being independent of the mother), *recognizability* (in human form), *organicity* (presence of basic organs), *activity* (of the brain or heart), *mobility* (when the first movements of the fetus are detected) or *sensitivity* (and, in particular, the capability of the fetus to feel pain).

Dobbs considers that the Supreme Court is not authorized to adopt a "theory of life", rejecting the previous case law that prevented State legislatures from adopting theories of life. Since abortion regulation cannot be disregarded or purely disconnected from any life theory, it could be more appropriate to leave it in the hands of the competent democratic legislator, with a subsequent control of reasonableness (or non-arbitrariness) by the constitutional adjudicator.

We are facing a moral issue that requires us to seek compromises, balances and nuances that can be agreed and specified in parliamentary rooms and debates. In turn, the courts can, prudently, delimit the field of the democratic game in order to promote collective deliberation, the accommodation of pluralism and the weighting of the various values in conflict. This would appear, broadly speaking, to be the European model

or individuality. But even if the fetus is not generally or constitutionally considered a person, the law may treat the unborn as such in certain areas or specific cases. There is no one and only legal sense of person. See also page 31.

that experts such as Mary Ann Glendon (1987) had recommended to replace the American model resulting from *Roe*, which was characterized by a preponderant role of the Supreme Court.[19]

In defense of *Roe* and the model that arises from this case law, Ronald Dworkin (1994, p. 146) considers that judicial decisions must be a matter of principle and not of compromises or political accommodation. But this argument can be turned against *Roe*: if the courts are not to seek compromises or accommodation, perhaps it is better to leave sufficient room for maneuver for the democratic legislators to seek compromises and accommodation on controversial issues such as abortion.

In addition to the requirement to decide on the basis of principles, the conception of *law as integrity*, according to Dworkin's theoretical proposal, also obligates the courts to be respectful and consistent with judicial precedents. The Supreme Court itself is also bound by its precedents, unless they are "clearly wrong", writes Dworkin (1994, p. 171).

8 The virtues of the doctrine of precedent

In the case at hand, we have already seen that the firm defenders of *stare decisis* (i.e. to stand by things decided and so respect the binding force of judicial precedent) were the three dissenting justices. According to them, this doctrine is a "foundation stone of the rule of law: that things decided should remain decided unless there is a very good reasons for change." Indeed, if the rule of law is based on treating like cases alike, *stare decisis* is key.

The doctrine of precedent promotes "the evenhanded, predictable, and consistent development of legal principles", which favors the integrity and stability of the legal system and prevents judicial abuses and arbitrariness. It is a doctrine inspired by "judicial modesty and humility". It is a source of transmission of institutional wisdom that helps to heed the lessons of predecessor and superior courts. In addition, it discourages litigating continuously on the same subject, and this allows a saving of both public and private resources.

Dissenting justices recall that *Roe* has prevailed for half a century and *Casey*, described as "precedent about precedent", for three decades. These judges warn that reversing the precedent without any other significant change beyond the renewal of the members of the court suggests that the judicial branch is not very different from the political ones.

In principle, more stability and coherence is expected in the predominant opinions of the judiciary than in those of the legislative and the executive. While judicial legitimacy lies in the impartiality, predictability and consistency of their judgements and rulings, we usually deem it normal and acceptable that political legitimacy follows closely the change of democratic representatives, leaders, majorities and coalitions. The doctrine of precedent, using the metaphor of Blackstone (1765, p. 69), keeps "the scale of justice even and steady".[20]

19 The late Supreme Court Justice R. B. Ginsburg, an icon of feminism and defender of women's right to choose, was also critical of *Roe*: not only because it was based on privacy and due process instead of the equal protection clause, but also because *Roe*, in being so drastic, generated a strong animosity: "A less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day, I believe and will summarize why, might have served to reduce rather than to fuel controversy." She was therefore in favor of a judicial approach that promoted dialogue with lawmakers at a time when the political trend, according to the Supreme Court itself, was favorable to the liberalization of abortion laws (Ginsburg, 1992, pp. 1198-1208; see Frommer, 2022). Similarly, years earlier Guido Calabresi (1985, pp. 92-97) had already labeled *Roe* as unfortunate and disastrous because, instead of having focused the question on whether or not fetuses are persons in a constitutional sense and at what point the Constitution begins to protect them, it should have focused on the value of equality and the equal protection clause to protect women above the unborn. According to Calabresi, if *Roe* had weighed women's equality with the value of life of the unborn, it would have been more respectful of the beliefs of numerous individuals and groups. This would not only have hurt less a society that is plural and regards itself as pluralist, but would also have caused fewer problems in other areas of law, such as in convictions for crimes related to physical injuries on or homicide of the unborn and in compensations for damages related to physical injuries on or death of the fetus.

20 This metaphor is found in the following passage: "For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law."

From a more philosophical perspective, we could say that this doctrine helps the courts to resolve disputes behind a *veil of ignorance* that gives them impartiality, since it obligates them to face each concrete case with awareness that the interpretative criteria or canons that are adopted will be of future application to an indeterminate plurality of similar cases. Inspired by the Kantian categorical imperative, the doctrine of precedent ensures that the courts adjudicate following the interpretation they consider to be a universal norm or criterion.

9 Reasons to overrule the precedent

Although all members of the court accept the doctrine of precedent, they also admit that it does not involve an unescapable bond: *stare decisis* is not an "inexorable command", nor a "straitjacket". In fact, if the bond were definitive when we face precedents that interpret the Constitution as in the cases that we are dealing with in this paper, they could only be amended through constitutional revision. The more difficult it is to amend the constitution, the more incentives there are to revise such precedents, and I am inclined to think that, for practical reasons, it should be easier to overturn them.

Casey, which we already know has been defined as a precedent about precedent, maintained *Roe* since the debate on abortion caused too much disagreement and discord. *Dobbs* now criticizes that back then the Supreme Court was too optimistic in expecting to have the ability to calm the controversy about abortion and too activist in stopping the democratic process. By contrast, today's court completely opens the doors to democratic deliberation and legislative regulation on abortion.

Dobbs identifies five factors that ought to be considered in deciding whether or not to overrule a precedent: (1) *the nature of the Court's error*, considering that only precedents that suffer serious errors or that are seriously wrong should be rejected; (2) *the quality of the reasoning*, since a weak reasoning harms the binding force of precedent and favors the legitimacy of an overruling based on strong reasons; (3) *workability*, in the sense that judicially created rules, criteria or tests may be rejected if they are difficult to apply in a consistent and predictable manner; (4) *effect on other areas of law*, according to which the more a precedent can distort other fields of the legal order, including important constitutional doctrines, the more reason to overturn it; and finally, (5) *reliance interests*, which arise from necessary long-term planning based on judicial rules, advise against a potential overruling.

The Supreme Court identifies relevant factors that, taken together, makes it considerably difficult to reconsider its own precedents. Indeed, we should keep in mind that we are dealing with a horizontal precedent (of the same court) rather than a vertical one (of a higher court). By virtue of these five factors, the doctrine of precedent is well protected against future assaults. However, both the dissenting opinion and the prudent opinion of Chief Justice Roberts seem to indicate that the majority has been, in fact, less respectful of the force of precedent than the aforementioned requirements seem to indicate.

10 Restriction on abortion and freedom of movement

The dissenting justices warn that, under the new case law, States could prohibit abortion from the moment of conception and also the freedom of women to travel outside the State with the aim to obtain an abortion. Justice Kavanaugh explicitly holds that the constitutional right to interstate travel protects women who wish to get an abortion in another State.

If the regulation of abortion did not involve any kind of restriction of movement or did not have any extraterritorial effect, it would be devoid of practical effects in numerous cases and, unfortunately, would end up burdening only the popular or low-income classes. Even if the woman who wanted to get an abortion had the constitutional right to travel to another State to do so, this legal possibility could lead to an incapacity or a material disadvantage for poor women compared to rich ones.

Imagine a case, which could be real, of a pregnant woman who wants to go to another State to give birth because it allows infanticide, or allows the infant to die, when the newborn suffers syndromes, diseases or disabilities that can seriously affect their quality of life. Should the legal orders of the other States (I no longer

speak of the USA, but in general) tolerate or allow pregnant women to go to give birth in these places in order to end their child's life? Let us consider an extreme case: if a poor country decided to allow infanticide to encourage tourism, it would be appropriate for other countries to prohibit travelling there with children, as defended by Dworkin (1994, pp. 47-48).

The situation of a woman residing in a State (and to whom the law of this place applies) seems rather different from that of a woman who simply travels to another State in order to abort. It is obvious that the complication of making this distinction would also be in how to determine the boundaries between one situation and the other. How do you prevent or control these movements? Would it be necessary that in order to abort the woman would already have to be living in the relevant State at the moment of conception? Can women change their residencies just before abortion? Will there be a check on fraudulent changes in residence?

Some may say that such questions and complications point towards the need for federal, international or global regulations. But to think that this is the only solution seems to me to over-reduce our horizon of possibilities. We should be able to establish and keep different regulations in distinct societies, and at the same time seek ways to order and coordinate extraterritorial problems of these various regulations by virtue of principles of mutual loyalty and sincere cooperation. If the law, as a democratic manifestation, loses its authority and legitimacy by the simple crossing of a territorial border, this could seriously damage the diversity that federalism aims to protect, the equality between better-off and worse-off people, and the effectiveness of the legal orders that result from democratic debate.

In any case, the role of law is not only to order coexistence in practical terms, but also to specify a shared conception of justice that guides this coexistence, even if this entails important problems when establishing this order. Although centuries ago the ability to pursue certain crimes effectively was meager, this would not have been a good argument to stop pursuing them. In fact, the low capacity to catch criminals could explain, in tension with the principle of proportionality of the penalty, the existence of a more severe criminal law in order to significantly deter crime.

11 The unborn, men and public authorities

There are several subjects that we can consider in this discussion. While it is necessary to ensure women's liberty, equality and prosperity, seeking to protect unborn human beings seems also legitimate, especially in postmodern liberal-democratic settings. I consider the protection of the interests of future generations and those which cannot defend themselves, such as infants, disabled people, non-human animals and Nature, a laudable evolution of advanced societies and their legal systems, even at the expense of individual freedom.[21]

In the thought experiment that Rawls's (1999) develops in *A Theory of Justice*, the parties gathered to agree the social contract are conceived as "continuing persons", "family heads" or "genetic lines", which helps to take into consideration long-term fairness and intergenerational justice. I wonder if this contract method could also take into consideration the unborn. According to Edmund Burke (1887, p. 359), society should be understood as a contract between the living, the dead and those yet to be born.[22]

Lately, in the debate on abortion, the role of men as potential parents is ignored, if not neglected. At least morally speaking (since to legally require it may be too thorny), they should have some right to be informed and heard, provided they had not violated the sexual freedom of women. The autonomy of men in shaping

21 In particular, as recalled in the Convention on the Rights of the Child (1989), the UN General Assembly Declaration of the Rights of the Child (1959) indicates that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".

22 "Society is, indeed, a contract. [...] As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born." Let me propose a mental experiment: imagine a hypothetical situation in which persons, as contracting parties of the social contract, would act behind a veil of ignorance that would prevent them from knowing their sex and age, including the possibility of being mere fetuses. Mind that we could run into a kind of circular argument since the result of the hypothetical contract would depend on how we redefine the contracting parties. That said, the parties of Rawls' (1999) social contract are artificially defined persons in order to frame the rational within the morally reasonable, and thus conceive justice from impartiality and fairness instead of the harsh and often arbitrary reality.

their reproductive conceptions and their (individual and family) life plans depends to a certain extent on being informed about these questions and having the possibility to act accordingly. Informing the potential father, and listening to him, should be considered a kind of prior moral duty of a pregnant woman that could institutionally be collected in the form of a recommendation or provision within a (soft-law) code of good practices on pregnancy and abortion.

During a reflection period prior to the drastic and irreversible decision (period that could also be regulated as a good practice), the man could try to convince the woman not to get an abortion, either with more moral-religious, emotional-amorous or practical-economic arguments. Maybe she sees herself more alone than she would really be. Perhaps she thinks that the child would not be sufficiently cared for, wanted or loved. Even if abortion is finally carried out, if a man is aware and involved in this tragic experience, he will have the opportunity to change his way of understanding or practicing sex in order to prevent new abortions in the future. This information and reflection could awaken or enhance the virtue of responsibility.

Indeed, one of the fundamental objectives of the mentioned code of good practices should be to promote individual and collective responsibility regarding pregnancy and abortion. It is necessary to promote an environment of reflection, conscientiousness and seriousness in decision-making, because ending a potential life is not something trivial or purely individual, and therefore should not be decided lightly nor without conversation. In order to base the code on the idea of responsibility rather than coercion, its provisions would not be binding, especially for pregnant women.[23] In fact, beyond coercion, it seems that social rejection has been, and may continue to be, a relevant way of regulating sexual and reproductive behaviors (Abrams, 2015, pp. 187-188).

Many advocates of a broad right to abortion contend that having an unintended child can ruin a woman's life. But, in an increasingly egalitarian society between the sexes, could or would something similar be said about a man? *Roe* and *Casey* argued that the public authorities could not control the course of a woman's life, nor determine her future. It is true that, traditionally, women's life plans have been much more affected by childbearing and childrearing than men's (MacKinnon, 1991, p. 1313). Yet life plans are often more affected by parenting than by pregnancy, and this duty of parenting is, or should be, increasingly shared between mothers and fathers in advanced societies. Thus, the more formal and material equality in the tasks and burdens of parenting, the more voice should be given to men.[24]

In general, the more egalitarian or fair society becomes in the burden sharing between sexes, the more legitimate abortion restrictions to protect the unborn could be, and the less necessary judicial activism in defense of abortion would be to protect women. This normative-idealist vision should be contrasted with a more realist one: the more burdens men have to bear in parenting, the more practical incentives they will have to adopt pro-choice positions. A possible test to reveal whether the dominant group has imposed discrimination or a disproportioned burden is to ask whether it would be maintained if it had to be supported by everyone equally (Calabresi, 1985, p. 101). Had men had to endure pregnancy, childbirth and childcare, abortion would probably have been more permissive.[25]

Some scholars, in tune with certain feminist criticisms and demands, have highlighted the importance of sex inequality in the debate on abortion and, consequently, have defended the role that the equal protection clause can play in the regulation of abortion (Calabresi, 1985 and 1991; Ginsburg, 1992; Sunstein, 1992; Siegel, 1992; among others). The principle of equality has been associated with the racial sphere, a sphere which, especially in the USA, has produced the paradigm of constitutional protection of equality (Fiss, 1976; Sunstein, 1994).

23 Nevertheless, legal formulas should be sought so that health centers and professionals encourage observance of the code of good practices, while respecting the liberty of pregnant women who want to get an abortion not to follow the code.

24 By the way, the man who becomes a father, even if he has not been informed about the pregnancy or could not express his will on abortion, will legally face significant obligations and responsibilities with respect to his children (regardless of whether they are wanted or not). For example, the effects of affiliation under the Civil Code of Catalonia include, among others, parental authority, maintenance obligations, inheritance rights and the assumption of parental responsibilities to minor children. In principle, by virtue of these responsibilities, the father shall take care of his children, provide them food, live with them and educate them. The obligation of maintenance includes nourishment, housing, clothing, medical care and education, which can be extended, and does often extend, beyond the age of majority.

25 Among other reasons, they would unlikely have accepted sexual self-restraint stemming from abortion restrictions.

This paradigm, which demands not to be treated differently (except in cases of positive action) on the basis of physical traits such as skin color, eye shape and hair type, is usually applied to the sexual sphere. However, as MacKinnon (1991) suggests, perhaps we should reconsider whether it is appropriate to apply the egalitarian canons relating to race in the sphere of sex.[26]

There may be reasonable distinctions on grounds of sex that would hardly be acceptable on grounds of race, since sex has more objective and solid biological bases than race. The latter tends to respond to perverse social constructs and convictions. Similar to race, gender is a social construct, which in various respects has also been, and still is, perverse. In the sphere of gender, the principle of equality would thus attempt to overcome old stereotypes about the differentiated roles between men and women within the family and society, rejecting biological essentialisms.[27] Accordingly, from the principle of equality, while natural differences derived from sex can justify the legislative decision to restrict abortion, the social differences associated with gender would rarely be reasonable justifications. More specifically, the survival of traditional roles that force mothers to care for their children, the home and the family in general, while freeing fathers, would be a good reason to defend abortion and its liberating and equalizing potential (Siegel, 1992).

In addition to promoting effective sex equality in childrearing, it is advisable that the public authorities help mothers without family support or sufficient resources to have and maintain their children.[28] At the same time, they should organize and promote institutional strategies to offer alternatives to abortion, such as centers for aiding young mothers and institutions where mothers, if they do not want to be so, could leave their babies to be put in adoption.[29] In Catalonia and Spain, as in other Western societies, there are many couples who cannot have children and wish to adopt without having to wait a number of years. A necessity and a desire that the public authorities should aim to reconcile.[30]

12 From abortion to infanticide: a dangerous slippery slope?

If it is possible to have an abortion until moments before the baby is born, then we can ask ourselves if the birth is really relevant enough to make distinctions between the regulation of abortion and that of infanticide (even more bearing in mind that the moment and the way of giving birth are increasingly under the control of the pregnant woman and the medical team). Undoubtedly, birth marks a major change of the relationship of the baby with the mother, both in terms of dependence of the former and in terms of impact on the latter. The debate on abortion and infanticide remains closely connected nonetheless. In fact, a regulation that downplays the value of life may not only lead to a normalization and banalization of abortion, but also to justifying infanticide and progressively normalizing it.

Renowned philosophers such as Michael Tooley (1972) and Peter Singer (1994) have spoken out in the direction of questioning the different treatment between the unborn and the newborn. They doubt that fetuses and infants are persons who own the right to life (as long as we are not willing to accept that other animals or living beings also have this right). I rather think that we should not conceive of the right to life as a rule that

26 On the various spheres of equality and the different ways of dealing with them, see Bossacoma (2021, pp. 4-5).

27 See Mill's (1869) classic work on the subjection of women.

28 See Snead and Glendon (2022). Helping women economically and socially is possibly the most effective way to protect fetuses, including the promotion of a fair burden sharing of childcare between sexes (MacKinnon, 1991, pp. 1320-1323). In fact, when the public authorities force pregnant women to gestate, they also end up forcing them, given the social roles and customs, to raise their children, since the natural fact of gestation results in a future social obligation of parenting that often stops them from giving them up for adoption (Siegel, 1992, pp. 371-377).

29 Although these safe-haven institutions for adoption should offer by default a high degree of security and anonymity to the mother willing to surrender her child for adoption, there could also be given the option of rejecting anonymity, especially if this would help to reduce the number of abortions. Yet, at this point, the debate on or problem about the biological father reappears, who may not be aware of the pregnancy nor consulted on putting his child into adoption.

30 Even if unborn or newborn children are not wanted by their biological parents, they may be wanted by other biological relatives, by potential foster parents and by other members of society. These potential feelings of love and kindness as well as responsibilities of care and maintenance can enhance the value of life. Instead of thinking in purely individual and current terms, we should strive to think more in societal, potential, and hypothetical terms.

operates in an all-or-nothing character, but as a principle that operates in a dimension of weight and, therefore, capable to be balanced and graduated, especially in the field of constitutional law.

It is a widespread conviction, confirms Dworkin (1994, p. 170), that abortion becomes steadily more problematic from conception to birth, during the development of the fetus into an infant. Among other reasons, the initial biological miracle (which for many people has a religious significance) should be added to the increasing value of human dedication and affections. Over time, either before or after birth, the creature has increasingly required more accumulated effort and has probably generated more hope and esteem.

Beyond whether those born or yet to be born hold a right to life in a strict or categorical sense, their protection is an expression of public commitment, as a society, to take human life seriously as an intrinsic and instrumental value.[31] Although they have not developed consciousness, conceptions, interests and life plans, it is usually a matter of time before they do so and, therefore, life also has an instrumental value in progress.[32]

However, "killing unwanted infants or allowing them to die has been a normal practice in most societies throughout human history and prehistory" (Singer, 1994, p. 129).[33] In advanced societies, it seems relatively common for infants who suffer severe disabilities and a poor quality of life (or a very short life expectancy) to be treated, with parental consent, in a way that they die quickly and without suffering.[34] To value a newborn's quality of life can also be regarded as a manifestation of respect for the value of life. After all, the ethics of the quality of life is not necessarily incompatible with the right to life understood as a principle. That said, the devaluation of human life could be a sign of a moral decline of postmodernity in which individuals are disconnected from society and their liberty is detached from responsibility.

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31 See the crucial distinction that Dworkin (1994, pp. 9-24) presents between the *intrinsic* value of life and what we here call *instrumental* value. While the latter derives more from the right to life in a rather strict sense, the former does not depend on holding the right to life, but on the value of life as such or in itself, which allows to untie the defense of life from the ownership of the right to life. It therefore allows us to question abortion independently of whether or not the fetus is entitled to the right to life (*detached objection*), unlike the criticism based on attributing to the fetus the condition of person and a right to life (*derived objection*). In an analogous sense, Dworkin points out that the legal system or public authorities can protect a species in danger of extinction, or Nature in general, and the artistic creations of an author or period, or art in general, with no need to attribute a right to life to these beings or things or, more generally, without the need for these subjects or objects to be holders of specific rights or interests. Although in general fetuses have not been considered persons in a constitutional sense, fetuses have been legislatively and judicially considered persons in matters related to property rights, crimes against the unborn, prenatal damage and child neglect (Calabresi, 1985, p. 94; MacKinnon, 1991, p. 1309). In any case, the fact that fetuses are not considered persons in a constitutional sense does not mean that they do not deserve more public protection than a legal person such as an association or a company. The argument that the fetus is not a person in a legal sense or has no constitutional rights is largely irrelevant to the debate on the legitimacy and constitutionality of public protection of potential life (Ely, 1973, pp. 925-926).

32 Unlike Article 4 of the American Convention on Human Rights, which provides that the right to life "shall be protected by law and, in general, from the moment of conception", Article 2 of the European Convention on Human Rights neither defines "everyone" whose "life" is protected nor stipulates when this protection is to begin. And yet, according to the European Court of Human Rights, the potentiality of the embryo or fetus to become a person requires protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2 (*Vo v. France* case of 2004). In Spain, although the Constitutional Court does not consider the unborn a person in a legal sense nor a holder of constitutional rights, it maintains that "human life in formation" is a constitutionally protected good under the constitutional right to life (Judgements 53/1985 and 44/2023).

33 In similar vein, see, among others, Moseley (1986) and Bechtold and Graves (2010).

34 See also Singer (1994).

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