The ‘European’ Future of American Abortion Law: *Dobbs*, Federalism and Constitutional Equality

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This article provides an innovative comparative examination of the Dobbs *ruling of the United States (U.S.) Supreme Court and the resulting new U.S. legal framework on reproductive rights, in light of the European experience with abortion federalism. The effect of* Dobbs *is to return regulation of abortion to the 50 U.S. states, with the consequence that major divergences are emerging across the United States. In this context, important new constitutional questions are coming to the fore in the United States, including whether women residing in states that ban abortion can access information on services available in states where it is legal, and travel out of state to seek lawful interruption of pregnancy. These legal questions are déjà vu for comparative legal scholars, as they have long shaped European abortion law. In the European Union (E.U.), states have long had different regulations of abortion. And while supranational courts shied away from establishing a transnational right to abortion, they established a woman's right to receive information about abortion services, and to travel out of state to lawfully end a pregnancy—a jurisprudence which had profound consequences especially for Ireland, long the E.U.*

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member state with the strictest abortion ban. As such, the article claims that Dobbs *is creating a 'European' future for U.S. abortion law. Yet, as the article critically highlights, a federal system in which women can escape the Draconian abortion bans existing in some states raises profound normative questions in terms of constitutional equality. As the ability of women to opt-out of abortion bans is ultimately dependent on financial resources, which are strictly correlated to race and social class, the new U.S. legal geography of abortion, like the old E.U. one, has discriminatory consequences which are difficult to square with the constitutional democratic commitment to the equal protection of the laws.*

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INTRODUCTION

In the June 2022 decision, *Dobbs v. Jackson Women's Health Organization*, the Supreme Court of the United States held that the U.S. Constitution does not protect a right to abortion,[1] overruling its 1973 *Roe v. Wade* precedent.[2] The *Dobbs* ruling—arguably the most important constitutional rights case in a generation—has catalyzed the attention of the public across the world,[3] and led to a vigorous debate

1. 142 S. Ct. 2228, 2242 (2022).

2. 410 U.S. 113, 165 (1973).

3. *See,* e.g., Adam Liptak, *In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/roe-wade-overturned-supreme-court.html [https://perma.cc/Q9LY-U6MC]; *Droit à l'avortement: la Cour suprême des Etats-Unis revient sur l'arrêt Roe vs Wade et laisse les Etats américains libres d'interdire l'IVG*, LE MONDE (June 24, 2022), https://www.lemonde.fr/international/article/2022/06/24/droit-a-l-avortement-la-cour-supreme-des-etats-unis-revient-sur-l-arret-roe-vs-wade-et-laisse-les-etats-americains-libres-d-interdire-l-ivg_6131955_3210.html [https://perma.cc/LV7P-8PKR]; Iker Seisdedos, *El Tribunal Supremo deroga el derecho al*

in academia. By returning the issue of abortion regulation to the fifty U.S. states, the Court's ruling has been welcomed from a conservative perspective as both promoting federalism and democratic self-governance, as well as permitting pro-life efforts to protect the life of the unborn.[4] However, by taking the unprecedented step of canceling a constitutional right, and thus upending a half-century of binding precedent, the Court's ruling has been bashed from a liberal perspective for threatening women's right to choose and undermining the rule of law.[5] Indeed, the changed composition of the Court, resulting from decades of partisan judicial confirmation battles,[6] and its conservative ideological orientation have been indicated as the main—if not only—explanation for the *Dobbs* decision.[7]

The purpose of this article is to enrich the discussion about *Dobbs* through the prism of comparative law—a perspective that so far has been neglected in legal commentaries about the U.S. Supreme Court ruling.[8] In particular, this article aims to compare the post-*Dobbs* regulation of abortion law in the United States with that of the

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aborto en Estados Unidos, EL PAIS (June 24, 2022), https://elpais.com/sociedad/2022-06-24/el-tribunal-supremo-deroga-el-derecho-al-aborto-en-estados-unidos.html [https://perma.cc/DZW7-ACHQ]; Martin Wall, Roe v Wade*: US Supreme Court Strikes Down Abortion Rights*, THE IRISH TIMES (June 24, 2022), https://www.irishtimes.com/world/us/2022/06/24/us-supreme-court-overturns-roe-v-wade-abortion-rights-ruling/ [https://perma.cc/7SRU-B8C6]; *La Corte suprema Usa cancella il diritto constituzionale all'aborto dopo 50 anni. In 13 Stati tra cui Texas scatta subito divieto*, IL SOLE 24 ORE (June 24, 2022), https://www.ilsole24ore.com/art/corte-suprema-usa-cancella-storica-sentenza-diritto-all-aborto-AETh9AiB?refresh_ce=1 [https://perma.cc/J5NY-8FRU].

4. Before *Dobbs*, see Mary Ann Glendon & O. Carter Snead, *The Case for Overturning* Roe, 49 NAT'L AFFS., Fall 2021 ("[B]asic fidelity to the Constitution and the rule of law . . . warrant overruling"), https://www.nationalaffairs.com/publications/detail/the-case-for-overturning-roe [https://perma.cc/W4EN-BTNN].

5. *See* Laurence H. Tribe, *Deconstructing* Dobbs, N.Y. REV. OF BOOKS (Sept. 22, 2022), https://www.nybooks.com/articles/2022/09/22/deconstructing-dobbs-laurence-tribe/ [https://perma.cc/FL86-E9A8].

6. *See generally* CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS (2009) (discussing politicization of the U.S. Supreme Court appointment process).

7. *See* Linda Greenhouse, *Requiem for the Supreme Court*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/opinion/roe-v-wade-dobbs-decision.html [https://perma.cc/Q7ZJ-FC4N].

8. *But see* I. Glenn Cohen, *Travel to Other States for Abortion after* Dobbs, 22 AM. J. BIOETHICS 42, 42–44 (2022); Stephen Gardbaum, *State and Comparative Constitutional Law Perspectives on a Possible Post-*Roe *World*, 51 ST. LOUIS U. L.J. 685, 694–99 (2007) (examining, well before *Dobbs*, the legal outlook of a post-*Roe* world in the United States through a comparative federalism perspective).

European Union (E.U.). From a European perspective, in fact, the new U.S. abortion landscape looks like a striking déjà vu. For decades now, E.U. member states have had different norms regulating women's right to seek termination of pregnancy—with some countries at the vanguard of protecting women's right to choose, and others imposing strict abortion bans.[9] Yet, primarily through the jurisprudence of the E.U. Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), women in E.U. member states that restrict abortion have been granted both a right to receive information about abortion services lawfully provided in other states, and a right to travel out of state to seek legal medical termination of pregnancy. As such, in the E.U. federal arrangement,[10] abortion pluralism coexists with free speech and the right to free movement, creating a complex legal constellation, ripe with consequences for equality.

The argument of this article is that *Dobbs* effectively leads to a European future for U.S. abortion law. The main consequence of the U.S. Supreme Court ruling is to return the regulation of abortion to the fifty U.S. states. Hence, while some (blue) states had, or have, adopted constitutional or legislative provisions protecting women's reproductive rights, other (red) states have prohibited voluntary interruption of pregnancy immediately under so-called trigger laws, or are about to do so through new legislation. In fact, a state-by-state battle is currently at play across the United States and being fought through state legislatures, state supreme courts, and state ballot initiatives. Because of the variation between states' rules on abortion access, new legal questions are shaping U.S. abortion law, including whether women in states with restrictive abortion bans have a right to access information on abortions provided out of state and a right to interstate travel to seek abortion. In comparative terms, these are exactly the key legal questions that the ECJ and the ECtHR had to address in Europe decades ago. As things stand, it appears that U.S. Supreme Court precedents, notably

9. *See* Federico Fabbrini, *The European Court of Human Rights, the EU Charter of Fundamental Rights and the Right to Abortion:* Roe v. Wade *on the Other Side of the Atlantic?*, 18 COLUM. J. EUR. L. 1, 4 (2011); *see also* FEDERICO FABBRINI, FUNDAMENTAL RIGHTS IN EUROPE: CHALLENGES AND TRANSFORMATIONS IN COMPARATIVE PERSPECTIVE 195–247 (2014).

10. That the E.U. can be considered a federal system is sometime the object of political or academic contention. *See generally* PAVLOS ELEFTHERIADIS, A UNION OF PEOPLES (2020) (arguing that the E.U. remains an international organization). There is widespread agreement, however, that for all practical purposes the E.U. presents federal-like features and can be conceptualized through the prism of federalism. *See* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 455 (1994); *see also* SIGNE REHLING LARSEN, THE CONSTITUTIONAL THEORY OF THE FEDERATION AND THE EUROPEAN UNION 1 (2021).

Bigelow v. Virginia,[11] and *Saenz v. Roe*,[12] offer protection to those rights—hence keeping a door open for women to escape strict abortion bans.

Nevertheless, as the article points out from a normative perspective, a pluralist legal system like the one Europe has had—and the United States now has—raises serious equality problems. In particular, such a system discriminates between well-off women who have the resources to opt out of restrictive abortion bans by traveling out of state, and poor women who instead remain to suffer the *dura lex, sed lex*. This system also has a disproportionately negative impact on racial and social minorities, due to higher poverty rates among people of color in the United States. By some socio-legal accounts, this policy outcome is deliberate and consistent with a right-wing ideological stance, which favors criminalization of specific gender, racial, and social groups.[13] But from a constitutional viewpoint, this state of affairs is largely unsustainable in a democracy which commits to respect "the equal protection of the laws."[14] As Vicki Jackson has argued, comparative law can help shed light on one's own legal system:[15] Along these lines, the European federal experience with abortion regulation provides a cautionary tale about what is next for U.S. abortion law, and perhaps an equality argument for change through political mobilization and prospective litigation.

The article is structured as follows: Section I sets the background by summarizing the U.S. legal framework of abortion regulation before *Dobbs*. Section II reviews the U.S. Supreme Court's *Dobbs* ruling and considers its consequences, mapping the emerging patchwork of U.S. abortion federalism. Section III enlarges the picture by considering the European experience with abortion federalism, highlighting the profound diversity in reproductive rights across the E.U., and identifying the four main models of abortion regulation

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11. 421 U.S. 809, 829 (1975) (declaring unconstitutional a Virginia statute that prohibited the publication of information about abortion clinics lawfully providing elective termination of pregnancies in the state of New York).

12. 526 U.S. 489, 503 (1999) (holding that the Constitution protects a right to travel from one state to another).

13. *See generally* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (2020); *see also* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 192 (2020).

14. U.S. CONST. amend. XIV, § 1.

15. Vicki Jackson, *Narrative of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 258 (2001) (arguing that comparative law can be used as a mirror—that is—as an instrument to better understand one's own legal system by looking at the experiences of others).

existing in its member states. Section IV assesses the case law of the ECJ and the ECtHR—arising out of the historic Irish abortion ban—dealing with the right to provide information about overseas abortion services in states with abortion bans, and the right of women to travel out of state to seek legal termination of abortion. In light of this jurisprudence, Section V discusses the equality challenges that a system based on abortion pluralism generates for women, effectively discriminating on the basis of wealth and race—and thus highlights what is in my view the most problematic constitutional consequence of *Dobbs*. Finally, the conclusion identifies some final comparative legal trends.

Before starting, however, some caveats are required. I am conscious that the topic of abortion is highly sensitive, and that people have strong opinions—in fact, abortion tends to be a clash of absolutes.[16] Moreover, I am aware that when dealing with such a controversial topic, it is difficult for an author to resist the influence of his or her personal conceptions regarding the serious moral questions at the core of abortion issue. From this point of view, the very fact that I formulate the issue as a "woman's right to an abortion" reveals my inclination toward a more liberal position, which supports the protection of abortion[17]—a position with which pro-life advocates would certainly disagree. Having revealed my subjective viewpoint on the moral issue presented, I have sought to adopt, throughout my assessment, an analytical stance. This piece is not a moral defense (or criticism) of abortion. Rather, it is a comparative study of abortion law,[18] designed to explore the constitutional complexity, and predicaments, that abortion federalism raises in the United States, in light of the analogous European experience in this field.

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16. *See generally* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1991).

17. For a classical liberal argument in favour of a woman's right to choose whether to seek an abortion, see RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 32–33 (1994) (defining as a "paradigm liberal position on abortion" a view that (1) rejects the extreme option that abortion is morally unproblematic; (2) nevertheless regards abortion as morally justified for a variety of reasons; (3) considers a woman's concern for her own interests as an adequate justification for abortion if the consequences of childbirth would be permanent and grave for her and her family's life; and (4) believes that, at least until late in pregnancy, the state has no business intervening in a woman's right to choose).

18. On the usefulness of a comparative approach to the study of abortion law, albeit with a different purpose and geographical focus, see generally Weiwei Cao, *"Glorious Mothers" and "Rational Women": A Comparative Analysis of Chinese and English Regulatory Models of Abortion*, 67 AM. J. COMP. L. 745 (2019).

I. THE U.S. LEGAL FRAMEWORK OF ABORTION BEFORE *DOBBS*

The U.S. legal and constitutional history of abortion is well known.[19] I have provided an overview elsewhere, so a short summary suffices here.[20] Abortion was largely unregulated at the time of the Founding, but by the middle of the nineteenth century almost all states had adopted abortion bans—a point which the majority opinion in *Dobbs* took pains to emphasize, attaching two Appendices including the ruling of dozens of state laws from the 1800s.[21] The Court reported these to confirm that the original meaning of the Fourteenth Amendment to the U.S. Constitution could not include abortion protections.[22] Yet, the primary aim of these laws was to protect the potential mother from the abortionist, at a time when the medical profession was not consolidated, and it is only in the early twentieth century that anti-abortion laws were redrafted with the goal of protecting the fetus rather than protecting the woman.[23]

By the 1960s, however, social and political pressures had emerged in many states to change restrictive abortion legislations.[24] On the one hand, there were efforts to reform abortion laws, as visible in the 1962 Model Penal Code, published by the American Law Institute.[25] The Code removed the criminal sanctions for the performance of an abortion when the medical practitioner certifies that "there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse."[26] On the other hand, however, pressure also grew to abolish abortion restrictions, as

19. *See* ZIEGLER, supra note 13, at xi–xiii; *see generally* N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE*: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY (2010); DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994).

20. *See also* Fabbrini, *supra* note 9, at 35–49.

21. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285–300.

22. *Id.* at 2252–53.

23. *Supra* note 19, at 47.

24. *See* MARK TUSHNET, ABORTION: CONSTITUTIONAL ISSUES 45 (1996).

25. *See* Edward Veitch & R.R.S. Tracey, *Abortion in the Common Law World*, 22 AM. J. COMP. L. 652, 664 (1974).

26. MODEL PENAL CODE § 230.3(2) (1962).

visible in legislation adopted by some states introducing abortion on demand up to the first trimester or later.[27]

Because the reform of state laws proceeded unevenly, however, advocates for changes began to mount challenges against restrictive abortion laws before both state and federal courts.[28] At the state level, in particular, the California Supreme Court ruled in 1969 that the state's act prohibiting abortion, except when necessary to save the woman's life, was unconstitutionally vague under the state constitution.[29] At the federal level, moreover, courts began to embrace claims that restrictive state abortion laws conflicted with the fundamental rights guarantees protected by the U.S. Constitution[30], and notably, with the right to privacy which the U.S. Supreme Court had recognized in 1965 in *Griswold v. Connecticut*.[31]

Eventually, in the paramount 1973 *Roe v. Wade* decision,[32] the U.S. Supreme Court found that the U.S. Constitution protected an unenumerated right to abortion and that state laws prohibiting abortion were unconstitutional.[33] In one of its most famous rulings, the Court held seven-to-two that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[34] The Court rejected the argument that a woman's right to abortion was absolute; rather, it acknowledged that "some state regulation in areas protected by that right is appropriate."[35] The Court refused to speculate on "the difficult question of when life begins."[36] But it unequivocally stated that the fetus could not be regarded as a person

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27. *See* New York Penal Law § 125.05.3 (1972) (justifying abortion upon request within 24 weeks from the commencement of pregnancy); Hawaii Rev. Stat. § 453–16(c) (1972) (justifying abortion on demand until viability).

28. *See* GARROW, *supra* note 19.

29. People v. Belous, 71 Cal. 2d 954 (Cal. 1969). On the approach of the California judiciary on the issue of abortion, *see* People v. Abarbanel, 239 Cal. App. 2d 31 (1965) (holding, under the aegis of the pre-1967 legislation, that abortion was not criminal if the doctor performing it believed in good faith that the mother would have committed suicide).

30. *See* HULL & HOFFER, *supra* note 19.

31. *See generally* 381 U.S. 479 (1965).

32. 410 U.S. 113 (1973).

33. The decision of the U.S. Supreme Court in *Roe v. Wade* is the object of detailed assessment in any U.S. constitutional law casebook. *See, e.g.*, GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 530 (13th ed. 1997). For a comparative perspective, see generally MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW (1979); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999).

34. *Roe*, 410 U.S. at 153.

35. *Id.* at 154.

36. *Id.* at 159.

within the meaning of the Fourteenth Amendment in order to justify restrictive states' anti-abortion statutes.[37] In light of this constitutional assessment, the Court developed its well-known "trimesters guidelines," clearly dictating the legitimate contours within which a state could regulate abortion:[38]

> (a) For the stage prior to approximately the end of the first trimester [of pregnancy], the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[39]

Roe recognized a constitutional right to abortion in the U.S. but generated strong reactions[40] and effectively transformed the issue of abortion into "*the* central legal problem" of U.S. constitutional law.[41] Congress debated several constitutional amendment proposals to overrule *Roe*[42] and with the 1976 Hyde Amendment, limited its impact by prohibiting the financing of abortion through federal funds.[43] Moreover, major reactions to the Supreme Court ruling occurred in several

37. *See* Veitch & Tracey, *supra* note 25, at 667; DWORKIN, *supra* note 17.

38. *See* HULL & HOFFER, *supra* note 19, at 176; TUSHNET, *supra* note 24, at 73.

39. *Roe*, 410 U.S. at 164–65.

40. *Compare* John Hart Ely, *The Wages of the Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (criticizing the decision), *with* Laurence Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (defending it).

41. Ann Althouse, *Stepping out of Professor Fallon's Puzzle Box: A Response to "If* Roe *Were Overruled*,*"* 51 ST. LOUIS U. L.J. 761, 761 (2007) (emphasis in original). *See also* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. CIV. RTS-CIV. LIB. L. REV. 373 (2007).

42. *See* Hull & Hoffer, *supra* note 19, at 186 ("within three years [of *Roe*] more than fifty differently worded amendments to ban or cut back on abortion had reached the floor of Congress.").

43. This was accomplished via the 1976 Hyde Amendment to Title X of the Public Health Service Act, Pub. L. 94-439, § 209, 90 Stat. 1434 (1976), which was systematically reenacted in successive Health Service appropriations bill and is now codified as Pub. L. No. 111-8, H.R. 1105, Div. F, Title V, Gen. Provisions, § 507(a) (2009).

U.S. states.[44] Indeed, a handful of states enacted statutes that were facially incompatible with *Roe*[45] while others passed legislation purporting to circumvent the Court's decision by denying public financing for abortion, and setting strict conditions under which abortions would be allowed.[46] In a series of decisions in the two decades following *Roe*, the Supreme Court struck down many such state laws, including: the imposition of spousal consent,[47] mandatory waiting periods,[48] and the requirement that abortions be performed only in hospitals.[49] At the same time, the Supreme Court upheld state laws imposing women's informed consent[50] and requiring parental notification.[51] Moreover, in *Maher v. Roe*,[52] and *Harris v. McRae*,[53] the Court declared constitutional both state and federal laws foreclosing public funding for elective abortions.[54]

In the 1992 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[55] the U.S. Supreme Court reaffirmed *Roe* but retracted its rigid trimester formula.[56] In a plurality opinion, the Supreme Court upheld *Roe*'s core holding that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[57] However, it rejected *Roe*'s trimester framework,

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44. For an assessment of the federalism issues involved, see Anthony Bellia, *Federalism Doctrines and Abortion Cases*, 51 ST. LOUIS U. L.J. 767 (2007).

45. *See* Veitch & Tracey, *supra* note 25, at 668; Glen Halva-Neubauer, *Abortion Policy in the Post-Webster Age*, 20 PUBLIUS 27, 32–33 (1990).

46. *See* TUSHNET, *supra* note 24, at 76–78; HULL & HOFFER, *supra* note 19, at 189.

47. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

48. *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983).

49. *Id.*

50. *See Danforth*, 428 U.S. at 52. Informed consent requirements are a core component of the relationship between medical doctors and patients and require doctors to disclose and discuss with the patient the patient's diagnosis (if known), the nature and purpose of a proposed treatment or procedure, its risks and benefits, and the alternatives (if available).

51. *See* Planned Parenthood Ass'n of Kan. City v. Ashcroft, 462 U.S. 476, 491 (1983).

52. *See* Maher v. Roe, 432 U.S. 464, 479–80 (1977) (upholding the constitutionality of a Connecticut statutory provision denying public funding for elective abortions).

53. *See* Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding the constitutionality of the Hyde Amendment).

54. *See* GOODWIN, *supra* note 13, at 64–69.

55. 505 U.S. 833, 870 (1992).

56. For the trimester formula, see generally HULL & HOFFER, *supra* note 19, at 214; GARROW, *supra* note 19, at 600.

57. *Casey*, 505 U.S. at 879.

replacing it with the "undue burden" test.[58] Under this test, a state's regulation of abortion would be regarded as "invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[59] Applying the undue burden test in *Casey*, the U.S. Supreme Court upheld a number of provisions in the Pennsylvania law under review, including the imposition of informed consent and a waiting period for women seeking abortions.[60] However, the Court struck down the spousal notification requirement, arguing that due to the threat of violence that a woman might face if she had to inform her partner of her decision to seek an abortion,[61] the provision represented a substantial obstacle to a woman's right to choose.[62]

Although *Casey* saved *Roe*,[63] the test that the U.S. Supreme Court developed empowered further legislative regulation, and restrictions, of abortion.[64] In fact, in the two decades after *Casey* an ever-growing number of abortion restrictions—commonly known as targeted regulations for abortion providers ("TARP")—was adopted both at the federal and state level.[65]

Arguably, however, the climax of states' efforts to circumvent *Roe* and banish abortion for all practical purposes in their jurisdiction was taken by Texas, which in 2021 enacted Senate Bill 8, the so-called Heartbeat Act.[66] This statute outlawed abortion in the state after six weeks of pregnancy—a timeframe clearly at odds with *Roe*'s holding. However, to avoid a facial challenge seeking judicial review of its

58. *See* TUSHNET, *supra* note 24, at 82. On the undue burden test, see also Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77, 142 (1995); Earl Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 19 (1992).

59. *Casey*, 505 U.S. at 878.

60. *Id.* at 879–87.

61. *Id.* at 893.

62. *Id.* at 894.

63. *See* Ronald Dworkin, Roe *Was Saved*, *in* FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 117 (1996).

64. *See* Brent Weinstein, *The State's Constitutional Power to Regulate Abortion*, 11 J. CONTEMP. LEGAL ISSUES 461, 462–64 (2000); Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008). *See also* HULL & HOFFER, *supra* note 19, at 258 (stating that the Court made clear "that state regulations [would] almost invariably pass[] muster").

65. *See also* Richard Fallon, *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L. J. 611 (2007).

66. Tex. Health & Safety Code Ann. § 171.204(a).

constitutionality, the statute prevented state public officials from enforcing the law. Rather—in what has been termed a form of "vigilante federalism"[67]—the Texas statute enlisted ordinary citizens in the enforcement of the law by awarding a monetary prize of at least $10,000 to private individuals who sued fellow citizens who had sought termination of pregnancy after six weeks, or the medical professionals who performed them. The Texas statute was promptly criticized as a shrewd legal solution to avoid judicial scrutiny. However, despite the novelty of the question, in the 2021 so-called shadow docket[68] ruling in *Whole Woman's Health v. Jackson*,[69] the U.S. Supreme Court declined to halt the Texas statute. This dealt a devastating blow to the protection of abortion rights, largely curtailing abortion access in the second largest U.S. state.[70]

At the dawn of the 2021–22 U.S. Supreme Court term, therefore, the picture of abortion regulation in the U.S. revealed a "crazy-quilt pattern of the laws"[71] with multiple restrictions on access to termination of pregnancy in large swaths of the country. Yet, formally, *Roe* remained the law of the land, with abortion rights being constitutionally protected by the U.S. Supreme Court.[72] In particular, in *Whole Woman's Health v. Hellerstedt*, in 2016,[73] the Supreme Court struck down a Texas statute which required admitting privilege requirements for doctors performing abortions in the state, and obliged abortion clinics to meet the standards for ambulatory surgical centers, holding that this unduly interfered with a woman's right to seek termination of pregnancy. Moreover, in *June Medical Service v. Russo*, in 2020,[74] the U.S. Supreme Court reached the same conclusion on *stare decisis* grounds, ruling that a Louisiana law which, like the Texas law at stake in *Hellerstedt*, placed hospital admission requirements on abortion clinics' doctors, was unconstitutional. Hence, despite a number of

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67. *See generally* Jon Michaels & David Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187 (2022).

68. *See generally* Stephen I. Vladek, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 128–32 (2019) (explaining the concept of shadow docket).

69. 142 S. Ct. 522 (2021).

70. *See generally* Katrina Morris, Whole Woman's Health v. Jackson*: One Texas Law's Procedural Peculiarities and Its Monolithic Threat to Abortion Access*, 48 AM. J. L. & MED. 158 (2022).

71. HULL & HOFFER, *supra* note 19, at 265.

72. *See* Marc Spindelman, *Embracing* Casey*:* June Medical Services L.L.C. v. Russo *and the Constitutionality of Reason-Based Abortion Bans*, 109 GEO. L. J. ONLINE 115, 115 (2020).

73. 579 U.S. 582 (2016).

74. 140 S. Ct. 2103 (2020).

retreating steps, the Supreme Court upheld a constitutional right to abortion in the United States[75]—until 2022.

II. *DOBBS* AND THE NEW U.S. LEGAL FRAMEWORK OF ABORTION

The law at stake in *Dobbs* was a 2018 Mississippi statute—the Gestational Age Act[76]—which prohibited abortion after 15 weeks of pregnancy, save in case of medical emergency or severe fetal abnormality. Lower federal courts had enjoined the application of the Act as inconsistent with *Roe*'s holding that states cannot forbid abortion pre-viability. In a six-to-three ruling, the U.S. Supreme Court, however, reversed the decisions of the appeals court and upheld Mississippi's law. In the majority opinion, five Justices (Alito, Thomas, Gorsuch, Kavanaugh, and Barrett) took the unprecedented step of explicitly overruling *Roe*, holding that it was "egregiously wrong."[77] In a separate concurring opinion, Chief Justice Roberts agreed with the judgment but on different grounds, arguing that the Court needed not overrule *Roe* to uphold the statute under review, and criticizing the majority for disregarding precedents and the principle of *stare decisis*. Three Justices (Breyer, Sotomayor, and Kagan) filed a dissenting opinion, lambasting the majority for its decision. Finally, two further concurring opinions were filed by Justices Kavanaugh and Thomas where they further clarified their thoughts on some consequential issues stemming from the Court's judgment they joined.

The Court's majority opinion written by Justice Alito—a draft of which, in an unprecedented break of the confidentiality of judicial deliberation, was leaked in May 2022—roundly held "that *Roe* and *Casey* must be overruled"[78] and that the issue of abortion should be returned "to the people's elected representatives."[79] The majority embraced a textual reading of the U.S. Constitution and stated that "the Court has long been 'reluctant' to recognize rights that are not mentioned in the Constitution."[80] It then engaged in a historical examination of the regulation of abortion, affirming that "until the latter part of the 20th century, there was no support in American law for a

75. *See generally* Eric R. Claeys, Dobbs *and the Holdings of* Roe *and* Casey, 20 GEO. J.L. & PUB. POL'Y 283 (2022).

76. Miss. Code Ann. §41-41-191.

77. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

78. *Id*. at 2242.

79. *Id*. at 2243.

80. *Id*. at 2247.

constitutional right to obtain an abortion."[81] The Court pointed out from an originalist viewpoint that "[b]y the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy."[82] Hence, its "inescapable conclusion [wa]s that a right to abortion is not deeply rooted in the Nation's history and traditions."[83]

In light of this, the majority engaged with the question of whether overruling *Roe* was consistent with the principle of *stare decisis*. The Court acknowledged that "*stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends."[84] Yet, the majority mentioned famous previous over-rulings by the Supreme Court,[85] and advanced a five-factor test "in favor of over-ruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning; the 'workability of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[86] Based on this matrix, the majority stated that "*Roe*'s constitutional analysis was far outside the bounds of any reasonable constitutional interpretation,"[87] and "failed to ground its decision in text, history, or precedent."[88] At the same time, it affirmed that "*Casey*'s 'undue burden' test has scored poorly on the workability scale"[89] and that its abortion jurisprudence had led "to the distortion of many important but unrelated legal doctrines."[90] Finally, the majority claimed that overruling *Roe* would not undermine reliance interests, stating that it "is hard for anyone—and in particular, for a court, to

81. *Id.* at 2248.

82. *Id.*

83. *Id.* at 2253.

84. *Id.* at 2261.

85. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding school segregation unconstitutional and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the principle of separate but equal)); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding the New Deal legislation and overruling *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923) (striking down minimum wages law as inconsistent with freedom of contract)); and W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (declaring that public school students could not be compelled to salute the flag and overruling *Minersville School District. v. Gobitis*, 310 U.S. 586 (1940) (upholding laws requiring salute to the flag)).

86. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

87. *Id.*

88. *Id*. at 2266.

89. *Id*. at 2272.

90. *Id*. at 2275.

assess . . . the effect of the abortion right on society and in particular on the lives of women."[91]

However, the view of the majority was forcefully faulted as disingenuous by the dissenters, who immediately stressed how "[f]or half a century, *Roe* . . . [and *Casey*] have protected the liberty and equality of women."[92] In their joint dissent, Justices Breyer, Sotomayor, and Kagan emphasized how the majority opinion led to an "upheaval in law and society,"[93] and threatened the sustainability of a large number of other Supreme Court precedents.[94] As they pointed out, by overruling *Roe* on originalist grounds, the Court was flouting precedents and undermining the rule of law.[95] No factual or legal change had occurred since the Court had last revisited the question of the constitutionality of abortion, so "[t]he Court reverses course today for one reason and one reason only: because the composition of this Court has changed."[96] In fact, the dissenters noted in comparative perspective that since *Roe*, "the global trend . . . has been toward increased provision of legal and safe abortion care."[97] Moreover, the dissenters faulted the majority for arguing that *Dobbs* removed the Supreme Court from the abortion battles, and stressed how, on the contrary, "the majority's ruling today invites a host of questions about interstate conflicts."[98] As such, the dissenters bashed the majority because "all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*'s and *Casey*'s protections."[99]

In a separate opinion, Chief Justice Roberts concurred in the judgment—upholding the constitutionality of Mississippi's Gestational Act—but on different grounds than the majority, which he faulted for creating "a serious jolt in the legal system."[100] Proceeding on the understanding that "[i]f it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more,"[101] the Chief Justice affirmed that "the drastic step of altogether eliminating the

91. *Id*. at 2277.

92. *Id.* at 2317 (Breyer, Sotomayor and Kagan, J.J., dissenting).

93. *Id*. at 2319.

94. *Id*.

95. *Id*. at 2333.

96. *Id*. at 2319–20.

97. *Id*. at 2340.

98. *Id*. at 2337.

99. *Id*. at 2343.

100. *Id.* at 2316 (Roberts, C.J., concurring).

101. *Id*. at 2311 (emphasis in original).

abortion right first recognized in *Roe*" was unnecessary.[102] Rather, he proposed discarding the viability rule set in *Roe* and striking a new balance between women's reproductive rights and the state's interest in protecting fetal life. Conclusively, he affirmed that the Mississippi law under review ought to be upheld because it "allows abortion up through fifteen weeks, providing an opportunity to exercise the right *Roe* protects."[103]

In his concurring opinion, on the other hand, Justice Thomas clarified that he would have gone further than the majority, revising much more fundamentally the Court's "substantive due process precedents."[104] Specifically, he claimed that the originalist interpretation of the Constitution that the majority embraced in *Dobbs* logically led to discard the recognition of rights such as homosexual sex and marriage under the Fourteenth Amendment.[105] On the contrary, in his concurrence Justice Kavanaugh qualified his support for the majority opinion by clarifying that "the Court's decision today *does not outlaw* abortion throughout the United States,"[106] and "that the Constitution does not freeze American people's rights as of 1791 or 1868."[107] Nonetheless, Kavanaugh affirmed that *Roe* ought to be overruled on *stare decisis* grounds as, in that judgment, the Court had "erroneously assigned itself the authority to decide a critically important moral and policy issue that the Constitution does not grant this Court the authority to decide."[108]

The consequence of *Dobbs* has been to return decisions about the right to abortion to the states.[109] As a result, the U.S. Supreme Court ruling has quickly generated a federalism patchwork, with abortion rights being prohibited in some U.S. states while protected in others.[110] On the one hand, as mentioned, several states had previously enacted trigger laws, which automatically outlawed abortion following the overruling of *Roe*. New abortion restrictions, or outright bans, were also adopted by legislatures in some states, e.g., North

102. *Id*. at 2313.

103. *Id*. at 2315.

104. *Id.* at 2304 (Thomas, J., concurring).

105. *Id*. at 2301.

106. *Id.* at 2305 (Kavanaugh, J., concurring) (emphasis in original).

107. *Id.* at 2306.

108. *Id*. at 2307.

109. *Id.* at 2284 (majority); *see also id.* at 2306 (Kavanaugh, J., concurring).

110. *See* Robert L. Bentlyewski, *Abortion Rights Under State Constitutions: A Fifty-State Survey*, 90 FORDHAM L. REV. ONLINE 201, 203 (2021).

Carolina,[111] and approved by supreme courts in others, e.g., Idaho.[112] On the other hand, however, well before *Dobbs*, a number of states had autonomously decided to protect abortion rights as a matter of state law. In fact, as famously pointed out by Justice Brennan, a distinctive feature of the U.S. federal system for the protection of fundamental rights is the possibility for state constitutions to offer greater fundamental rights protection than the minimum provided by federal law.[113] As such, several states decided to supersede the federal standard by offering even greater constitutional protection for the right to abortion than the federal minimum. Following the lead of the California Supreme Court,[114] five state supreme courts concluded that their state constitutions contained an independent right to abortion,[115] and inferior courts in nine other states recognized a state constitutional right to abortion or privacy.[116] At the same time, after *Dobbs*, in a number of states, including Vermont, voters rushed to further entrench women's reproductive rights in state constitutions.[117]

In fact, *Dobbs* quickly spurred a massive legal battle to secure access to lawful abortion being fought in state courts, state legislatures, and state referenda across the United States. In less than six months since *Dobbs*, this flurry of activity led to a stark polarization across the country.[118] In fact, abortion rights emerged as one of the most

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111. *See* Hannah Schoenbaum et al., *Abortion after 12 Weeks Banned in North Carolina after GOP Lawmakers Override Governor's Veto*, AP NEWS (May 17, 2023), https://apnews.com/article/abortion-veto-override-north-carolina-4282913637b499490494dd3e3cce3478 [perma.cc/7PL7-K97L].

112. *See* Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1148–49 (Idaho 2023).

113. *See* William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *see also* Stewart Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 707 (1983).

114. *See* Comm. to Def. Reprod. Rights v. Myers, 625 P.2d 779, 796 (Cal. 1981) (holding that the right to "procreative choice" under the California Constitution is "at least as broad as that described in *Roe v. Wade*").

115. On the expansive interpretation of state constitutions offered by some state courts in the field of abortion law, see Janice Steinschneider, *State Constitutions: The New Battlefield for Abortion Rights*, 10 HARV. WOMEN'S L.J. 284, 284–87 (1987).

116. *See* Gardbaum, *supra* note 8, at 687.

117. *See* Wilson Ring, *Gov. Scott Signs Amendment Protecting Abortion Rights in Vermont*, BURLINGTON FREE PRESS (Dec. 13, 2022), https://www.burlingtonfreepress.com/story/news/politics/government/2022/12/13/vermont-abortion-rights-gov-phil-scott-signs-constitutional-amendment/69726055007/ [https://perma.cc/U6QM-R9F7].

118. *See* Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022), https://www.pewresearch.org/fact-

powerful mobilizing issue for voters in the November 2022 midterm elections, and other special ballot initiatives.[119] Hence, in August 2022, voters in conservative-leaning Kansas rejected a ballot that would have removed abortion rights from the state constitution.[120] Similarly, in November 2022, voters in Kentucky opposed a ballot seeking to introduce an abortion ban in the state constitution.[121] Moreover, state courts across the United States delivered important rulings in favor of abortion rights. In September 2022, a lower court in Michigan suspended the 1931 state abortion ban.[122] In December 2022, the Arizona Court of Appeals invalidated the territorial-era law that prohibited abortion in all cases, while upholding the newer fifteen-week ban set by state legislation.[123] Further, in January 2023, the Supreme Court of South Carolina ruled that the state constitutional right to privacy encompassed a right to abortion.[124]

Due to the different states' decisions, a form of "horizontal federalism"[125] has emerged in the U.S. abortion landscape, with some states at the vanguard of protecting women's reproductive rights while others now lag behind, effectively banning abortion tout court.[126] In particular, it seems that as of the time of publication of this Article, four dominant regulatory models for abortion have emerged: twenty-five states allow abortion on the same grounds as those provided by *Roe*, or broader; another seven states still allow abortion, but subject

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tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/ [https://perma.cc/B7AZ-88D8].

119. *See generally* Udi Sommer et al., *The Political Ramifications of Judicial Institutions: Establishing a Link between* Dobbs *and Gender Disparities in the 2022 Midterms*, 9 SOCIUS 1 (2022) (highlighting through a quantitative social science perspective a marked increase in female voters registration in North Carolina, after the *Dobbs* ruling).

120. *See* Sherman Smith & Lili O'Shea Becker, *Kansas Voters Defeat Abortion Amendment in Unexpected Landslide*, KAN. REFLECTOR (Aug. 2, 2022), https://kansasreflector.com/2022/08/02/kansas-voters-defeat-abortion-amendment-in-unexpected-landslide-1/ [https://perma.cc/BT5A-NZMH].

121. *See* Spencer Kimball, *Kentucky Rejects Anti-Abortion Constitutional Amendment in Surprise Victory for Reproductive Rights*, CNBC (Nov. 9, 2022), https://www.cnbc.com/2022/11/09/midterm-elections-kentucky-rejects-anti-abortion-constitutional-amendment.html [https://perma.cc/593Q-2DGD].

122. *See* Planned Parenthood of Michigan v. Att'y Gen., No. 22-000044-MM, 2022 WL 7076166, at *1 (Mich. Ct. Cl. July 29, 2022).

123. *See* Planned Parenthood Arizona, Inc. v. Brnovich, 524 P.3d 262, 270 (Ariz. Ct. App. 2022).

124. *See* Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 774 (S.C. 2023).

125. *See generally* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2009).

126. *See generally* Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PENN. L. REV. 1745 (2004).

to more stringent conditions (in four cases within a fifteen- or twelve-week gestational period); two states allow abortion only within the first six weeks; and finally, fourteen states forbid the procedure except for medical emergencies.[127] At the moment, four states have abortion bans currently blocked by the courts pending litigation.

As a result of this radical variation in abortion regulation across U.S. states, a number of pressing constitutional questions have come to the forefront.[128] In particular, can women from a state where abortion is prohibited travel to seek voluntary termination of pregnancy in another state where it is lawful? Can they be prosecuted for doing so in states where abortion is a crime? And can abortion providers promote their services in other states where abortion is prohibited? As shown by the widely reported ordeal of a 10-year-old girl who became pregnant as a result of rape, and had to travel in July 2022 from Ohio (where abortion is now prohibited) to Indiana (where it was temporarily legal),[129] these questions are hardly theoretical. In fact, as I shall point out in the next sections, these questions have long hampered European abortion federalism, which provides a comparative lesson that U.S. lawyers, activists, and scholars should not ignore.

III. EUROPEAN ABORTION FEDERALISM

Abortion law in Europe is significantly diversified.[130] In the course of the last six decades, a plurality of the E.U. member states recognized, to various degrees, a right—based mostly on statutory law—of a pregnant woman to have an abortion within a certain number of weeks from the inception of pregnancy. In several E.U. member states, however, abortion is not regarded as a woman's right; rather, it is only permitted under certain conditions and pursuant to specific procedures, which often include mandatory medical advice and counseling sessions. Moreover, some E.U. member states still have extremely

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127. For an excellent tracker of the law across the U.S. states, see *Tracking Abortion Bans Across the Country,* N.Y. TIMES (last updated Oct. 13, 2023), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/B72U-FYDL].

128. *See* Julie Suk, *A World Without* Roe, 64 WM. & MARY L. REV. 443, 450–51 (2022); *see also* David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 37 (2023).

129. *See* Shari Rudavsky & Rachel Fradette, *An Ohio 10-year-old Crossed State Lines for Abortion Care in Indiana. She Isn't Alone*, USA TODAY (July 2, 2022), https://www.usatoday.com/story/news/nation/2022/07/02/10-year-old-ohio-indiana-abortion-roe/7795409001/ [https://perma.cc/DL2F-4D4L].

130. *See* FABBRINI, *supra* note 9, at 199–209; Fabbrini, *supra* note 9, at 8.

restrictive abortion laws, which criminalize all forms of abortion, except when deemed necessary to save the life or protect the health of the pregnant woman from severe injury. For analytical purposes, it is possible to classify E.U. member states' laws into four models, which range from "liberal" to "restrictive." Although these four models do not neatly correspond to the above-mentioned typologies of regulation emerging in the United States, they present many parallels to them, on the basis of legal criteria such as time limitations on abortion and the conditions and procedures that define a woman's abortion right.[131]

In the first model, abortion is permitted until fairly late in pregnancy, largely at the woman's demand, and without significant procedural hurdles. Legal examples of this model can be found in the United Kingdom (U.K.) and France.[132] In particular, the U.K. Abortion Act 1967,[133] as amended,[134] states that pregnancy can be lawfully terminated up to the twenty-fourth week if "the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family."[135] In addition, abortion is always permitted if "the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant

131. Admittedly, this classification relies primarily on the analysis of the law in books, as opposed to the law in action; although, of course, the practical application of abortion legislation has a significant impact on the exercise of a statutory right, especially due to the recognition of conscientious medical objections to the performance of abortion. *See* Sheelagh McGuinnes & Michael Thomson, *Conscience, Abortion and Jurisdiction*, 40 OXFORD J. LEGAL STUD. 819, 820 (2020). *But see* Sally Sheldon et al., *The Abortion Act (1967): A Biography*, 39 LEGAL STUD. 18, 33 (exploring from a biographical perspective the role of the U.K. Abortion Act, emphasizing the role that the act played as a focal point, and acknowledging "the complex, ongoing co-constitution of law and the contexts within which it operates, recognizing that understanding how law works requires historical, empirical study.").

132. Loi 2001–588 du 4 juillet 2001 relative à l'interruption volontaire de la grossesse et à la contraception [Law 2001–588 of July 4, 2001 on the voluntary interruption of pregnancy and contraception], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 7, 2001, p. 10823. The law was challenged before the *Conseil* constitutionnel. *See Conseil* constitutionnel [CC] [*Constitutional* Court] decision No. 2001-446 DC, June 27, 2001, J.O.; *Conseil* constitutionnel [CC] [Constitutional Court] decision No. 2001-449 DC, July 4, 2001, J.O. (declaring the law constitutional).

133. Abortion Act 1967, 15 Eliz. 2 c. 87, § 1 (Eng.). Note that the U.K. abortion legislation, however, applies only in Great Britain and not in Northern Ireland. *But see* Northern Ireland (Executive Formation) Act 2019, c. 22, (UK) (extending the application of abortion rights to Northern Ireland).

134. Human Fertilisation and Embryology Act 1990, 38 Eliz. 2 c. 37 § 37 (Eng.).

135. Abortion Act, § 1(1)(a), as amended by Human Fertilisation and Embryology Act, § 37(1).

woman,"[136] if "the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated,"[137] or in case of fetal abnormalities.[138] The consent of two registered medical practitioners is required to perform an abortion,[139] except when terminating the pregnancy is "immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."[140] Nevertheless, in determining whether the continuance of a pregnancy would involve a risk of injury to the health of a woman, doctors may also consider "the pregnant woman's actual or reasonably foreseeable environment."[141] As a consequence, women may obtain elective abortions for a wide variety of social reasons.[142] Similarly, in France, since 2001 a right to terminate pregnancy exists "in a situation of stress" up to the twelfth week, and with no waiting period or counseling requirement.[143]

In the second regulatory model, abortion is permitted, but within a more restrictive timeframe and subject to waiting periods and counseling requirements. This model is exemplified by the 1978 Italian abortion law,[144] which was modeled on the old 1975 French law,[145]

136. *Id.* § 1(1)(b).

137. *Id.* § 1(1)(c).

138. *Id.* § 1(1)(d).

139. *Id.* § 1(1).

140. *Id.* § 1(4).

141. *Id.* § 1(2).

142. *See* Christina Schlegel, *Landmark in German Abortion Law: The German 1995 Compromise Compared with English Law*, 11 INT'L J. L. POL'Y. & FAM. 36, 51 (1997) ("Although; according to the letter of the law and the intent of the legislator, there is no abortion on demand in England, in fact a woman seeking an abortion 'only' has to find two registered medical practitioners to certify the wide socio-medical indication under [§] 1(1)(a) of the Abortion Act 1967.")

143. CODE DE LA SANTE [Health Code], art. 2212–1, modified by Loi 2001–588, du 4 juillet 2001 relative à l'interruption volontaire de grossesse et à la contraception [Law 2001-588, of July 4, 2001 on the voluntary termination of pregnancy and contraception], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 7, 2001, art.1.

144. Legge 22 maggio 1978, n. 194, G.U. May 22, 1978, n. 140 (It.). In its decision of February 18, 1975 the *Corte Costituzionale* [Constitutional Court] had already declared unconstitutional the provision of the Italian *Codice Penale* [Criminal Code] punishing abortion to the extent it did not include an exception for a pregnant woman whose life was in peril. *See* Racc. uff. corte cost. 18 febbraio 1975, n. 27, Giur. It. 1975, n.55 (It.).

145. Loi 75–17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse [Law 75–17 of January 17, 1975, on the voluntary interruption of pregnancy], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 18, 1975, p. 739. The

and served as a template for other Mediterranean countries like Portugal[146] and Spain.[147] Abortion in Italy is decriminalized and can lawfully be obtained in the first 90 days of pregnancy when,

> continuance of pregnancy, delivery or maternity would involve a serious risk for the physical and psychological health [of the woman] in light of her state of health, or her economic, social and family conditions or the circumstances in which conception occurred or in view of the anomalies and malformations of the fetus.[148]

After the first trimester, abortion is only permitted when there is a medically certified risk for the life of the pregnant woman or for her physical and psychological health.[149] Before obtaining an abortion in the first trimester, however, women are required to undergo compulsory non-directive counseling.[150] Moreover, a seven-day waiting period applies before women can obtain termination of pregnancy.[151]

In the third regulatory model, abortion is not permitted, but is not sanctioned either; women can obtain an abortion, but only subject to strict conditions, and following pro-life counseling. Germany epitomizes this approach.[152] After unification, an abortion act was adopted in 1992, which made first-trimester abortions lawful after

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law was challenged before the Conseil Constitutionnel [CC] [Constitutional Court], which declared it constitutional in its decision No. 74-54 DC, Jan 15, 1975 (Fr.).

146. *See* Lei n.º 16/2007 de 17 de Abril, [Act no. 16/2007 of April 17], https://diariodarepublica.pt/dr/detalhe/lei/16-2007-519464 (Port.).

147. *See* Ley Organica de salud sexual y reproductive y de la interrupción voluntaria del embarazo [Sexual and Reproductive Health and Abortion Law] (B.O.E. 2010, 55) (Spain).

148. L. n. 194/1978, art. 4 (It.) ("la prosecuzione della gravidanza, il parto o la maternità comporterebbero un serio pericolo per la sua salute fisica o psichica [della donna], in relazione o al suo stato di salute, o alle sue condizioni economiche, o sociali o familiari, o alle circostanze in cui è avvenuto il concepimento, o a previsioni di anomalie o malformazioni del concepito." ["the continuation of the pregnancy, childbirth or maternity would entail a serious danger for her [the woman's] physical or mental health, in relation to her state of health, or her economic, social or family conditions, or to circumstances in which conception occurred, or to predictions of anomalies or malformations of the conceived."]).

149. *Id*. art. 6.

150. *Id*. art. 5.

151. *Id*.

152. *See* Eva Maleck-Lewy, *Between Self-Determination and State Supervision: Women and the Abortion Law in Post-Unification Germany*, 2 SOC. POL. 62, 72 (1995); *see also* SCHLEGEL, *supra* note 142, at 52.

mandatory counseling.[153] Nevertheless, in 1993, the *Bundesverfassungsgericht*, following a 1975 precedent,[154] declared the 1992 Act unconstitutional,[155] arguing that the state had a duty to protect human life, and that therefore, legislations ought to express a clear disapproval of abortions.[156] In reaction to this decision, the German Parliament enacted a new abortion act in 1995,[157] amending, *inter alia*, the Criminal Code. On the basis of the new law, abortion is unlawful, but may not be punishable[158] if it is performed at the request of the woman, by a medical practitioner, before the end of the twelfth week of pregnancy, and after a mandatory counseling session and a three-day waiting period.[159] In contrast, abortion is “not unlawful”[160] if performed, at any time, under medical indication to prevent danger to the life of or serious harm to the health of the woman or, within the first twelve weeks of pregnancy, on criminal-ethical grounds, e.g., when the pregnancy was the result of rape.[161] Given the history of Nazi Germany, the law clarifies, as explicitly requested by the *Bundesverfassungsgericht*, that

153. *See* Schwangeren-und Familienhilfegesetz [Pregnancy and Family Assistance Act], July 27, 1992, BGBL. I at 1398, art. 13(1) (Ger.).

154. *See* BVERFGE, 39 BVR 1, Feb. 25, 1975, https://www.servat.unibe.ch/dfr/bv039001.html [https://perma.cc/9Q5Z-R4RW]. This first decision of the *Bundesverfassungsgericht* has been the object of extensive comparative analysis with the abortion decisions of the U.S. Supreme Court. *See* Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 551, 551–52 (1976).

155. *See* BVerfG, 2 BVF 2/90, May 28, 1993, https://www.bverfg.de/e/fs19930528_2bvf000290en.html.

156. *See* Gerald Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 275 (1995) (comparing abortion law in Germany and the United States).

157. *See* Schwangeren-und Familienhilfe. . .nderungsgesetz [Pregnancy and Family Support Amendment Act], Aug. 21, 1995, BGBL. I at 1050 (Ger.).

158. A subtle distinction is indeed drawn in German criminal law between the abstract lawfulness of an act and the effective possibility to sanction an act. As such, an act may be lawful and, therefore, not punishable, or an act may be unlawful. In the latter case, however, an act still might not be punishable when other compelling reasons push for the lifting of the criminal sanction. The 1992 Act had made first trimester abortion “not unlawful,” but the *Bundesverfassungsgericht* declared the measure unconstitutional to the extent it failed to protect the right to life of the unborn. The 1995 Act, therefore, made abortion simply “not punishable,” in order to express a clear disapproval for abortion. *See* NEUMAN, *supra* note 156, at 285.

159. STRAFGESETZBUCH [StGB] [PENAL CODE], § 218a(1), as amended by SFHAndG, art. 8(3).

160. *Id.* § 218a(2) (“nicht rechtswidrig” [“not illegal”]).

161. *Id.* § 218a(3).

counseling must be pro-life oriented,[162] i.e., it must be directed toward encouraging the woman to continue the pregnancy and open her to the perspective of a life with the child.[163] From this point of view, the regulation of abortion via the instruments of criminal law and the imposition of a directive counseling procedure highlight the German legal system's restrictive attitude toward the voluntary interruption of pregnancy.[164] At the same time, however, the possibility for a woman to obtain an abortion during the first trimester, if she still wishes to do so after the mandatory counseling and three-day waiting period, differentiates the German law from the legislative model of the last group of E.U. member states.

The fourth model of abortion regulation is based on a strict ban, with criminalization of interruption of pregnancy, save on highly exceptional grounds. In particular, until 2018, Ireland had the most restrictive abortion ban in the E.U. Historically, Ireland prohibited abortion on the basis of the colonial-era Offences Against the Person Act 1861,[165] the content of which was re-affirmed in the Health (Family Planning) Act 1979.[166] In 1983, to prevent a possible recognition of a right to abortion by judicial fiat,[167] an amendment to the Irish Constitution was adopted by popular referendum, which enshrined a right to life of the unborn in Irish fundamental law.[168] According to the Eighth Amendment, codified as Article 40.3.3 of the Irish Constitution, "the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect,

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162. *See* STGB, § 219, as amended by SFHAndG, art. 8.

163. *See* Nanette Funk, *Abortion Counselling and the 1995 German Abortion Law*, 12 CONN. J. INT'L L. 33, 51 (1997) (discussing the importance of the counselling process in the German abortion regime).

164. *See also* JACKSON & TUSHNET, *supra* note 33, at 130–40 (describing how the German abortion law limits abortions by requiring mandatory counselling).

165. Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, §§ 58 & 59 (Eng.). Note that this Act was adopted by the U.K. and applied in Ireland because, until 1922, the U.K. exercised dominion over Ireland. *See* Gerard Hogan, *An Introduction to Irish Public Law*, 1 EUR. PUB. L. 37, 37 (1995).

166. Health (Family Planning) Act 1979 (Act No. 20/1979), § 10 (Ir.), https://www.irishstatutebook.ie/eli/1979/act/20/enacted/en/html.

167. Note that in *McGee v. Att'y Gen.* [1974] I.R. 284, the Irish Supreme Court had recognized a fundamental right to privacy as either an unenumerated personal right or a familial right. As a result, there was widespread preoccupation that the Irish Supreme Court would follow the path of the U.S. Supreme Court, who recognized a right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973) following its decision recognizing a right to privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See* TUSHNET, *supra* note 24, at 86.

168. *See* John Quinlan, *The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, 3 BYU L. REV. 371, 383–90 (1984).

and, as far as practicable, by its laws to defend and vindicate that right."[169] The specific consequences of Article 40.3.3 on the prohibition of abortion were addressed in the seminal *X.* case.[170] This case involved a fourteen-year-old female rape victim who became pregnant. The girl wanted an abortion and showed clear signs of suicidal tendencies if she could not obtain one. Her family agreed to bring her to England for the abortion. On the Irish Attorney General's application, however, the Irish High Court issued an injunction prohibiting the girl from leaving Ireland.[171] The decision of the Irish High Court sparked widespread controversy and was quickly overruled by a majority of the Irish Supreme Court, which ruled that "if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible."[172] The Court recognized that suicide could be considered as a real and substantial risk to the life of the woman and therefore concluded that the defendant had a right to obtain an abortion in Ireland.[173] As a result, the law in Ireland was that, constitutionally, termination of pregnancy is unlawful "unless it meets the conditions laid down by the Supreme Court in the *X.* case."[174]

This situation, of course, has now changed. As is well known, following an extensive deliberative process led by a Citizens Assembly, and influenced by both grass-roots movement[175] and transnational legal pressures,[176] in May 2018, the Irish people voted overwhelmingly in a national referendum to repeal the Eighth Amendment of the

169. CONSTITUTION OF IRELAND 1937 art. 40.3.3, as amended by the Eighth Am. (1983).

170. *See* Caroline Forder, *Abortion: A Constitutional Problem in European Perspective*, 1 MAASTRICHT J. EUR. & COMP. L. 56, 57–58 (1994).

171. Att'y Gen. v. X [1992] ILRM. 401, 410 (H. Ct.) (Ir.) (on file with author).

172. Att'y Gen. v. X [1992] 1 IR 41, 53–54 (S.C.) (Ir.).

173. *Id*. at 55. Although the opinion of the Irish Supreme Court left some doubts as to whether abortion could be obtained in Ireland in case of real and substantial risk to the woman's life, this possibility was later confirmed by the High Court in *A. and B. v. E. Health Bd.* [1998] 1 I.L.R.M. 460, 478–79 (H. Ct.) (Ir.).

174. DEP'T OF THE TAOISEACH, THE GREEN PAPER ON ABORTION 3 (1999). This report was prepared at the request of the Irish government to clarify the legal framework of abortion in Irish law.

175. *See generally* Anna Carnegie & Rachel Roth, *From the Grassroots to the Oireachtas: Abortion Law Reform in the Republic of Ireland*, 21 HEALTH & HUM. RTS. J. 109 (2019).

176. *See generally* Federico Fabbrini, *The Last Holdout: Ireland, the Right to Abortion and the European Federal Human Rights System*, 42 DUBLIN U. L. J. 21 (2019) (discussing the interplay between European and Irish law, and the supranational influence on the transformation of Irish abortion law resulting in the 2018 constitutional referendum legalizing reproductive rights).

Irish Constitution. By a landslide of 66.4 percent to 33.6 percent, Irish citizens replaced the old Article 40.3.3 with a new clause, stating that "[p]rovision may be made by law for the regulation of termination of pregnancy."[177] On this basis, in December 2018, the Irish Parliament passed a statute—the Health (Regulation of Termination of Pregnancy) Act—which entered into force on January 1, 2019.[178] The Act permits abortion at any time in cases of risk to the woman's health and life[179] and fatal fetal abnormality.[180] It introduces an early pregnancy termination at the request of the woman, subject to the medical practitioner's certification that the pregnancy has not exceeded 12 weeks.[181] The Act also sets a three-day waiting period before elective abortions,[182] but no counselling process is required. Henceforth, Ireland's abortion law (at least on the books) today pertains to the first typology of regulation—the most liberal one in Europe—being largely aligned with those of countries such as France.[183]

Nevertheless, legislation of the fourth model, essentially outlawing abortion in almost all circumstances, remains in force in other E.U. member states—including Poland, Malta, and Hungary.[184] In Poland, in particular, elective abortions have been banned via legislation since 1993, following the collapse of the Communist regime.[185] The Polish Act prohibits abortion with a punishment of three years' imprisonment except if: (1) a physician, other than the one who performs the abortion, certifies that the pregnancy is endangering the mother's life or health; (2) up to viability (i.e., 24 weeks), if the fetus is seriously impaired; or (3) up to the twelfth week, if pregnancy resulted from rape.[186] Exceptions are, however, interpreted very strictly and the medical profession is reluctant to carry out abortions for risk of

177. CONSTITUTION OF IRELAND 1937 art. 40.3.3, as amended by the Thirty-Sixth Am. (2018).

178. Health (Regulation of Termination of Pregnancy) Act 2018 (Act No. 31/2018) (Ir.).

179. *Id.* § 9.

180. *Id.* § 11.

181. *Id.* § 12.

182. *Id.* § 12(3).

183. *See supra* text accompanying note 143.

184. *See* MAGYARORSZÁG ALAPTÖRVÉNYE, THE FUNDAMENTAL LAW OF HUNGARY, Article II (protecting fetal life from the moment of conception).

185. *See* Magdalena Zolkos, *Human Rights and Democracy in the Polish Abortion Debate*, 3 ESSEX HUM. RTS. REV. 1, 6 (2006).

186. Family-Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act 1993, § 4(a) (an English translation of this provision is available in *Tysiąc v. Poland*, 2007–I Eur. Ct. H.R. ¶ 38).

incurring legal trouble.[187] A legislative attempt in 1996 to reform the law and re-introduce a right to abortion in the first trimester on grounds of material or personal hardship was declared unconstitutional by the *Trybunał Konstytucyjny*, which interpreted the right to life provision in the Polish Constitution as protecting the unborn.[188] Moreover, recently, in October 2020, the *Trybunał Konstytucyjny* ruled unconstitutional the provision of the 1993 Act that allows for abortion in case of fetal abnormality.[189] The decision, delivered in the midst of the Covid-19 pandemic, became binding when published by the Polish government in January 2021. By effectively leading to a de facto ban on abortion, the ruling made Poland the E.U. member state with the harshest restrictions on women's reproductive rights.[190]

IV. ESCAPING THE ABORTION BAN

As the previous section highlighted, "horizontal federalism"[191] has long characterized the E.U. abortion landscape, with states both at the vanguard and laggard[192] in the protection of a woman's right to seek termination of pregnancy (or conversely, a right to life of the unborn). In a growing number of E.U. member states, the right to abortion has been recognized, to varying degree, in statutory law. Nevertheless, constitutional rules and legislation in other E.U. Member States regard the right to life of the unborn as paramount, and prohibit abortion tout court, save in limited, exceptional circumstances. These profound disparities have raised legal questions analogous to those currently arising in the United States. In the European federal arrangement, rights are simultaneously protected both at the state level and at supranational level by E.U. law and the ECHR. The ECHR is an international treaty concluded in 1950, enshrining a catalogue of civil

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187. *See infra* text accompanying note 274.

188. Trybunał Konstytucyjny [Constitutional Court] May 28, 1997, K 26/96. *But see* the dissenting opinions of Judges Garlicki and Sokolewicza. *See also* Alicia Czerwinski, *Sex, Politics, and Religion: The Clash Between Poland and the European Union over Abortion*, 32 DENV. J. INT'L L. & POL'Y 653, 659–60 (2004) (discussing the Polish abortion regime and its tensions with E.U. law).

189. Trybunał Konstytucyjny [Constitutional Court] October 22, 2020, K 1/20. *See* Magdalena Furgalska & Fiona de Londras, *Rights, Lawfare and Reproduction: Reflections on the Polish Constitutional Tribunal's Abortion Decision*, 55 ISR. L.REV. 285 (2022).

190. *See generally* European Parliament Resolution of 26 November 2020 on the De Facto Ban on the Right to Abortion in Poland, EUR. PARL. DOC. (RSP 2020/2876) (2020).

191. *See* Erbsen, *supra* note 125, at 493.

192. *See* Althouse, *supra* note 126, at 1745.

and political rights that contracting parties (including all E.U. member states) are bound to respect in all circumstances.[193] The ECHR is enforced by the ECtHR, a supranational court with mandatory jurisdiction to hear complaints from natural and legal persons who believe their rights have been violated, provided they have exhausted domestic remedies.[194] The E.U. is an entity that has a much broader purview than the ECHR, as it covers both economic and political integration.[195] However, the E.U. has consistently provided a framework for the protection of human rights too.[196] In fact, the ECJ, as the supreme court of the E.U., can review member states' actions for compliance with the E.U. treaties, which nowadays includes a binding Charter of Fundamental Rights.[197] The E.U. and the ECHR, therefore, are separate, but exercise joint, overlapping human rights jurisdiction on member states.

Until the early 1990s, abortion law, as an area falling between criminal law and family law, appeared to be insulated from the influence of supranational law. Nevertheless, in the last three decades, the ECJ and the ECtHR have increasingly adjudicated cases dealing with national abortion restrictions—notably the Irish ban.[198] Admittedly, supranational courts never ruled that state abortion bans breached either E.U. law or the ECHR—falling short of delivering a European equivalent of *Roe*.[199] In fact, in the landmark 2010 case *A, B, & C v. Ireland*, the ECtHR rejected a facial challenge against the Irish abortion ban, holding that the Irish state enjoyed a wide margin of appreciation[200] in the matter, given "the acute sensitivity of the moral and

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193. *See* Convention on the Protection of Human Rights and Fundamental Freedoms, Counc. Eur., Nov. 11, 1950, C.E.T.S. No. 5.

194. *See* FABBRINI, *supra* note 9, at 11; A EUROPE OF RIGHTS (Helen Keller & Alec Stone Sweet eds., 2008).

195. *See* Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2483 (1991) (discussing transformation of the E.U. from an international economic organization into a constitutional federation of large remits).

196. *See* FABBRINI, *supra* note 9, at 9; Armin Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights at the Core of the European Union*, 37 COMMON MKT. L. REV. 1307, 1307 (2000).

197. Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 389.

198. *See* David Cole, *"Going to England": Irish Abortion Law and the European Community*, 17 HASTINGS INT'L & COMP. L. REV. 113, 115 (1994) (stating that "isolationism is impossible, even on an issue as strongly felt as abortion.").

199. *See* Fabbrini, *supra* note 9.

200. On the concept of the margin of appreciation, see Eva Brems, *The Margin of Appreciation in the Case Law of the European Court of Human Rights*, 56 Zeithschrift fur Auslandisches offentliches Recht und Volkerrecht 240 (1996).

ethical issues raised by the question of abortion."[201] Nevertheless, in the same case, the ECtHR held that Article 8 of the ECHR, the provision enshrining a right to private and family life, imposed a positive obligation on Ireland to effectively permit abortion in the (very limited) cases in which this was lawful according to national law (i.e., the *X.* case law of the Irish Supreme Court).[202] And in a string of other cases dealing with Poland, the ECtHR found that state practices which made it impossible for women to obtain abortion on life-saving grounds constituted inhuman and degrading treatments,[203] and even torture.[204] This jurisprudence helped to edge the toughest abortion restrictions at the state level[205]—and they were influential in the Irish context to promote social and legal change.[206] Most importantly, for the purpose of this article, the ECJ and the ECtHR played a key role in creating escape routes for women seeking to obtain termination of pregnancy by preserving free speech and free movement rights.

A first opportunity for the ECJ to deal with the Irish abortion ban emerged in 1991. In the *Grogan* case,[207] the Society for the Protection of the Unborn Child (SPUC) had requested an injunction prohibiting the representatives of three student unions from advertising the names and contacts details of abortion providers in England, arguing that the recently enacted Eighth Amendment to the Irish Constitution banned the publication of any such information.[208] The Irish High

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201. A, B, and C v. Ireland, 25579/05 Eur. Ct. H.R. 64 (2010).

202. *Id.* at 72.

203. Tysiąc v. Poland, 2007–I Eur. Ct. H.R. 219, 35; R.R. v. Poland, App. No, 27617/04, (May 26, 2011), https://hudoc.echr.coe.int/fre?i=001-104911 [https://perma.cc/XK2D-WU8S].

204. P & S.v. Poland, App. No. 57375/08, ¶ 75 (Oct. 30, 2012), https://hudoc.echr.coe.int/fre?i=001-114098 [https://perma.cc/2NSQ-85P9].

205. *See* Nicolette Priaulx, *Testing the Margin of Appreciation: Therapeutic Abortions, Reproductive 'Rights' and the Intriguing Case of* Tysiąc v. Poland, 15 EUR. J. OF HEALTH L. 361, 361 (2008) and Brenda Daly, *"Braxton Hick's" or the Birth of a New Era? Tracing the Development of Ireland's Abortion Laws in Respect of European Court of Human Rights Jurisprudence*, 18 EUR. J. OF HEALTH L. 375 (2011).

206. *See* Fabbrini, *supra* note 176, at 46–50 (discussing adaptation, resistance and empowerment as dynamics fostered by the interplay between E.U. and ECHR law and the Irish abortion ban).

207. Soc'y for the Prot. of Unborn Children Ir. Ltd.v. Grogan, 1991 E.C.R. I-4685.

208. Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan [1989] IR 753, 758 (H. Ct.) (Ir.). While the Irish High Court referred the question to the ECJ, it stayed the proceedings and did not grant the injunction requested by SPUC barring the student from publishing information about abortion providers. SPUC appealed to the Supreme Court, and the Supreme Court granted a temporary injunction but did not interfere with the High Court's decision to raise a preliminary reference to the ECJ. Rather, the Supreme Court gave the parties leave to

Court sent a preliminary reference to the ECJ and asked it whether abortion could be considered a service within the meaning of the E.U. Treaty and, therefore, whether a national ban on information about abortion services overseas was contrary to E.U. fundamental rights law.[209] In his opinion, ECJ Advocate General (AG)[210] Van Gerven acknowledged that medical termination of pregnancy constituted a service within the meaning of E.U. law. Therefore, he devoted most of his opinion to examining whether the Irish prohibition on distributing information about abortion services that are lawfully available in other E.U. states could be regarded as "consistent with or not incompatible with" the general principles of E.U. law, including respect for fundamental rights.[211] However, the AG found that the Irish restriction was justified in light of the public interest pursued by the state and the "high priority" the Irish Constitution then attached to the protection of unborn life.[212] In addition, the AG concluded that the ban on information sought by SPUC did not disproportionately infringe upon freedom of information, which is protected as a general principle of E.U. law and

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apply to the High Court again in order to adjust the injunction in light of the ECJ's decision. Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan [1989] 4 I.R. 760, 765–66 (SC) (Ir.).

209. *See* Stauder v. City of Ulm—Sozialamt, 1969 E.C.R. 419, ¶ 7 (affirming that fundamental rights are general principles of E.U. law). Prior to the enactment of the E.U. Charter of Fundamental Rights, in the absence of a written E.U. catalog of fundamental rights the ECJ developed the protection of fundamental rights as unwritten general principles of E.U. law, drawing inspiration from the common constitutional traditions of the Member States and especially from the ECHR. *See* Nold v. Comm'n, 1974 E.C.R. 491, ¶ 13; Consolidated Version of the Treaty on European Union, art. 6, Mar. 30, 2010, 2010 O.J. (C 83) 19. *See also* José N. Cunha Rodriguez, *The Incorporation of Fundamental Rights in the Community Legal Order*, *in* THE PAST AND FUTURE OF E.U. LAW: THE CLASSICS OF E.U. LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 89, 91 (Miguel Poiares Maduro & Loic Azulai eds., 2010). The ECJ has recognized that both the E.U. institutions as well as the E.U. member states must respect fundamental rights as general principles of E.U. law when acting within the scope of application of E.U. law. *See* Hubert Wachauf v. Bundesamt für Ern. . .hrung und Forstwirtschaft, 1989 E.C.R. 2609, ¶ 17–19; ERT AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas, 1991 E.C.R. I-2925, ¶ 41. *See also* Zdenek Kühn, *Wachauf and ERT: On the Road from the Centralized to the Decentralized System of Judicial Review*, *in* THE PAST AND FUTURE OF E.U. LAW: THE CLASSICS OF E.U. LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY 151 (Miguel Poiares Maduro & Loic Azulai eds., 2010).

210. The Advocate General is a member of the ECJ vested with the role to provide to the court impartial advice as to how the case should be resolved. *See* Laure Clement-Wilz, *The Advocate General: A Key Actor of the Court of Justice of the European Union*, 14 CAMB. Y.B. EUR. LEG. ST. 587 (2017) (discussing the role of the ECJ AGs).

211. Op. of Advoc. Gen. Van Gerven, Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan, 1991 E.C.R. I-4685, ¶ 24.

212. *Id.* ¶ 29.

is thus binding upon the member states "in an area covered by [E.U.] law."[213]

The ECJ followed only the very first part of the opinion of the AG, stating that "medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of the [E.U. Treaty]."[214] The ECJ rejected the contention made by SPUC that abortion could not be regarded as a service since it is immoral and stated that it would not "substitute its assessment for that of the legislature in those Member States where the activities in question are practiced legally."[215] However, on the controversial question of the compatibility of the Irish ban on the publication of information with E.U. law, the ECJ refused to take a position, arguing that the link between the Irish student unions and the English abortion providers was "too tenuous"[216] to trigger the application of E.U. law—meaning that the plaintiffs (i.e., the students' union) lacked standing to invoke a violation of their E.U. fundamental rights.[217] The ECJ, therefore, failed to address directly the confrontation between the Irish ban and E.U. fundamental rights,[218] showing a certain reluctance to deal with the "thorny issue" of abortion.[219] Nevertheless, by clearly holding that abortion was a service within the meaning of E.U. law,[220] the ECJ made clear "that Ireland's treatment of access to abortion was not simply a matter of Irish law"[221] but also a matter of E.U. law, free movement, and freedom to provide services.[222]

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213. *Id.* ¶ 31.

214. *Grogan,* 1991 E.C.R. I-4685, ¶ 21.

215. *Id.* ¶ 20.

216. *Id.* ¶ 24.

217. *See* Rick Lawson, *The Irish Abortion Cases: European Limits to National Sovereignty?*, 1 EUR. J. OF HEALTH LAW 167, 173 (1994).

218. *See* Siofra O'Leary, *Freedom of Establishment and Freedom to Provide Services: The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case*, 16 EUR. L. REV. 138, 156 (1992).

219. Catherine Barnard, *An Irish Solution*, 142 NEW L. J. 526 (1992).

220. *See* David O'Connor, *Limiting "Public Morality" Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union*, 22 BROOK. J. INT'L L. 695, 702–03 (1997).

221. Cole, *supra* note 198, at 129.

222. *See* Alison Young, *The Charter, Constitution and Human Rights: Is This the Beginning or the End for Human Rights Protections by Community Law?*, 11 EUR. PUB. L. 219, 230 (2005) (arguing that "*Grogan* can be regarded as a triumph for the right of the woman to choose.").

The same controversy that led the ECJ to deliver the *Grogan* case also offered to the ECtHR an opportunity to rule on the compatibility of Irish abortion regulation with the broader European human rights framework. Relying on Article 40.3.3 of the Irish Constitution, the SPUC had obtained an injunction from the Irish High Court,[223] later confirmed by the Supreme Court,[224] which perpetually prohibited two Dublin-based family planning and counseling clinics from providing information concerning the availability of abortion services in England.[225] Having exhausted their domestic remedies, the two clinics lodged an appeal before the ECHR supervisory bodies, arguing that the Irish ban unduly limited their freedom of expression. In *Open Door Counselling*,[226] the ECtHR found a violation of Article 10 ECHR, which protects freedom of expression.[227] In a fifteen-to-eight majority opinion, the ECtHR concluded that the national measure under review could not pass judicial scrutiny on the basis of its conventional proportionality test.[228] According to the ECtHR, the prohibition barring the two clinics from providing information about abortion services overseas could be regarded as prescribed by law—that is, grounded in the Irish Constitution—and necessary to pursue the legitimate aim of the Irish State to protect the life of the unborn.[229] But, the "absolute nature"[230] of the "restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued"[231] and was thus in violation of the right to freedom of information.[232] The judgment of the ECtHR significantly affected the

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223. Soc'y for the Prot. of Unborn Children Ir. Ltd.v. Open Door Counselling [1988] I.R. 593 (H. Ct.) (Ir.), aff'd in part and rev'd in part, [1989] [1988] I.R. 618 (S.C.) (Ir.).

224. *Id.*

225. Having succeeded in obtaining a judicial injunction barring the two Dublin-based counselling clinics, Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd., from circulating information about abortion service providers in the U.K., SPUC started a proceeding against the student associations. This proceeding then led to the decision of the ECJ in Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan, 1991 E.C.R. I-4685.

226. Open Door Counselling v. Ireland, App. No. 14234/88 & 14235/88, 246 Eur. Ct. H.R. (ser. A), ¶ 73 (Oct. 29, 1992), https://hudoc.echr.coe.int/fre?i=002-9896 [https://perma.cc/TPB8-7YUT].

227. *See* Lawson, *supra* note 217, at 177–78.

228. *See* Cole, *supra* note 198, at 135.

229. Open Door*,* 246 Eur. Ct. H.R. (ser. A), ¶¶ 60–63.

230. *Id.* ¶ 73.

231. *Id.* ¶ 80.

232. The decision of the ECtHR reached an issue that, as mentioned *supra* in the text accompanying note 208, was not addressed by the ECJ in Soc'y for the Prot. of Unborn Children Ir. Ltd. v. Grogan, 1991 E.C.R. I-4685.

purview of the Irish abortion ban, since it effectively removed the domestic obstacle that prevented Irish pro-choice organizations in promoting and disseminating information on lawful access to abortion outside the country.

In sum, the jurisprudence of the ECJ and the ECtHR had profound consequences for Ireland.[233] Following these rulings, a popular referendum in November 1992 approved the Thirteenth and the Fourteenth Amendments to the Irish Constitution, which integrated Article 40.3.3 of the Constitution. One explicitly provided that "[t]his subsection shall not limit freedom to travel between the State and another state."[234] The other provided that "[t]his subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state"[235]— a provision which was subsequently implemented with appropriate legislation.[236] Admittedly, Ireland also sought to further shield itself from the pressure and influence of European supranational law.[237] In particular, on the eve of the approval of the Maastricht Treaty in 1992, Ireland obtained from its E.U. partners the enactment of an additional protocol to the E.U. Treaty stating that "nothing in the [E.U.] Treaties, shall affect the application in Ireland of Art 40.3.3° of the Constitution of Ireland."[238] Nevertheless, the possibilities for Irish women to receive information on abortion

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233. *See also* Eamon Gilmore, *European Court of Human Rights has driven social change in Ireland*, THE IRISH TIMES (Nov. 3, 2020), https://www.irishtimes.com/opinion/european-court-of-human-rights-has-driven-social-change-in-ireland-1.4398763 [https://perma.cc/YMT3-SV8Z].

234. CONSTITUTION OF IRELAND 1937, Art 40.3.3°, as amended by the 13th Am. (1992) https://www.irishstatutebook.ie/eli/1992/ca/13/enacted/en/print?printonload=true [https://perma.cc/VR2Z-2X7A].

235. CONSTITUTION OF IRELAND 1937, Art 40.3.3°, as amended by the 14th Am. (1992), https://www.irishstatutebook.ie/eli/1992/ca/14/enacted/en/print?printonload=true [https://perma.cc/3WQP-3J9B].

236. *See* Regulation of Information (Services Outside the State for Termination of Pregnancy) Act 1995, § 3 (Act No. 5/1995) (Ir.) [https://perma.cc/LQ8C-2VYT]. The Act makes it legal to distribute information on abortion services abroad as long as the information does not promote abortion. The Irish Supreme Court was asked to decide on the abstract and *a priori* constitutionality of the Act, and unanimously upheld it. *See* In re Article 26 of the Constitution and Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill [1995] 1 IR 1 (SC), http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/(WebFiles)/DE984F5A426E14AA802575F300331389/$FILE/Information_%5B1995%5D%201%20IR%201.htm [https://perma.cc/K2VJ-ENMN].

237. *See* Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MARKET L. REV. 17, 48 (1993).

238. Protocol Annexed to the Treaty on European Union and to the Treaties Establishing the European Communities, 1992 O.J. (C 224/130).

access lawfully available in other E.U. member states and to travel out of state to seek abortion services fundamentally changed the nature of the Irish abortion ban.[239] Thanks to E.U. and ECHR law, Irish women were able to exercise these rights without facing any risk of prosecution or subjection to the severe domestic criminal sanctions against abortion.[240]

In fact, the possibility for a woman to escape the restrictive domestic abortion bans by going abroad and avoiding prosecution in her home state has arguably shaped the jurisprudence of the European supranational courts. Indeed, it could even be argued that because women theoretically could get out of restrictive bans on abortion by leaving their home states for the abortion, the ECJ and ECtHR were more protective of the member states' regulatory autonomy since, viewed from such perspective, abortion bans were not absolute. This go-around is precisely what prompted AG Van Gerven in *Grogan* to conclude that the Irish ban on information about abortion services was not disproportionate.[241] In his opinion, AG Van Gerven clearly affirmed that "a ban on pregnant women going abroad or a rule under which they would be subjected to unsolicited examinations upon their return from abroad"[242] would never be tolerated under E.U. law. Furthermore, the ECtHR cited the fact that the Irish law granted women the ability to opt-out of the abortion ban by "lawfully travelling to another State"[243] as one of the justifications for its ruling in *A, B, & C v. Ireland*.[244]

Ironically, before *Dobbs*, federal courts had firmly rejected this possibility in the United States. In *Jackson Women's Health Organization v. Currier*[245] the Court of Appeals for the Fifth Circuit struck down a Mississippi law that led to the closure of the only licensed abortion clinic in the state and rejected Mississippi's argument that women could still travel to obtain abortion in neighbouring states. As the Fifth Circuit held then, "a state cannot lean on its sovereign neighbours to provide protection of its citizens' federal constitutional

239. Fabbrini, *supra* note 9, at 47.

240. *See* Abigail-Mary Sterling, *The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law*, 20 B.C. INT'L & COMP. L. REV. 385, 385–87 (1997).

241. *See* Opinion of Advocate Gen. Van Gerven, June 11, 1991, Case C-159/90, Soc'y for the Protection of Unborn Children v. Grogan, [1990] E.C.R. I–4703, 4732, ¶ 29.

242. *Id.* ¶ 29.

243. A, B, and C v. Ireland, 25579/05 Eur. Ct. H.R. 66 (2010).

244. *See infra* text accompanying note 262.

245. Jackson Women's Health Org. v. Currier, 760 F.3d 448 (5th Cir. 2014).

rights."[246] However, following *Dobbs*, abortion is no longer a constitutional right, so this is exactly what will happen in the United States too. As noted above,[247] women from states which ban abortions are already traveling to seek termination of pregnancy where abortion is permitted. In fact, notwithstanding some debate in academia, the predominant view of U.S. law is that the states' power of extraterritorial regulation is limited.[248] Already, in 1975, the U.S. Supreme Court, in *Bigelow v. Virginia*,[249] struck down on First Amendment grounds a Virginia statute, which, much like the Irish ban challenged before the ECJ in *Grogan*,[250] prohibited the advertising of abortion providers in other U.S. states.[251] In *Saenz v. Roe*,[252] the Supreme Court explicitly recognized a constitutional right to inter-state travel. And in his concurrence in *Dobbs*, Justice Kavanaugh explicitly stated:

> [S]ome of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.[253]

For sure, the constitutional right to inter-state travel is nowhere to be explicitly found in the text of the U.S. Constitution. And after *Dobbs*, a number of precedents are no longer secured. Indeed, in his concurring opinion, Justice Thomas was explicit in saying that "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,' . . . we have a duty to 'correct the error' established in those precedents."[254] Moreover, laws like the above-mentioned Texas

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246. *Id*. at 457.

247. *See supra* text accompanying note 129.

248. *Compare* Seth Kreimer, *The Law of Choice and the Choice of Law: Abortion, the Right to Travel and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) (arguing that states' extraterritorial power is limited) *with* Mark Rosen, *"Hard" or "Soft" Pluralism? Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L. J. 713 (2007) (arguing that it is not).

249. Bigelow v. Virginia, 421 U.S. 809, 825 (1975).

250. *See infra* text accompanying note 264.

251. *See* Fallon, *supra* note 65, at 628–29.

252. Saenz v. Roe, 526 U.S. 489, 489–91 (1999).

253. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

254. *Id.* at 2300–03 (Thomas, J., concurring) (internal citations omitted). The precedents to which Justice Thomas refers also concern U.S. Supreme Court cases recognizing a

S.B. 8 operate extra-territorially, revealing a trend by (conservative) states to expand the reach of their regulations to other jurisdictions.[255] And some states with abortion bans have recently also endeavored to limit access to, or use of, drugs medically required for termination of abortion and duly approved by the U.S. Food and Drug Administration (FDA), hence restricting women's ability to obtain pills like mifepristone needed to self-administer abortion in the early stages of pregnancy.[256]

Nevertheless, the jurisprudence of the U.S. Supreme Court on free movement and free speech seems unaffected by the ultra-conservative turn in the Court. In fact, the First Amendment has increasingly become an absolutist right.[257] Moreover, the principle of federal preemption resulting from the U.S. Constitution's Supremacy Clause[258] implies that states cannot ban or restrict a medication that the federal government has approved.[259] At the same time, a number of (liberal) states are moving to adopt legislation to shield state abortion providers from possible incriminations by out-of-state prosecutors[260]—along the model of Massachusetts' 2022 act that protects telemedicine abortion providers who assist out-of-state patients from abusive litigation in other states' courts.[261] As a result, provision of information about abortion provided in states where it is lawful, and the right to travel out of states that ban abortion towards state that permit it—what has been called "'circumvention tourism'—traveling abroad for the express purpose of doing something illegal in the home

constitutional right to privacy, to consensual homosexual sex, and to homosexual marriage. *See* Griswold v. Connecticut*,* 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that sodomy laws are unconstitutional); Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the Constitution protects a right to homosexual marriage). *See also* STEPHEN MACEDO, JUST MARRIED: SAME-SEX COUPLES, MONOGAMY AND THE FUTURE OF MARRIAGE (2015).

255. *See also* Cohen et. al., *supra* note 128; Michaels & Noll, *supra* note 67.

256. *See* Pam Belluck, *New Lawsuit Challenges State Bans on Abortion Pills*, N.Y. TIMES, Jan. 25, 2023, at A19, https://www.nytimes.com/2023/01/25/health/abortion-pills-ban-genbiopro.html?smid=url-share [https://perma.cc/9ZTJ-Q64R].

257. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that the First Amendment bars restrictions on corporations' ability to fund political campaigns).

258. *See* U.S. CONST. art VI.

259. *See* Patricia J. Zettler et al., *Mifepristone, Preemption and Public Health Federalism*, 9 J. LAW BIOSCI. 1, 3 (2022).

260. *See* Emily Bazelon, *Abortion Pills are Medication*, N.Y. TIMES MAGAZINE, Oct. 9, 2022, at 26.

261. *See* Act Expanding Protections for Reproductive and Gender Affirming Care, 2022 Mass. Acts ch. 127, https://malegislature.gov/Laws/SessionLaws/Acts/2022/Chapter127 [https://perma.cc/FZB8-BYVN].

[state] but not the destination [state]"[262]—are likely to remain features of the new American abortion geography.[263]

V. A TROUBLED EQUALITY IDEA

If the new normal of U.S. abortion law resembles the decade-long experience of the E.U. it also raises a deep normative question, namely, is such an arrangement consistent with the constitutional imperative of equality that ought to underpin a just government of equal citizens? In fact, in a federal arrangement in which women can opt out of strict abortion rules by traveling out of state, abortion bans only apply to, and bind, women who have no (cultural, social, and especially financial) means to evade the ban. On the contrary, well-off women who have the resources to pursue the escape route can avoid draconian abortion laws and their consequences. Admittedly, even when abortion was constitutionally protected in the U.S., the ability of women to exercise their reproductive rights was heavily influenced by socio-economic factors, including health insurance and wealth,[264] which has de facto made abortion increasingly a "privilege."[265] Nevertheless, today this discrimination is effectively sanctioned by law—as the inter-jurisdictional interplay between state laws draw a clear differentiating line between those women who will be able to continue enjoying reproductive rights, and those who do not. As Justices Breyer, Sotomayor, and Kagan aptly put it in their dissent in *Dobbs*, the possibility to travel to states that still allow abortions "is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision."[266] Yet, can this clearly discriminatory

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262. I. GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS 318 (2014) (describing what has been called "circumvention tourism—traveling abroad for the express purpose of doing something illegal in the home [state] but not the destination [state]").

263. *See generally* B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L. J. 1081 (2021).

264. *See* GOODWIN, *supra* note 13, at 3 (stating that "the fundamental right to an abortion was already more illusory than real for poor women in light of robust antichoice legislating in the shadow of *Roe*."); *see generally* Heather D. Boonstra, *The Heart of the Matter: Public Funding for Abortion for Poor Women in the United States*, GUTTMACHER INST. (Mar. 5, 2007), https://www.guttmacher.org/gpr/2007/03/heart-matter-public-funding-abortion-poor-women-united-states [https://perma.cc/CL22-LVDL].

265. *See generally* Ederlina Co, *Abortion Privilege*, 74 RUTGERS U. L. REV. 1 (2021).

266. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor and Kagan, J.J., dissenting).

state of affairs be normatively justifiable in light of the principle of women's equality?

As is well known, the reasoning of the U.S. Supreme Court in *Roe* had been criticized, from a liberal perspective, for overemphasizing the role of medical doctors in the decision about termination of pregnancy and failing to address the issue of women's autonomy and equality.[267] In particular, Justice Ginsburg famously faulted the U.S. Supreme Court abortion jurisprudence for treating "reproductive autonomy under a substantive due process/personal autonomy headline not expressly linked to discrimination against women."[268] And as a U.S. Supreme Court Justice, she reaffirmed her view in her dissenting opinion in *Gonzales v. Carhart* that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[269] In fact, a growing body of scholarship pre-*Dobbs* had made the case to find a new foundation for the abortion jurisprudence in the Fourteenth Amendment's Equal Protection clause.[270] However, the argument I am making here goes beyond this line of thought. Rather than discrimination *against* women, it also concerns discrimination *between* women. In the post-*Dobbs* U.S., some women will seek termination of pregnancy, as it has long been the case; however, some will be able to do so lawfully, while others not.[271]

The European experience evidences this. While the Irish abortion ban ruled, it was normal for women who could afford it to travel out of state to seek termination of pregnancy. In fact, in defending the Irish abortion ban in the 2010 hearings before the ECtHR in *A, B & C v. Ireland*, the Irish Government openly acknowledged that in 2007, at least 4,686 women had travelled to England to have an abortion.[272] And more recent statistics reported that in 2017, at minimum 3,092 women had exited Ireland to seek termination of pregnancy just in

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267. *See generally* Donald Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979).

268. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376 (1985).

269. Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

270. *See generally* Melanie Kalmanson & Riley Erin Fredrick, *The Viability of Change: Finding Abortion in Equality after* Obergefell, 22 N.Y.U.J. LEGIS. & PUB. POL'Y 647 (2020); Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation,* 34 HARV. J.L. & GENDER 377 (2011).

271. *See* Michelle Oberman, *What Will and Won't Happen When Abortion Is Banned*, 9 J. L. & BIOSCIENCES 1, 10 (2022) (discussing disparate social impact of abortion bans).

272. A, B, and C v. Ireland, 25579/05 Eur. Ct. H.R. 50 (2010).

England—an average of nine women a day.[273] Yet many other women could not avail themselves of this option—and we know about some of them who paid the price with their life.[274] Similarly, in the U.S., women in roughly half of the 50 states will live in jurisdictions that do not allow abortion.[275] Well-off women will still be able to opt out of the ban, but poor women will not. And while some early initiatives have been taken by progressive municipalities to create special funding mechanisms to support out-of-state trips for women in need seeking an abortion,[276] the success of these efforts remains uncertain.[277] In fact, Supreme Court precedents in *Maher v. Roe* and *Harris v. McRae* put a heavy burden on such prospects by allowing state and federal prohibitions of using public funding to support abortion access.[278] As such, the wealth gap will remain a dominant discriminatory factor in

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273. *See* Ashley Kirk, *Nine a Day: The Women Who Have to Travel for Abortion as Ireland Prepares for Referendum*, THE TELEGRAPH (May 24, 2018), https://www.telegraph.co.uk/news/2018/05/24/nine-day-women-have-travel-abortions-ireland-prepares-referendum/ [https://perma.cc/2YTQ-67JZ].

274. See, for example, in the Irish context, the death of Savita Halappanavar, an Indian dentist who died due to the complications of a septic miscarriage at Galway University Hospital—an event which drew particular attention and public outcry. While the woman had sought termination of pregnancy on life-saving grounds, medical personnel at the hospital had refrained from acting under the chilling effect of the Irish abortion ban. The case led the Irish Government Department of Health to open an investigation. *See generally* HEALTH SERV. EXEC., FINAL REPORT: INVESTIGATION OF INCIDENT 50278 FROM TIME OF PATIENT'S SELF REFERRAL TO HOSPITAL ON 21ST OF OCTOBER 2012 TO THE PATIENT'S DEATH ON THE 28TH OF OCTOBER 2012 (2013) (Ir.)*; see also* Alison O'Connor, *How the Death of Savita Changed the Abortion Debate*, THE IRISH EXAMINER (Oct. 28, 2017, 1:00 AM), https://www.irishexaminer.com/business/arid-20461787.html [https://perma.cc/M4XA-352T].

275. *See generally* LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE AND LAW IN THE UNITED STATES 1867–1973, WITH A NEW PREFACE (2d ed. 2022) (discussing conditions pre-*Roe*); CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA (2017) (discussing profoundly intimate nature of a woman's decision to seek an abortion).

276. *See* Alexis Marshall, *Metro Councilmembers Pitch $500K Grant for Abortion Access and Sex Education*, WPLNNEWS (Aug. 28, 2022), https://wpln.org/post/metro-councilmembers-pitch-500k-grant-for-abortion-access-and-sex-education/ [https://perma.cc/B83B-ZFBE] (reporting debate by the liberal metropolitan city council of Nashville, Tennessee, to create a special fund to support out-of-state travel for women who need an abortion, currently banned by Tennessee law).

277. *See* Margaret Renkl, *This is How Red States Silence Blue Cities. And Democracy*, N.Y. TIMES (Jan. 16, 2023), https://www.nytimes.com/2023/01/16/opinion/nashville-city-council-tennessee-republicans.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/6LJJ-HXTK] (reporting efforts by the conservative state legislature of Tennessee to limit funding for abortion discussed by the metropolitan city of Nashville).

278. *See* Linda Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433, 437–39 (1996).

women's abortion access going forward.[279] And of course, because of the direct correlation between wealth and race, abortion bans are going to disproportionately affect women from Black, Latino, and other disadvantaged socio-economic communities.

How can this be squared with the constitutional commitment to the "equal protection of the laws"?[280] Needless to say, federal unions like the United States (and the E.U., for that matter), do allow for different entitlements across states. As Justice Brandeis famously quipped, "one of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[281] Moreover, it is well known that the United States stands out among Western developed economies for allowing the greatest degree of discrimination based on wealth in the form of a very thin social safety net and the lack of a commitment—like that found in many post-World War II constitutions[282]—to achieve substantive equality.[283] Nevertheless, few would question that despite its federal features today, the United States is (contrary to the E.U., for that matter) one nation—with a single people entitled to equal rights. In fact, the Fourteenth Amendment of the U.S. Constitution made federal citizenship primary, downgrading the role of state citizenship,[284] and the Nineteenth Amendment granted women the same voting rights as men,[285] recognizing their equal status as self-governing citizens. Moreover, with the awareness that states can also serve as laboratories

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279. *See* Ziegler, *supra* note 13, at 211 (stating that the "abortion struggle offer[s] a window into disagreement about poverty, [etc.]").

280. U.S. CONST. amend. XIV, § 1.

281. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

282. *See, e.g.*, ART. 3 COSTITUZIONE [COST.] (IT.). (recognizing that "[a]ll citizens have equal social dignity and are equal before the law" and affirming that "[i]t is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person.").

283. *See* George Katrougalos, *European 'Social States' and the USA: An Ocean Apart*, 4 EUR. CONST. L. REV. 225, 239 (2008).

284. *See generally* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425 (1987) (underlying the original national genus of the U.S. Constitution); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019) (stressing how the Reconstruction Amendments fundamentally altered the federal nature of the U.S. constitutional bargain in favour of national unity). For a comparative perspective with the E.U., see generally ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW (2009).

285. U.S. CONST. amend. XIX.

against democracy,[286] U.S. federal law and jurisprudence have long recognized that poverty is not a justification for discriminatory treatment, for instance on suffrage.[287]

In fact—drawing a parallel between access to the ballot box and access to abortion—the current state of reproductive rights in the United States appears to be at odds with a thick conception of constitutionalism, which sees equality as essential to democratic self-governance. Indeed, on the one hand, equality is central to republican theories of constitutionalism,[288] which are premised on the ability of fellow citizens to govern themselves as free and equals. On the other, equality is also essential to liberal theories of constitutionalism, as the purpose of (limited) constitutional government is to overcome arbitrary rule, and secure individual rights equally to everyone.[289] As Stephen Holmes has argued, liberals "universally associate[] justice with a more substantive idea of impartiality: *all* individuals must be protected *equally* from third-party injury."[290] Therefore, seen through the prism of constitutional equality, a legal arrangement which discriminates between women's right to reproductive autonomy based on wealth undermines their equal status, and thus appears to be profoundly unfair and unjust.

I accept that arguments about equality cut both ways. From a conservative perspective, if someone believes that the fetus is a legal person, then the Equal Protection Clause would entitle it to constitutional protection.[291] And by this reasoning, the right to abortion would have to be banned everywhere in the United States—including in those U.S. states which still allow women the right to choose after *Dobbs*—in order to ensure that the fetus's rights are equally protected

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286. *See generally* JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS (2022).

287. *See* U.S. CONST. amend. XXIV, § 1 (abolishing poll taxes in federal elections); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (declaring poll taxes for state elections unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

288. *See* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 82 (2012).

289. *See* JOHN RAWLS, POLITICAL LIBERALISM 5 (2d ed. 2005) (stating that the first of two core principles of liberal justice is that "[e]ach person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all").

290. STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 242 (1995).

291. *See* John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A* Dobbs *Brief*, 45 HARV. J.L. & PUB. POL'Y 927, 930 (2022).

nationwide.[292] However, this argument stands on weaker jurisprudential grounds, as the U.S. Supreme Court has never held that a fetus is a person entitled to constitutional protection, much less suggested that the U.S. Constitution would limit the ability of the people in the states to make abortion legal. In fact, the majority opinion in *Dobbs* clearly stated that "[i]n some States, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. . . . Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."[293] Justice Kavanaugh, in his concurring opinion, doubled-down on the opinion that the Court "does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion. . . . In sum, the Constitution is neutral on the issue. . . ."[294] Moreover, U.S. constitutional history provides a strong precedent against such a hypothetical prohibition—namely the disastrous experience of Prohibition itself. The Eighteenth Amendment, adopted in 1919, constitutionally banned the sale and purchase of alcohol across the United States on the basis that this was a moral sin.[295] But Prohibition proved to be a major failure[296]—and was quickly repealed by the Twenty-First Amendment in 1933.[297] This clearly provides a cautionary tale against morally driven prohibitions, and a strong argument against the constitutionality of a hypothetic top-down federal abortion ban—even more so a judicially-imposed one.

In sum, the troubled equality idea that emerges from the current U.S. abortion landscape raises profound normative questions. Yet, if the experience of the E.U. is of any value, this state of affairs can provide the moral, political, and legal argument for future constitutional change.[298] Of course, comparative law cannot predict what will happen in the United States. But the previously mentioned example of

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292. *Id.* (stating that "prohibitions of elective abortions are constitutionally obligatory because unborn children are persons within the original public meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses.").

293. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257 (2022).

294. *Id.* at 2306 (Kavanaugh, J., concurring).

295. U.S. CONST. amend. XVIII, § 1.

296. *See generally* DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION (2010) (discussing prohibition).

297. U.S. CONST. amend. XXI, § 1.

298. On equality arguments in the abortion debate, see generally Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160 (2013) (discussing equality arguments for abortion rights under the Equal Protection and Due Process Clause).

Ireland offers perhaps a possible playbook which U.S. scholars and activists could look to. The unjust system in which well-off women could travel overseas to secure a lawful abortion, while poor women could not, was turned by Irish pro-choice campaigners into a powerful case to canvass for domestic change. Indeed, as much as the repeal of the Eighth Amendment to the Irish Constitution was driven by domestic grass-roots movements, it was also the outcome of a meandering process in which the inequities of an abortion ban hitting poor women disproportionately was progressively exposed through the transformative jurisprudence of the European human rights courts.[299] By the same token, equality arguments can be a mobilizing force for political action in states which now ban abortion in the United States. Just to be clear, the point here is not—as the majority opinion cynically held in *Dobbs*—that constitutional protections of abortions rights are not needed because "[w]omen are not without electoral or political power."[300] Rather, the point is that through political action—one may dare say *constitutional* mobilization—women and pro-choice activists can reclaim abortion rights by appealing to their fellow citizens with normative arguments about equality.[301] At the same time, equality arguments can also be leveraged as a legal cause of action in state courts. As most state constitutions do recognize non-discrimination and equal protection principles, legal activists can invoke those provisions to challenge abortion bans that produce disparate effects on the basis of wealth, race, and class.[302]

Of course, the success of this strategy is not foretold. As is well known, equality arguments largely failed to win the day in the United States in the 1970s—witness the defeat of the Equal Rights Amendment. But in other contexts, notably the struggle for homosexual marriage, equality arguments did win in the courts—and the court of public opinion—to the point that today there is large bipartisan consensus in favour of protecting homosexual marriages,

299. *See* Fabbrini, *supra* note 176.

300. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022).

301. *See generally* DAVID COLE, ENGINES OF LIBERTY: HOW CITIZEN MOVEMENTS SUCCEED (2016).

302. *See generally* Robert L. Bentlyewski, *Abortion Rights Under State Constitutions: A Fifty-State Survey*, 90 FORDHAM L. REV. ONLINE 201 (2022); *see also* Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 29, 2023), https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html [https://perma.cc/SMV8-Z7D2].

even in the face of a possibly hostile U.S. Supreme Court.[303] Indeed, the recent increase in women's political mobilization following the *Dobbs* ruling,[304] and the success of efforts by pro-abortion activists to protect reproductive rights even in fairly conservative states,[305] suggest that this is a possible path.[306] Moreover, the track record of state supreme courts' review of abortion bans highlights some early receptiveness to equality arguments,[307] which one day could even possibly garner some attention from the U.S. Supreme Court—albeit admittedly with a very different composition than what it has now.

CONCLUSION

Abortion laws in Europe and the United States have increasingly converged over the last fifty years. In the early 1980s, the refrain of many comparative lawyers was that the United States stood alone among Western countries in recognizing a broad individual right to the voluntary interruption of pregnancy, while most E.U. member states subjected abortion to stricter regulations or prohibited it tout court.[308] Already during the mid-1990s, comparative law scholars noticed that the United States was retreating from its earlier, very liberal position by permitting states to restrict a woman's right to an abortion.[309] At the same time, E.U. member states were widening the conditions under which women could choose to terminate pregnancies, often under the pressures of the rising supranational laws.[310] In the 2010s, an even clearer pattern of convergence emerged: In the United States, the federal government and many states enacted laws that further constrained women's reproductive rights, while a number of E.U. member states

303. *See* Respect for Marriage Act, Pub. L. No. 117-228, § 2(2), 136 Stat. 2305, 2305 (2022) (bipartisan statute approved by the U.S. Congress to reaffirm support for marriage equality after *Dobbs*).

304. *See supra* text accompanying note 119.

305. *See supra* text accompanying note 120.

306. *See* Linda Greenhouse, *Does the War Over Abortion Have a Future?*, N.Y. TIMES (Jan. 18, 2023), https://www.nytimes.com/2023/01/18/opinion/abortion-culture-wars.html [https://perma.cc/J4C5-MJUT] (arguing that in "Roe v. Wade's constitutional death lies the political resurrection of the right to abortion.").

307. *See supra* text accompanying notes 114–116.

308. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 10–50 (1987); Marie-Thérèse Meulders-Klein, *Vie privée, vie familiale et droits de l'homme*, 44 REVUE INTERNATIONALE DE DROIT COMPARE 767, 767 (1992).

309. *See* TRIBE, *supra* note 16, at 197; TUSHNET, *supra* note 24, at 114–15.

310. *See* Cole, *supra* note 198, at 114.

further liberalized their abortion laws.[311] By the early 2020s, eventually, the convergence had become complete. On the one hand, in 2018, Ireland repealed the most restrictive abortion ban in the E.U., while, on the other, in 2022, the U.S. Supreme Court overruled *Roe* and declared that the U.S. Constitution no longer protected a constitutional right to abortion. As such, *Dobbs* flipped the balance, with abortion rights now being more widely protected in the E.U. than in the United States.[312]

Yet, as this article has argued, *Dobbs* also "Europeanized" American abortion law to the extent that the federalism dynamics that the United States is now experiencing have been a constant feature of the E.U. abortion landscape. In a pluralist system in which abortion is legal in some states, but not others, women will be able to escape strict abortion prohibitions by leaving right-to-life states and traveling to right-to-choose states. This possibility is entrenched and defended both in the E.U. and the United States in supranational/federal jurisprudence on the right to free movement or inter-state travel, free speech, and freedom to provide services. Yet, it has a disparate impact on women: Those with resources will be able to evade bans, while those lacking the financial means—and those coming from racially and socially disadvantaged groups—will be unable to opt-out of an abortion ban and suffer its dire consequences. As this article has pointed out, this state of affairs raises profound normative questions in light of the constitutional principle of equality, which should underpin a liberal democracy of self-governing citizens. From this point of view, therefore, the U.S. Supreme Court ruling in *Dobbs* has created as many constitutional problems as those it claimed to resolve. Although comparative law is a controversial tool in U.S. Supreme Court jurisprudence,[313] a look beyond the Atlantic would have helped to

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311. For a recent comparative assessment of abortion rights worldwide, see Reva B. Siegel, *The Constitutionalization of Abortion*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1057, 1071–78 (Michel Rosenfeld & András Sajó eds., 2012); *see generally* REVA B. SIEGEL ET AL., ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES (Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens eds., 2014).

312. Indeed, in response to *Dobbs*, the European Parliament—the lower house of the E.U. legislature, which is directly elected by E.U. citizens—passed a resolution condemning the U.S. Supreme Court ruling and proposing an amendment to the E.U. Charter of Fundamental Rights to codify a right to abortion. *See* Resolution on the U.S. Supreme Court Decision to Overturn Abortion Rights in the United States and the Need to Safeguard Abortion Rights and Women's Health in the E.U., EUR. PARL. DOC. P9_TA0302 (2022), § 2 (proposing to amend the Charter by adding a new Article 7a, as follows: "Everyone has the right to safe and legal abortion.").

313. *See* Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (stating that "[w]e must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can

anticipate the inevitable effects of overruling *Roe*. At the same time, the European experience provides a potential pathway to reclaim reproductive rights in the United States on equality grounds after the removal of constitutional protections of abortion in a federal union of states and citizens.

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be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. . . . But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.") (internal citations omitted). *But see* Roper v. Simmons, 543 U.S. 551, 578 (2005) (Justice Kennedy delivering the opinion of the Court, stating "[i]t does not lessen our fidelity to the Constitution . . . to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom"); STEPHEN BREYER, THE COURT AND THE WORLD 236–46 (2015); *see* generally Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, 52 HARV. INT'L L. J. ONLINE 1 (2010), https://dash.harvard.edu/handle/1/10511098 [https://perma.cc/Z6FK-FE2V].