Chapter 12

A Few Musings on the *Dobbs v. Jackson Women's Health Organization* Case

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INTRODUCTION

According to the statistics available online, the US Supreme Court delivers an average of seventy-five rulings per year.[1] Rarely do its adjudications make the headlines in American newspapers, news outlets, or social networks. Even less frequently do they capture the attention of European media and their audience. However, against this backdrop, the judgment in *Dobbs v. Jackson Women's Health Organization*, issued on June 24, 2022, achieved significant global recognition, especially within the Euro-Atlantic sphere.[2] The case concerned abortion and its admissibility under the US Constitution. Ultimately, the Supreme Court overruled previous precedents set in *Jane Roe et al. v. Henry Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[4] holding that the US Constitution does not guarantee the right to terminate pregnancy. This ruling will undoubtedly provide rich material for numerous analyses and studies, focusing not only on the right to abortion alone but also—or perhaps above all—on the limits of judicial activism. This paper briefly outlines the arguments presented in the reasoning to the aforementioned rulings

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[1] "Number of Cases Decided by the Supreme Court of the United States from 2010 to 2023, by Term," Statista, accessed February, 25, 2024, https://www.statista.com/statistics/1326129/number-supreme-court-cases-decided-term-us/.

[2] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022), hereinafter as *Dobbs*.

[3] *Roe v. Wade*, 410 U.S. 113 (1973), hereinafter as *Roe*.

[4] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), hereinafter as *Casey*.

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and offers certain reflections arising in the context of the Polish reader, specifically with regard to the legitimacy of the adjudication in *Dobbs*, the various methods of interpretation adopted by the Supreme Court and the ruling of the Polish Constitutional Tribunal of October 22, 2020.[5]

FROM *ROE* TO *DOBBS*—THE COURT'S ARGUMENTATION

In *Roe*, the Supreme Court found that state abortion laws that prohibited abortion at any stage of pregnancy on pain of criminal liability, except when the woman's life was at risk, violate the so-called due process clause of the Fourteenth Amendment to the Constitution. According to the latter, "nor shall any State deprive any person of life, liberty, or property, without due process of law." In essence, the ruling recognized that, within the scope of this provision, the concept of "liberty" encompasses the right to privacy, which, in turn, includes the right to decide whether to terminate pregnancy. Drawing upon the history of abortion laws, the majority opinion authored by Justice Blackmun asserted that restrictive criminal abortion laws are 'of relatively recent vintage'. In common and statutory law, distinctions were made between pre-quickening and post-quickening abortions, and at the time of the Constitution's adoption and throughout much of the nineteenth century, abortion was treated more leniently than in the prevailing state laws at the time of the ruling. It emphasized that in previous case law, the right to privacy had been derived from various constitutional provisions, Amendments: First, Fifth, Ninth, and Fourteenth, in particular. Building on precedents that, based on the right to privacy, granted protection to decisions relating to marriage, procreation, contraception, family relations, or children's education, it was recognized that only personal rights deemed "fundamental" or "implicit in the concept of ordered liberty," are included in the guarantee of personal privacy. Subsequently, it was affirmed that the right to privacy is expansive enough to encompass a woman's decision on whether or not to terminate her pregnancy. Since depriving her of the ability to make such a decision could significantly impact her physical and psychological well-being, particularly by inducing the stress of giving birth to an unwanted offspring. However, it was noted that the right to decide on abortion is not absolute and may face restrictions. As it is a fundamental right, the interest of the state has to be compelling in order to prevail. After considering the rationales behind the criminalization of abortion, the various phases of fetal development, and the mortality statistics in pregnant women, the court found that compelling interest in protecting the health and life of the

[5] Judgment of the Constitutional Tribunal of the Republic of Poland of October 22, 2020, K 1/20, OTK-A 2021, no. 1.

woman arises following the first trimester. At the point of viability—indicating the fetus' ability to survive outside the mother's body—the State's compelling interest shifts toward protecting potential life, thereby justifying a potential ban on abortion.

The second precedent overruled by *Dobbs* was the ruling issued in *Casey*, in which, among other things, the obligation of the pregnant woman to give formal consent—preceded by an adequate consultation she was to receive at least twenty-four hours prior to the procedure—was found to be constitutional. While the case reaffirmed and, in principle, upheld the essential premises adopted in *Roe*, this affirmation was less a reflection of the justices' personal belief in its correctness and more a result of the binding principle of *stare decisis*[6] and the imperative to preserve the integrity and credibility of the Supreme Court as an institution.[7] According to the Court, the prerequisites for overruling a precedent were not met.[8] The Court emphasized that post-*Roe*, individuals had organized their intimate lives and made choices that shaped their views of their roles in society by relying on the availability of abortion. Therefore, even though proscribing abortion directly would not violate 'reliance interests,' a change in the legal status quo was inadmissible. The Court argued that even if the *Roe* ruling was erroneous, the consequences of that error were deemed less severe than if women were deprived of the right to decide whether to continue a pregnancy and give birth. Considering the prevalent socio-political situation in the US, the Court believed that deviating from the assertions made in *Roe* could be perceived as yielding to political pressure. This, in turn, would undermine the tenet of judicial independence and erode public trust in the judiciary. Addressing the substance of the argument advanced in *Roe*, the Court reaffirmed that the due process clause in the Fourteenth Amendment protects against state interference in all those fundamental rights inherent in the notion of "liberty," which broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints. Invoking the case law referred to in *Roe* and the role of history and tradition in determining the balance between liberty and state interest, it was concluded that termination of pregnancy was highly a controversial issue and that it was not the state's prerogative to deny women the right to choose. However, in approving

[6] According to the principle of *stare decisis*, decisions of higher courts are binding on lower courts in all similar cases, while a change of ruling at the same level must be justified by a valid and compelling reasons; thus Diana Pustuła, "Znaczenie doktryny stare decisis dla sądowej kontroli konstytucyjności prawa USA—między stabilnością orzecznictwa a instrumentalizmem," *Przegląd Prawa Konstytucyjnego* 49, no. 3 (2019), 80.

[7] Here, one cannot fail to note that the judges who drafted the principal opinion asserted no need to elaborate on how they would have weighed the interests of the State if they had ruled in Roe and whether they would have reached the same conclusions, as that was not the subject of their deliberations.

[8] Moreover, the Supreme Court observed that the jurisprudential line may be legitimately altered if: (1) the ruling has proved unworkable, (2) a change in legislation has caused the ruling to be perceived as anachronistic or (3) the state of fact which provided grounds for the holding has changed and, simultaneously, and (4) a potential change would not have a major impact on such interests of individuals to which the precedent has contributed.

the ruling in *Webster v. Reproductive Health Services*[9] the Supreme Court rejected the trimester paradigm and replaced it with the category of so-called undue burden. Legal constraints on the right to terminate pregnancy shall be found invalid if their purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

In *Dobbs*, a Mississippi state law that prohibited abortion after fifteen weeks of pregnancy, except in a medical emergency or in the case of a severe fetal abnormality, was declared constitutional by a vote of six to three. At the same time, it was held that the rulings in *Roe* and *Casey* should be overruled in their entirety because the constitutional guarantees do not extend to the right to terminate pregnancy. A reversal of the precedents and departure from the principle of stare decisis was expounded in the majority opinion written by Justice Alito, which in the first place argued that *Roe* was egregiously wrong. The ruling inaccurately assessed the historical background; it imposed a certain viewpoint on a proportion of the public without regard for democratic procedures; it failed to identify relevant legal grounds and instances of using the criterion of viability, which was informed solely by medical advances and the specific situation of the woman concerned, whether in the constitutional provisions, the history of abortion law or in precedents. Moreover, the criterion of undue burden introduced in *Casey* was deemed too general and subjective, which made it unworkable and difficult to apply uniformly. The Court did not share the view formulated in *Casey*, namely that change in jurisprudence violates reliance interests since abortion as such is always unplanned and the possible impact of the right to abortion on the public and women's lives is an empirical question that is hard for a court to assess. In the deliberations concerning the termination of pregnancy itself, it was particularly emphasized that the Constitution makes no express reference to a right to obtain abortion, nor can such right be inferred indirectly from any of its provisions, in particular, the due process clause. As regards previous precedents, it was noted that the Constitution protects rights that are not expressly stated there only if they are rooted in the Nation's history and tradition and are an essential component of "ordered liberty."[10] The Court asserted that having been developed and established in the doctrine, such criteria should guide the interpretation in order to prevent subjective determinations based on the notions espoused by individual members of the bench as to how a given liberty should be construed. Extensive historical analysis prompted the Supreme Court to reach a somewhat different conclusion than in *Roe*. It was observed that although both common law and American colonial statutes differed on the severity of punishment for abortions committed at different points in pregnancy, it was not an endorsed practice. It is likely that the distinction between pre- and post-quickening

[9] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

[10] Interestingly, such "conservative" criteria (see below) were, in fact, employed by the liberal-leaning Justice R. B. Ginsburg in the majority opinion she formulated in *Timbs v. Indiana*, 586 U.S. (2019).

arose from the impossibility of detecting early-stage pregnancy and was therefore abandoned in the nineteenth century. At the time when the Court ruled in *Roe*, as a general rule abortion at all stages was prohibited in thirty states. Hence, the right to abortion cannot be regarded as deeply rooted in tradition and history. Neither does the historically based notion of ordered liberty prevent the people's elected representatives from deciding how abortion should be regulated. In *Roe*, the Court struck a particular balance between the interests of a woman who wants an abortion and the interests of "potential life," but the people of the various States may evaluate those interests differently. Regarding the precedents that define the notion of liberty, it was demonstrated that the right to abortion cannot be compared with the right to contraception or the decision to marry a person of one's choice, as they involve distinct situations, in which the fundamental element of destroying a potential life is lacking.

Assuming that no limitations arise from the Constitution, the Supreme Court left the issue to the democratic legislative process, in which women can and should seek appropriate guarantees. In doing so, however, it maintained that any legislation governing abortion, just like any other healthcare legislation, is entitled to a "strong presumption of validity" and should be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.[11]

Three justices presented dissenting opinions, focusing primarily on the potential legal and factual ramifications of the judgment. Their central concern was that any future restrictions on the right to abortion might be deemed reasonable, leading to women being deprived of the ability to terminate pregnancies, even in cases of rape or medical conditions. Additionally, they expressed worries that certain states could enforce restrictions on 'abortion tourism,' preventing individuals from traveling to have terminations performed elsewhere. Moreover, the judgment might jeopardize other rights previously acknowledged by the Supreme Court as constitutionally protected, including the right to same-sex unions.

ROE V. DOBBS—WHICH IS MORE COMPELLING?

In an overall evaluation of the rationales behind the mentioned rulings, it is crucial to emphasize that the Supreme Court's role in cases like *Roe*, *Casey*, or *Dobbs* was to ascertain the constitutionality of specific state laws. Its responsibility was not to prescribe the correct resolution of an issue but to discern how it should be

[11] Specific examples of such interests were, in fact, enumerated, including respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fatal pain; and the prevention of discrimination on the basis of race, sex, or disability.

resolved in accordance with the Constitution, meaning its text and the associated body of case law. While the assertion made by abortion advocates, stating that the Constitution 'must protect a woman's decision whether or not to terminate her pregnancy,' may have merit, it is not synonymous with the assertion of what the Constitution actually safeguards. Therefore, it was imperative to establish the guarantees that do arise from the Constitution, not those that should. Otherwise, any amendment to the Constitution would be superfluous, as it would always be possible to broaden its scope to encompass specific conduct deemed expedient at the time.

Therefore, upon closer examination, one might not fully agree with the supporters of the *Roe* ruling.[12] Firstly, the Supreme Court allocated relatively little attention in this case to the doctrinal analysis of the Constitution, specific statutes, and earlier precedents. The pivotal assertion that the Constitution protects the right to privacy, encompassing a woman's decision whether to terminate pregnancy, is based only on a brief analysis, with the substantial part contained in a footnote and an acknowledgment of the self-evident nature of the non-absoluteness of this right. Moreover, the newly introduced trimester paradigm lacks explicit links to normative provisions or precedents and seems to be a creative attempt by the Court to address a perceived need, seeking regulation in the absence of pertinent guidelines. Rather than delving into legal texts, the Court predominantly engaged in historical, contextual, and purposive deliberations, with the interpretation primarily focused on the consequences of adopting a particular solution.

Similar reservations can be raised about the dissenting opinion in *Dobbs*, where the judges also prioritize the foreseeable consequences of the ruling. Some of the judges' concerns may be well-founded, as the danger they anticipated is becoming a reality in many states that enact highly restrictive abortion statutes.[13] These statutes may ultimately be declared unconstitutional, but they remain in force, impacting the lives of many women pending review. Justice Thomas' literal reading of the Fourteenth Amendment, confining its application to procedural rather than substantive rights, also adds legitimacy to concerns about the prospective jurisprudence related to substantive rights, which were derived from the due process clause.[14] On the other hand, apprehensions about a potential ban on

[12] Significantly, the ruling and its reasoning were quite extensively critiqued by Justice R. B. Ginsburg, who can hardly be claimed to be an opponent of women's rights. Cf., for example, Ruth B. Ginsburg, "Speaking in a Judicial Voice," *New York University Law Review* 67, no. 6 (1992): 1198–208.

[13] "After Roe Fell: Abortion Laws by State," Center for Reproductive Rights, accessed February, 25, 2024 https://reproductiverights.org/maps/abortion-laws-by-state/.

[14] Justice Thomas asserted that "because the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion." Incidentally, it should be noted that in the linguistic interpretation, which continues to predominate in continental legal doctrine and has a limiting effect on the systemic and teleological interpretation, the application of the due process clause to substantive rights may be subject to objections. The wording "nor shall any State deprive any person of life, liberty,

'abortion trips' appear unfounded. As Justice Kavanaugh, in supporting the majority, aptly noted, such a ban would contradict the constitutional right to interstate travel.

The trajectory of prospective legislation and Supreme Court case law remains uncertain. Even if it turns out to be as restrictive as feared by the authors of the dissenting opinion, significantly limiting the possibility of terminating pregnancies in certain states, one cannot solely on these grounds assert that the right to abortion is subject to constitutional guarantees.

The interpretative approach adopted in *Dobbs*, which aimed to discern the protection arising under the Constitution rather than prescribing what should be protected, appears compelling. When determining the compatibility of an abortion statute with the Constitution, the Supreme Court was well within its rights to find that the law is silent on the subject—neither explicitly prohibiting nor permitting the termination of pregnancy. The question of whether the Supreme Court accurately determined this silence and employed an accurate method to infer protected liberties from the Constitution is a separate matter beyond the scope of this study. However, examining the Supreme Court's jurisprudence post-*Roe*, one might be inclined to question whether the right to abortion meets the basic premise invoked by both liberal and conservative justices: that it must be grounded in history and tradition. Despite *Roe*'s unequivocal declaration of abortion as a fundamental right, the Supreme Court's subsequent position on how this right should be exercised has been notably conservative. In principle, the Court has often assumed a stance accepting legal solutions that while not expressly prescribing the termination of pregnancy, significantly limit the possibility of undergoing the procedure.[15] Despite criticism from women's and pro-choice groups, the option of terminating pregnancies was effectively suspended in numerous states, primarily due to the procedural requirements and significant financial obstacles. The pivotal judgment in *Webster v. Reproductive Health Services* on July 3, 1989, declared constitutional the ban on public healthcare professionals performing terminations of pregnancies that did not pose a threat to the life of the mother, as well as the prohibition on using public facilities for this purpose.[16] The departure from the liberal premises adopted in *Roe* is also

or property, without due process of law" explicitly states no more than the need to follow due process of law before imposing the restriction in question.

[15] Cf. Anna Demenko, "Aborcja w orzecznictwie Sądu Najwyższego USA," *Czasopismo Prawa Karnego i Nauk Penalnych* 24, no. 4 (2020): 12–16 with the literature cited there.

[16] This is because said prohibitions "place(d) no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but l(eft) her with the same choices as if the State had decided not to operate any hospitals at all." See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). As early as 1977, in *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court determined that the ban on funding medically unjustified abortions adopted by the State of Connecticut was constitutional. In 1980, in *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court endorsed the so-called Hyde Amendment, a provision first introduced in 1976 to the budget bill of the Department of Health

evident in *Casey*, as described above.[17] The seemingly undemanding requirement to precede the procedure with a consultation and a sufficient period of reflection significantly prolonged the entire process, posing a tangible obstacle in American realities. This hurdle was especially burdensome for poorer women, as it led to additional costs associated with accommodation or leave. Despite occasional liberal rulings from the Court, as in *Akron v. Akron Center For Reproductive Health*[18] and *Whole Woman's Health v. Hellerstedt*,[19] continual attempts to toughen abortion laws in some states underscore that the issue of termination of pregnancy has not been conclusively resolved in favor of its admissibility.

FEMINIST V. TRADITIONAL METHODS OF ARGUMENTATION

In both *Roe* and *Dobbs*, Supreme Court judges operated under the presumption that their rulings were neutral reflections of existing law rather than influenced by personal views and beliefs. This kind of modernist presumption, rightly criticized in feminist jurisprudence, is counterfactual. While research into various legal systems has not definitively confirmed the impact of personal factors (such as gender or origin) on adjudication,[20] it is undeniable that interpreting legal texts is not a value-

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for 1977, which prohibited abortions under Medicaid in pregnancies which did not endanger the life of the mother.

[17] It is rightly observed in the rationale in Dobbs that "paradoxically, the judgment in *Casey* did a fair amount of overruling."

[18] In 462 U.S. 416 (1983), incompatibility with the Constitution was determined with regard to the requirement that following the end of the third-trimester terminations be performed at a hospital; the stipulation that one has to obtain consent of the woman concerned after she has been advised of, for example, potential complications and adoption possibilities was found unconstitutional as well.

[19] In 579 U.S. __ (2016), the requirements that were deemed contrary to the Constitution included performance or induction of abortion by a physician entitled to admit patients at a hospital located up to thirty miles from the abortion facility, and conducting the same at a facility whose standards are equivalent to the so-called ambulatory surgical centers.

[20] Allison P. Harris and Maya Sen, "Bias and Judging," *Annual Review of Political Science* 22 (2019): 251–52; Christina L. Boyd, Lee Epstein, and Andrew D. Martin, "Untangling the Causal Effects on Sex on Judging," *American Journal of Political Science* 54, no. 2 (2010): 390, 406; Phyllis Coontz, "Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?", *Gender Issues* 18 (2000): 62; Cécile Bourreau-Dubois et al., "Does Gender Diversity in Panels of Judges Matter? Evidence from French Child Support Cases," *International Review of Law and Economics* no. 63, (2020): 1; Michael E. Solimine and Susan E. Wheatley, "Rethinking Feminist Judging," *Indiana Law Journal* 70, no. 3 (1995): 898; Susan B. Haire and Laura P. Moyer, *Diversity Matters: Judicial Policy Making in the U.S. Courts of Appeals* (Charlottesville, University of Virginia Press, 2015), 47–48; Ulrike Schultz, "Do Female Judges Judge Differently? Empirical Realities of a Theoretical Debate," in *Women Judges in the Muslim World: A Comparative Study of Discourse and Practice*, eds. Nadia Sonneveld and Monika Lindbekk (Leiden, Boston: Brill, 2017), 43.

neutral process aimed solely at discovering inherent truths waiting to be elucidated.[21] The application of different modes of interpretation can yield entirely distinct conclusions, and these conclusions cannot be assessed in terms of truth or falsity. The acceptable boundaries of interpretation are determined by linguistic conventions and purposive assumptions. Notably, the rulings in *Roe* and *Dobbs* demonstrate that a shift in emphasis, even with the same legal and factual grounds (given the persistent societal division in American society on abortion since the 1970s), can lead to divergent conclusions.

Based on the social context and the aftermath, the approach taken in *Roe* (and, to some extent, in *Casey*) appears characteristic of the so-called feminist interpretation of the law, which is typified by the increased involvement of women in the contextual analysis and consideration of a broad range of factors.[22] In a pivotal 1990 paper on the subject, Katharine Bartlett notes that feminists, in addition to conventional methods of doing law, such as deduction, induction, analogy, and policy, use other specific methods, which attempt to reveal features of a legal issue which more traditional methods tend to overlook.[23] According to her, the distinctive traits of feminist jurisprudence are: firstly, asking 'the woman question', in order to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups. Secondly, it is feminist practical reasoning, expanding traditional notions of legal relevance to make decision-making more sensitive to the features of a case not already reflected in the legal doctrine. Thirdly, it tests the validity of accepted legal principles through the lens of the personal experience of those directly affected by those principles.[24]

Already at the stage of checking the admissibility of the complaint to be examined, the reasoning in *Roe* is indicative of the feminist approach. The Court, taking into account the duration of pregnancy and the potential length of court proceedings, departed from the general criterion—the existence of an actual controversy at the stage of appellate review. Substantively, the Court's deliberations focused prominently on the aftermath of the decision, particularly its implications for women and their families. To support its position, the Court invoked various

[21] On this issue cf. Anna Demenko, *Przestępstwa popełniane przez wypowiedź* (Warszawa: Wydawnictwo C. H. Beck, 2021), xiv–xv; Thomas M. J. Möllers, *Juristische Methodenlehre* (Munich: C. H. Beck, 2017), 448, 473–75; Stanley Fish, "Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law," *Cardozo Law Review* 29, no. 3 (2008): 1111–12; Jerzy Leszczyński, "O charakterze dyrektyw wykładni prawa," *Państwo i Prawo* 3 (2007).

[22] Solimine and Wheatley, "Rethinking Feminist Judging," 891; Dianne Otto, "Feminist Judging in Action: Reflecting on the *Feminist Judgments in International Law* Project: Loveday Hodson and Troy Lavers (eds.): *Feminist Judgments in International Law*, Hart Publishing, Oxford, 2019," *Feminist Legal Studies* 28 (2020): 207–10.

[23] Katharine T. Bartlett, "Feminist Legal Methods," *Harvard Law Review* 103, no. 4 (1990): 836.

[24] Bartlett, "Feminist Legal Methods," 836–37.

non-legal arguments. The historical analysis delved into antiquity, exploring abortion attitudes in ancient Greece and Rome, referencing works of philosophers like Plato and Aristotle, and examining concepts such as the Hippocratic oath and ideas on the origins of human life in philosophical and religious theories, including Stoicism, Judaism, and Christianity. The Court also considered the positions of reputable organizations such as the American Medical Association, the American Public Health Association, and the American Bar Council. Current medical knowledge played a crucial role, notably in the introduction of the trimester paradigm. In essence, the Court's comprehensive approach to the matter acknowledged and considered various aspects, emphasizing its commitment to a holistic understanding of the issue at hand.[25]

However, that multifaceted approach was not embraced in *Dobbs*. On the contrary, one of the criticisms against the rationale for the overruling precedent was precisely that it invoked circumstances irrelevant to the final decision, failing to specify their contribution to the interpretation of the Constitution.[26] With a significant emphasis on prioritizing the latter, the majority opinion in *Dobbs* reflects the hallmarks of a modernist approach to legal interpretation. To identify the constitutional provisions supporting the right to abortion, the majority opinion in *Dobbs* focuses on two premises from earlier case law: whether the right is rooted in the nation's history and tradition, and whether it is an essential component of ordered liberty. As a rule, history, and tradition do not readily accommodate the introduction of new, previously unrecognized rights aligned with ongoing societal processes. The reliance on such criteria is grounded in the conviction that a given law possesses an inherent, immutable, and objective substance, devoid of subjective value judgments from the court at a particular moment and possessing certain timeless quality. While the concept of ordered liberty allows for more flexibility in deriving new guarantees that consider current social circumstances, the Court in this case chose not to take full advantage of this discretion. Its analysis was confined to determining whether 'the right is somehow implicit in the constitutional text.' The actual aftermath of the judgment was largely disregarded, as the Court, by leaving the abortion issue to be resolved by the lawmaker, did not deliberate on the realistic decisions that could follow. When assessing the legitimacy of overruling precedent in terms of reliance interest, the Court narrowly defined that premise as concrete reliance interest, overlooking the indirect impact that the *Roe* ruling might have on the functioning of society.

[25] Interestingly, the application of feminist methods led the Court to a male-centric, "paternalistic" solution: in the first trimester of pregnancy, the decision to terminate the pregnancy should, according to the Supreme Court, be made by the pregnant woman's physician, meaning a male, in the Court's assumption. Cf. Nadine Strossen, "Reproducing Women's Rights: All Over Again," *Vermont Law Review* 31, no. 1 (2006): 32.

[26] "The Court Did Not Explain Why These Sources Shed Light on the Meaning of the Constitution."

THE DECISION OF THE CONSTITUTIONAL TRIBUNAL OF OCTOBER 22, 2020— THE POLISH PERSPECTIVE

The holding in *Dobbs*, particularly its chief conclusion that the US Constitution is silent on the issue of abortion, deferring the matter to the discretion of the legislature, is particularly interesting in light of the widely commented, and fraught with consequences, decision of the Polish Constitutional Tribunal of October 22, 2020. The Tribunal found that certain injunctions or prohibitions concerning the protection of conceived life or, using probably the most fitting terminology of the ECHR, potential life,[27] can indeed be derived from the Polish Constitution. In essence, the approach of the Constitutional Tribunal aligns with the approach of the US Supreme Court in *Roe*, as both institutions acknowledged that their respective Constitutions contain certain injunctions/prohibitions, even though neither the Polish nor the American Constitution explicitly addresses the admissibility of terminating pregnancy. The legislative process in Poland demonstrates even a deliberate choice by the lawmakers not to resolve the abortion issue explicitly. A provision on protecting life from the moment of conception was indeed considered, but ultimately it was not introduced precisely because of the existing divergence of worldview among the public.[28] A compromise solution was adopted instead, leaving it "to the public consciousness and also to what will transpire in the following years."[29] Nevertheless, the Constitutional Tribunal reached a conclusion contrary to the will of the Polish legislator and to the US Supreme Court's stance in *Roe*. Despite no significant changes in public attitudes towards abortion since the enactment of the Constitution, the Tribunal inferred a virtually total prohibition of abortion from its provisions. Thus, the contention raised against *Roe* and taken into account in *Dobbs*, namely that a particular point of view is imposed on the public which is not accepted by a substantial proportion of that public, also applies to the Polish ruling. Similar to the US Supreme Court in *Dobbs*, the Constitutional Tribunal should have recognized that the Constitution does not explicitly regulate the issue of abortion, leaving the protection of potential life and its scope to the legislature. As Wiesław Skrzydło aptly observes, it is not the purpose of the Constitution to resolve issues that are disputed and debated by philosophers, medical professionals, and adherents of various religions and worldviews. Its task is to institute the principle of legal protection of human life. The admissibility of abortion should be decided and regulated in current legislation.[30]

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[27] *Vo v. France*, judgment of the ECHR of July 8, 2004, Application no. 53924/00.

[28] Cf., for example, Szymon Tarapata and Witold Zontek, "Prawnokarne skutki wyroku TK z 22.10.2020 r., K 1/20 (zagadnienia wybrane)," *Państwo i Prawo* no. 8 (2021): 213.

[29] Komisja Konstytucyjna Zgromadzenia Narodowego, *Biuletyn nr XLV* (Warszawa: Wydawnictwo Sejmowe, 1997), 46.

[30] Wiesław Skrzydło, "Article 38," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warszawa: Lex a Wolters Kluwer business, 2013). Likewise, P. Sarnecki observes that "on the grounds of this provision

CONCLUSIONS

In summary, despite criticisms directed at the *Dobbs* ruling, particularly from supporters of a liberal approach to abortion, it appears that the direction adopted to arrive at that decision is, overall, correct. It would have been most welcome if the Polish Constitutional Tribunal had embraced a similar approach to that of the US Supreme Court. Naturally, the analysis of the reasoning behind *Dobbs* reveals a lack of broader contextual considerations and the absence of methods from the feminist interpretation of the law, which would have been most advisable, particularly when adjudicating matters pertaining to women. On the other hand, relying almost exclusively on purposive reasoning, as in *Roe*, may not be entirely justified either. Although drawing on teleological arguments when interpreting the law is most desirable, they should not be the sole basis for substantiating a solution derived from the wording of the legal act in question. Purposive and contextual interpretation, which considers the non-legal aspects of the case, should be complemented by arguments linking the outcome with the legal text. In a situation where the text of the Constitution provides no express prohibitions or injunctions related to the termination of pregnancy, a legitimate assertion could be made that the issue should be decided by the public through its representatives, who can undertake appropriate legislative action.

Summary: This article presents some reflections relating to the highly controversial US Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, which overruled the precedents set in *Jane Roe et al. v. Henry Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. First, the author briefly outlines the reasoning that supported the rulings in question. Against this background, the subsequent text offers a number of observations that a Polish perspective might prompt, with regard to the legitimacy of the holding in *Dobbs*, the various methods of interpretation applied by the US Supreme Court, and the decision of the Polish Constitutional Tribunal of October 22, 2020.

Keywords: US Supreme Court, abortion laws, Polish Constitutional Tribunal, feminist jurisprudence, interpretation methods

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