

Social Cohesion and Development

Vol 19, No 1 (2024)

No 37

Social Cohesion and Development

Biannual Scientific Review,
Spring 2024, volume 19, issue 1

Κοινωνική Συνοχή και Ανάπτυξη

37 Εξαμηνιαία Επιστημονική Επιθεώρηση,
Άνοιξη 2024, τόμος 19ος, τεύχος 1

ARTICLES Άρθρα

Andreas Feronas & Manos Spyridakis, Implementing the Guaranteed Minimum Income in Greece: An evaluation from the perspective of social services professionals

Despoina Andreadou & Sevaste Chatzifotiou, Violence Against Women in Rural Greece

Ioannis Tsoukalidis, Antonios Kostas & Dimitrios Kolovos, Social and economic impact of the COVID-19 pandemic at local level. A quantitative study

DIALOGUE Διάλογος

Pavlos Karagregoris, Roe vs Wade and the public discourse regarding reproductive rights

BOOK REVIEWS Βιβλιοκριτικές

G. Stamelos, La démocratisation de l'enseignement supérieur en Europe. Le cas hellénique (**Δέσποινα Καρακατσάνη**), Σ. Πανταζόπουλος, Κοινωνικός μετασχηματισμός στην Ελλάδα της Μεταπολίτευσης 1974-2001: Η νεοελληνική κοινωνία σε ιστορική προοπτική (**Μαρία Συρμαλή**)



Roe vs Wade and the public discourse regarding reproductive rights

Pavlos Karagregoris

doi: [10.12681/scad.39746](https://doi.org/10.12681/scad.39746)

Copyright © 2024, Pavlos Karagregoris



This work is licensed under a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0](https://creativecommons.org/licenses/by-nc-sa/4.0/).

To cite this article:

Karagregoris, P. (2024). Roe vs Wade and the public discourse regarding reproductive rights. *Social Cohesion and Development*, 19(1), 61–71. <https://doi.org/10.12681/scad.39746>

Roe vs Wade and the public discourse regarding reproductive rights

Pavlos Karagrigoris, Panteion University

Roe vs Wade και ο δημόσιος διάλογος γύρω από τα αναπαραγωγικά δικαιώματα

Παύλος Καραγρηγόρης, Πάντειο Πανεπιστήμιο

ABSTRACT

The following text aims to provide a socio-political analysis regarding the right to an abortion on the United States. Via the legal arguments of the scholars supporting the Originalist interpretation of the U.S constitution, it aims to understand the overturning of Roe v. Wade, which guarantees abortion as a right. However, this position isn't supportive of the limitation of women's reproductive rights but aims to transfer the decision-making process from the judicial to the legislative branch (especially on the state level). This case will be assisted through the utilization of modern arguments in favor of women's rights, the necessity of democratic dialogue and involvement with issues that pertain to human rights in liberal democracies and by the reasoning provided in Jurgen Habermas' essay «The future of human nature», which will strengthen the sentiment that in a democracy the citizens via their representatives should be the ones that decide about crucial life and death matters.

KEY WORDS: Abortion, Reproductive rights, US Supreme Court, Originalism, Living Constitution, Due Process, US Constitution, Roe v. Wade, Dobbs v. Jackson, Consensus, Discourse.

ΠΕΡΙΛΗΨΗ

Το παρακάτω κείμενο επιχειρεί να αναλύσει σε πολιτικό/κοινωνικό επίπεδο το δικαίωμα στην έκτρωση στις Ηνωμένες Πολιτείες. Μέσα από την νομική επιχειρηματολογία των υποστηρικτών της «Originalist» ερμηνείας του Αμερικανικού συντάγματος, σκοπεύει να κατανοήσει την ακύρωση της απόφασης Roe v. Wade που κατοχυρώνει συνταγματικά την έκτρωση ως αναφαίρετο δικαίωμα. Ωστόσο αυτό δεν αποτελεί υπέρσπιση του περιορισμού των αναπαραγωγικών δικαιωμάτων των γυναικών, αλλά μετατόπιση της προστασίας του δικαιώματος, από την δικαστική εξουσία στην νομοθετική εξουσία και δη σε πολιτειακό επίπεδο. Αυτή η θέση θα υποστηριχθεί δια της παράθεσης σύγχρονων απόψεων για το δικαίωμα της αυτοδιάθεσης των γυναικών, της αναγκαιότητας περί δημοκρατικής συμμετοχής και διαβούλευσης σε ζητήματα που αφορούν τα ανθρώπινα δικαιώματα (με βάση την λειτουργία των σύγχρονων αστικών δημοκρατιών) και με την παράθεση της επιχειρηματολογίας του Jurgen Habermas στο δοκίμιο «Το μέλλον της ανθρώπινης φύσης», η οποία θα ενισχύσει την θέση πως σε μία δημοκρατία, οι πολίτες δια των αντιπροσώπων τους πρέπει να αποφασίζουν για τα λεπτά θέματα ζωής και θανάτου.

ΛΕΞΕΙΣ-ΚΛΕΙΔΙΑ: Αμβλώσεις, Αναπαραγωγικά δικαιώματα, Ανώτατο Δικαστήριο ΗΠΑ, Οριτζιναλισμός, Ζωντανό σύνταγμα, Due Process, Σύνταγμα Ηνωμένων Πολιτειών Roe v. Wade, Dobbs v. Jackson, Consensus, Discourse.

1. Introduction

Human Rights don't exist in a vacuum. They are conceptualized, compartmentalized, fought for and founded, and reformed by challenging social processes ranging from the field of ideological debates to class and political warfare. Rights also can't be absolute, the way that they are understood and preserved is constantly changing due to the fact that they are abstract products that exist only within the social sphere. A social sphere which in turn is affected and transformed constantly by the powers of societal change. Of course, if one goes further than purely philosophical analyses, they would find it almost inhuman to deny certain basic principles and rights which should be enjoyed by all members of a society. Even by those that refuse to be integrated into one or who even actively fight against the laws and institution that guarantee those rights.

The right to an abortion is valid in it of itself, however, it is closely related and part of broader rights such as women's rights, the right to self-determination and bodily autonomy, and medical rights. On the other hand, there exist certain parts of society (which despite being homogenous to a high degree, meaning that for most of the opponents of abortion, their opinions are shaped by religious beliefs, without this necessarily being always the case), that considers the right to an abortion as contradictory to the right to life that the fetus possesses. This text does not aim to particularly support one of the above opinions in any capacity, but instead, it aims to interpret and explain the approaches that both sides seem to have adopted, within the context of a grossly unproductive public dialogue. Following basic academic and objective principles, while hoping to provide conciliatory interpretation that bridges the gap between large parts of society.

2. The legal status of abortion in the United States

The issue of the legal status of abortion has attracted a lot of interest lately due to the leaks of the draft opinion of most of the US Supreme Court justices regarding the overturning of *Roe v. Wade* (Politico, 03/05/2022). The right to abortion in the United States is not guaranteed through the federal legislature nor through its explicit guarantee in the United States Constitution; instead, its guarantee is the result of a judicial decision by the U.S. Supreme Court (*Roe v. Wade*, 410 U.S. 113 1973).

The above decision was based on the principle of the "Living Constitution" according to which the constitution is the foundation of the state, but its explicit text is not the ultimate be-all end-all in terms of rights and laws (Strauss, 2010). Judicial and legislative decisions must be made in the spirit of the constitution and not to the letter, as it could not fully anticipate all the developments that would take place in the United States over the next 200 years. Therefore, its interpretation should not be absolute but should be based on the basic principles it establishes and the social conditions in the current state of affairs.

More specifically, under the 14th Amendment to the Constitution, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; (a provision also included in the 5th Amendment to the Constitution)" (Magoulas, 1997). In 1973 the court ruled that the right to abortion is protected by the Constitution as one of the civil rights/liberties that are protected by the constitution. The result of this decision was that the right to an abortion was guaranteed through the judicial (and subject to overturning through the judicial) without giving the states or the federal government the power to rule on them, except on particular points such as weeks of gestation and medical supervision.

This verdict has been strongly criticized even by supporters of reproductive rights as an example of "judicial activism" (Dershowitz, 2004. Cassidy, 2016; Gerard, 1989) and as a counterproductive ruling for women's rights as the right to an abortion was enshrined in a way that reinforced the militancy of more conservative and religious political groups (Segall, 2017). While progressive and liberal groups within the US ignored the public debate and legal arguments surrounding the abortion issue and the *Roe v. Wade* for decades (Karrer, 2011), overlooking that all that was needed to put the issue back to square one was a change in the court's structure that would allow the decision to be overturned. A reversal that would enable those states that do not have an explicit reference to abortion rights in their constitutions and a conservative majority in their legislatures to make abortion illegal from day one.

The constitutional protection of abortion has not been strongly contested for several decades. The current of the living constitution and of judicial progressivism that led to *Roe v. Wade* was confronted by the constitutional theory of Originalism, which holds that the Constitution must be strictly construed in terms of the provision explicitly stated in it and with the intentions of its framers in mind. Originalism is complemented by Textualism, which argues that a constitution should be interpreted on the basis of how it would have been interpreted at the time it was drafted (Posner, 1995, Scalia, 2011).

With regard to *Roe v. Wade*, the opposition of the Originalists on the one hand concerns the fact that there is no explicit reference to the issue of abortion in the articles and amendments of the US Constitution and that there was no such original intent by its authors, because if they wanted abortion to be constitutionally protected then they would have included it among the universal and inalienable rights guaranteed by the Constitution. Additionally, one cannot be certain that the original text meant any protection of the right to abortion as such a concept was not taken for granted at the time of the constitution's drafting and implementation. Nor did the right to abortion have mass social acceptance in order for it to be taken for granted or considered necessary at that time period. (Tang, 2021).

Thus *Roe v. Wade* is a clear case of judicial overreach, as the right to an abortion is neither explicitly enshrined in the constitution, nor is it certain that it is meant either through the context, the intentions of its drafters, or its interpretation at the time of its application. And it is indeed arbitrary (always based on Originalist Interpretation) as the court is essentially legislating on an issue that it does not itself have jurisdiction over as abortion is not a constitutional issue but a legislative issue. With the states and the Federal government being the ones who must by democratic means through their legislatures decide the legality or otherwise of abortion. Indeed, it is certain that the framers of the United States Constitution intended to protect through their constitutional guarantee all those rights which they believed should be fundamental and universal for the survival of the state, precisely because they knew that societies and their perceptions change. So that even if the will of the people and governments is in favor of the infringement of a fundamental right, this is not possible. For those rights not contained in the constitution, it is the responsibility of future generations of US citizens to decide by democratic and institutional means (laws and amendments to the constitution) whether they should be protected or not, whether they should be universal or prohibited, and (to decide) the exact individual provisions of any legislative action on the above issues. So, the lack of reference to the right to an abortion means that such decisions should not be made by the US Supreme Court but through the legislative process (Scalia, 1989).

The overturning of *Roe v. Wade* was the result of decades of a multi-dimensional effort by various largely conservative groups. This effort occurred on the electoral level in local, state, and federal elections, on the judicial level with the appointment of more and more originalist judges to municipal, state, and federal courts (Gramlich, 2021). On the legislative level with the backing of candidates who either directly or indirectly restricted access to abortion in conservative states or promoted of measures challenging *Roe v. Wade* and even at the academic level by establishing and funding originalist societies and groups at all major US law schools to raise the next generation of originalist lawyers (Duncan, 2016; Hoover Institute 2009; Hoover Institute 2009. Hoover Institute, 2012). Of course, in addition to the efforts of these groups, the stroke of luck (for the supporters of the overturn) played a decisive role in the reversal, as during the Trump presidency 33% of the seats on the Supreme Court were vacant at a time when both the presidency and the US Senate were controlled by people who wanted to promote originalist judges to the Supreme Court. Ergo the appointment of Justices Gorsuch, Kavanaugh, and Barrett who were in favor of overturning the constitutional protection of the right to an abortion and shifted the balance of the supreme court to the conservative side.

In *Dobbs v. Jackson Women's Health Organization*, the now conservative court held that the U.S. Constitution does not guarantee the right to abortion. In addition, the above-mentioned court decision overturned *Planned Parenthood v. Casey*, which prohibited states from enacting measures that would impose "Undue Burdens" on their citizens with respect to the exercise of fundamental rights (which, according to *Roe v. Wade*, includes the right to an abortion). The overturning of the above two decisions allowed those state legislatures that wished to do so, to impose restrictions or ban abortion altogether, and also opened the way for those state legislatures to prevent access to abortion in almost any way through individual regulations and restrictions (e.g., viewing mandatory anti-abortion content prior to the final decision to terminate a pregnancy or mandatory parental consent) (Center for Reproductive Rights, 2020).

The arguments of the 6 judges who voted in favor of the decision were based on the following pillars.

a) Established legal scholars, experts on constitutional law (Ely, 1973), and even the Supreme Court itself (*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 1992) have come out against *Roe v. Wade* even though they support the right to abortion.

b) The Constitution contains no mention of abortion, nor is it protected by any constitutional provision. Even if the Due Process clause guarantees rights not explicitly mentioned in the constitution, it only applies to rights that are deeply rooted in the nation's history and tradition as well as those rights that are fundamental to the preservation of ordered liberty (Blake, 2022).

c) Prior to the adoption of the 14th amendment about 3/4 of the states had legislatively banned abortion and prior to the 1973 decision more and more states were removing this restriction. *Roe v. Wade* not only prevented the natural and democratic progress of the right to an abortion but instead succeeded in sowing discord in an entire nation (De Vogue, 2022).

d) Abortion is differentiated from other similar rights of self-determination as the right to abortion is contrasted with the right to life possessed by the fetus (which is potential human life or unborn human life) (De Vogue, 2022).

e) The variance in beliefs around the issue of abortion shows that there is the freedom to form and express opinions about its morality and legality, the so-called ordered liberty. It is not for the court itself to try to shape a balance between reproductive rights and the right of the embryo to potential human life. The States and their citizens are the ones who will be asked to set the balance by democratic means, which will surely lead to different results from state to state, in accordance with the principles of ordered liberty (*Dobbs v. Jackson*, Alito draft, 2022).

3. Social Reaction and Public Discourse

The polling data shows, both overall and especially among younger age groups, that most citizens in the US and almost every Western country is in favor of abortion rights. And of course, every decision of a constitutional court has, apart from its validity, important consequences for the entirety of social life and in this case for women's reproductive rights.

An overwhelming majority of American citizens reacted negatively to the court's decision to renege the constitutional protection for abortion, with 57% opposing the decision. Even in the conservative states that have banned abortion altogether/imposed strict restrictions thanks to the ruling, 52% of respondents opposed the decision. The groups most strongly opposed to the decision are the 18-34 age group, women, minorities, and Democratic Party voters (all the previous groups overwhelmingly vote for Democratic candidates) (Pew Research Center, July 2022).

Of course, the reaction to the court's decision was manifested not only on paper but also on a social level. Massive demonstrations and protest marches took place throughout the US, especially in major urban centers and around the rest of the world (ERT, 25/06/2022). Moreover, as a consequence of the decision, there was a significant increase in donations both to organizations that support women's reproductive rights and to politicians and political parties whose actions promote these rights (USA Today, 2022).

In fact, even at the level of legal arguments, there was a section of jurists who were against *Roe v. Wade*, not because they considered the constitutional guarantee of the right to abortion wrong, but because they believed that the guarantee of the right to abortion as a Civil right is not sufficient but should instead be guaranteed as a human right with fully unrestricted and free access for those women who wish to terminate their pregnancy (Rebouche, 2022).

At the electoral level, Dobbs has also shifted the balance in an important period ahead of the November 2022 mid-term elections. Before the decision, polling data showed a comfortable Republican victory in the House of Representatives and a tight race for the Senate. At the state level, Republican candidates enjoyed a wide lead in many key races in the so-called swing states (because of the US electoral system, special weight is given to states where the two major parties have similar support). This is because the public debate was dominated by economic insecurity, inflation, housing market volatility, the war in Ukraine and its consequences, and the fact that President Biden's approval ratings showed a lack of broad support and a high dissatisfaction with him. After the overturning of *Roe*, the Democratic Party has succeeded in rallying its base and bringing to the fore an issue on which its positions are identical to those of most of the American society. Although the individual negative issues mentioned above remain, the decision has led to a far from negligible decline in the Republican momentum, with the new data showing that the Republicans' victory in the House will not be so easy and that the Democrats now have the upper hand in the Senate. At the state level, many substantive races in states such as Pennsylvania and North Carolina now show trends that strengthen the Democratic party (especially in terms of recently registered voters with Democratic turnout being particularly elevated after the decision).

The above claims are demonstrated by an analysis of the quantitative data available in the Polling Aggregate FiveThirtyEight database. Prior to the *Dobbs v. Jackson* decision in the Pennsylvania gubernatorial elections, the polling data showed a slim lead of 3% for the Democratic candidate. In the weeks immediately following and to date the lead for the Democratic candidate has widened to the 6.9-10.5% range). At the federal level in the generic ballot polls before *Roe*'s overturn, Republican candidates enjoyed a 2-3% lead, a situation that has now been reversed with Democratic candidates in the post-Dobbs polls holding a solid 1-point lead. The exact same trend is evident in the North Carolina Senate election.

The red state of Kansas was the first one to put the issue of abortion rights to a referendum held on August 2, 2022. The issue of the referendum was whether the protection of the right to abortion should be removed from the state constitution and whether there should be an implementation of further restrictions on abortions. The final results showed about 60% of voters voting in favor of women's reproductive rights. Based on the above, it can be concluded that the majority of Americans are against abortion restrictions and that this group is more politically active after recent developments (State of Kansas Official Primary Election § 22, 2022, State of Kansas Official Primary Election, HCR 5003, 2022, Associated Press, 2022).

Most conservative states had already prepared bills that partially or fully restrict access to abortion in case *Roe v. Wade* was overturned. In states such as Texas, Oklahoma, Tennessee, and Louisiana abortion is now illegal in almost every case and carries penalties under both criminal and civil law. In Idaho and West Virginia, an outright ban on abortion is currently not in place but both legislative and executive actions already allow for this possibility. In most Mid-west and Mid-South states, there are varying restrictions on abortion ranging from 15 weeks to almost total bans with only medical exceptions or in cases where the fetus was conceived through non-consensual sexual intercourse. Finally, in several other states which are mostly located in the southern part of the Atlantic coastline of the United States, the issue of the legality and protection of abortion is subject to litigation (Jimenez, 2022; Center for Reproductive Rights, 2022-20xx). In any case, the November 2022 elections will be decisive for the immediate developments, where the new political/social/electoral trends that will shape the new dynamics between the two sides at the state and federal levels will be plain for all to see.

4. Theories of consensus. The necessity of compromise and productive public dialogue

Human ingenuity is the tool that societies have always used when they wish to solve the problems that plague them or to improve the standard of living of the people existing in them. Abortion is not a new phenomenon, the desire of women and entire families to terminate a pregnancy has occurred in many different societies and at many different time periods. Of course, a discussion of the nature of abortion in pre-modern societies, although interesting, cannot be of much help, except to understand the scope of the issue. That is, abortions occur precisely because not wanting a person to give birth is something normal and not reprehensible.

Many women are unable/not in a position to give birth either for material/financial reasons, medical reasons, or even for personal/social reasons. Even if there is no specific justification, women's bodily autonomy must be respected by all.

At the same time, there is also the embryo itself. An entity that is destined to be born and to enjoy all the rights and protections that the members of society receive or should receive. It makes perfect sense that the members of that society would want to protect all potential forms of human life from premature termination. Such a desire can be observed especially in newer and modern European societies.

as well as in many Islamic societies (amongst others). Based on the above logic, groups that believe that a fetus is a life form with rights that must be protected (otherwise it is a case of murder) have imposed laws that restrict, prohibit, or even criminalize abortion (International Planned Parenthood Federation, 2007; Hessini, 2007).

Both sides have strong arguments based on some of man's noblest urges, such as birth and nurture of life, protection of the weak, freedom of choice, and individual liberty.

In modern democracies, citizens are often called upon to balance their individual interests and find compromise solutions. The issue of abortion is one of these cases. In every developed Western democracy, access to abortion is legal or even free, but with strict criteria regarding the weeks of gestation which are intended to protect a fetus that is already sufficiently developed. The critical period is the first trimester of pregnancy, during which women are free to terminate their pregnancy. Abortion is also permitted later, even after the second trimester, when the fetus develops serious health issues or the woman's own life is at risk. (Center for Reproductive Rights, 2020).

However, even if the legal framework of abortion in most western democracies is in general correct, this does not mean that there are no dysfunctions, from the medical and legislative to the social and constitutional. The United States is the pre-eminent example of a liberal democracy that has not managed to resolve the abortion issue, but instead, the social and political controversies surrounding the issue have led public discourse to an almost complete standstill.

But there are tools that, if used correctly, will allow American society to deal with such a difficult and sensitive issue in a much better way. And because it is understood that it is not always possible to find solutions to all of society's problems, then it is at least necessary to find conventions that admonish the side effects that these problems cause.

First of all, in every principled democracy, certain basic axioms must be respected. Directly related to the protection of the right to abortion in the USA is the protection of the minority from the unbridled and uncritical imposition of the views of the majority (Majoritarianism). The above principle is the reason why the framers of the US Constitution decided to constitutionally protect certain fundamental rights. Rights which would be safe even if a tyrannical majority prevails in the US (institutionally safe, because if there are no strong institutions then there can be no protection of the constitution and the rights it guarantees) (Ratner, 1978).

Therefore, the minority should be protected from the decisions of the majority when they violate their fundamental rights, as defined by the constitution and the laws in the context of a just state. However, is the right to an abortion something so fundamental and inalienable, but moreover institutionally and constitutionally guaranteed (without any question of interpretation which is not resolved in a decisive manner and where there is no significant quantitative and qualitative difference between the arguments of the two sides), that if the majority votes in favor of its removal it would constitute a violation of a fundamental right on the basis of extremist majoritarianism?

As there is no consensus on the moral and constitutional status of abortion and there are strong arguments on both sides, it cannot be inferred that abortion should be included in the vague constitutional rights enshrined in the constitution. This is not because abortion under the Originalist approach was not a matter of concern to the framers of the U.S. Constitution and its amendments, but because even today there is no agreement on the status of abortion on either the simplistic political level or the philosophical or legal realms. So the predominance of one side over the other does not mean that an extreme majority prevails, but that within the framework of a democracy decisions are taken on important issues that dissatisfy and even anger significant sections of society.

On the same basis as before, therefore, there can be raised a potential question of whether it would be arbitrary for the majority to amend the Constitution to explicitly guarantee the right to abortion or to codify *Roe v. Wade*. Again, the answer is that it is not majoritarian tyranny but a normal and healthy democratic process.

But a subsequent question can be asked based on "are the basic rights of a fetus equal to or greater than those of a woman who wishes to terminate her pregnancy?" The truth is that the concept of a fetus as a living being is somewhat abstract in contrast to the concept of a citizen which, although it varies from state to state, has solid foundations, rights, and obligations.

The rights of the embryo in contrast to those of the pregnant woman/parents have been analyzed in Habermas' work "The Future of Human Nature", in which he approaches the issue of the genetic modification of embryos. The above dilemma in his work takes the name of "Human dignity versus dignity of human life" and leads to the conclusion that there is an important difference between modifying the embryo and terminating its existence. This is that in the first case the parents do not unexpectedly happen upon a dilemma in which a particular outcome deprives the embryo of its right to self-determination and free life. Whereas in the case of abortion the parents take the decision to deprive a (for a significant part of society) rightful right to live, in many cases without having another choice and in almost all cases without planning for the pregnancy to occur. Therefore, the violation of any rights of the fetus is not their goal, but only a necessity that leads to a conflicting interpretation of rights.

In the case of fetal genetic modification, Habermas concludes that it should not be allowed and that in any case, it is much less morally acceptable than abortion. However, he does not side explicitly with the pro-life camp and against the right of the embryo to life but understands that this is a question where "In the context of this dispute every attempt has failed to achieve a theoretically neutral worldview and therefore a non-prejudicial description of the moral status of early human life that would be acceptable to all citizens of a secular society... But now the ontological fundamental assumptions of quasi-scientific naturalism, from which birth emerges as the important intersection in the status of life, are not in any case more valid or scientific than the religious or metaphysical dogmata that life begins at conception. Both sides plead that, to draw a morally significant boundary between fertilization or union of reproductive cells, on the one hand, birth on the other, there is something arbitrary inherent, since from organic beginnings life develops in unbroken continuity, which is initially capable of feeling emotions and then of acquiring a personal character. However, if I see it correctly, the continuity thesis rather argues against both attempts to set up by ontological judgments an "absolute" principle, which is binding also from a normative point of view... For, as was already evident in the abortion debate, it is impossible to make a universally binding definition of when the embryo is included in the community of rights-bearing subjects and thus from what point onwards respect for its dignity is due, insofar as such judgments depend on moral evaluations" (Habermas, 2001).

So surely the above reasoning strengthens the argument that there should not be a predominance of one side or the other on the basis of compelling arguments, as neither the lack of rights of the fetus nor that the rights of the fetus exceed those of the woman can be proven so that abortion is de facto equated with murder or even illegality.

If we combine the lack of unquestionably valid arguments in support of the constitutional protection of abortion in the US, with the lack of solid arguments demonstrating the timeframe in which a fetus is a bearer of full rights and the lack of a commonly accepted decision on the right to abortion, we come to the conclusion that the right to abortion should be decided democratically by societies like all other issues. As there are different camps and groups that support antithetical positions and policies.

In the US the issue of abortion was placed outside the forefront of the public sphere for decades, as access to abortion was protected by a controversial decision, which has been heavily criticized even by liberal and centrist constitutional scholars such as Alan Dershowitz (Dershowitz, 2004). And now with the overturning of *Roe v. Wade*, many conservative states have moved to a radical and complete suppression of a right that the majority of citizens support. Without it being a voting criterion for a large proportion of voters in regional elections because of its prior constitutional guarantee.

Moreover, even if there is no objectively valid view on the issue of abortion, a complete ban is a retrograde decision that would not only set back women's rights by decades (it is much easier to argue for the right to autonomy of a citizen's body than for the very broad right to life of a newly conceived fetus, without even an agreement on when and if it acquires rights). The most important consequence of the abortion ban is the social and economic inequalities it will create as, the poorest social strata of the US, who are disproportionately non-Asian minorities, will not be able to travel out of state to terminate an unwanted pregnancy, with this entailing dire consequences (huge medical debts, further criminal penalties to targeted minorities, raising new family members without the necessary capital and state support, and coercion to use non-medically supervised procedures to terminate a pregnancy) (Riley, Enquobahrie et Katz, 2022).

Habermas' theory of consensus explains how in modern democracies there is an unprecedented diversity of opinions and differences among socio-political subjects. Indeed, on important issues, the differences between them lead to acrimonious disputes, intense conflict, and a complete disregard for the rights of opponents and the values that just societies are based upon. The solution according to Habermas is found in the concept of consensus, which arises through understanding the other's positions and the values that lead to them (Ingram, 2019). Through understanding and consensus, individuals can reach a discourse through which the common goal of all sides will be to seek a common truth (rather than an imposition of views or positions behind which shadowy motives are hidden) that all sides can accept (Deflem, 1998). A truth ideologically uncommitted and based on logical axioms. Legislatures in turn should weigh up the individual arguments and interests and legislate with the intention of balancing interests and reaching compromise solutions that do not violate the core values of the members of a society and do not lead to a situation of worldview imposition (after all, the composition of parliaments is largely representative and therefore there is a 'fair' representation of many ideologies and views). For the above, the technocratic/scientific sector will also play an important role, which as an advisory body will provide assistance to legislators to optimize their decisions and measures (Warnke, 1996).

Ultimately, although in such complex political issues it is not possible to say with certainty what should be done and how it should be done, it is possible to implement measures that are based on sound principles. Nevertheless, some difficulties remain in the US case, such as the broader political polarization, the antiquated electoral system leading to a counterproductive two-party system, and the US constitution, which although extremely durable and infused with the principles of enlightenment and humanism, is extremely difficult to amend and a product of very different era (The rigidity of the constitution and the lack of references within it to critical issues, is seen as a great advantage by groups such as modern federalists and originalists) (Duncan, 2016).

These difficulties do not condemn the US to a bleak future for women's reproductive rights, but instead, place the burden on citizens and social and political groups to fight for them with all available legal means. And of course, the success or failure of this effort, beyond the strategies they pursue, will depend on the will of the American people through their votes in every

election. With regard to the current situation, however, it is important for the conservative wing of the American society to understand that adherence to maximalist positions for a complete abortion ban is damaging the social cohesion of the United States in various ways, and through this understanding to follow the policy drawn up by the European conservative parties, which are trying by preventive means to stop unwanted pregnancies and accept abortions in the first weeks of pregnancy or in case of a medical or other emergencies (Wiliarty, 2010), not so much because they have changed their fundamental beliefs on the issue, but because they have understood that adherence to these beliefs in damaging and counterproductive both for their own sake and for the entire social fabric.

Bibliographic References

- Blake, A. (May 3, 2022). *"The Supreme Court's draft opinion on overturning Roe v. Wade, annotated"*. The Washington Post.
- Cassidy, R. (2016). Scalia on Abortion: Originalism... But, Why?. Σε *Touro Law Review*. (τ.32). [x.τ.]. Touro University.
- Center for Reproductive Rights. (2020). The undue burden standard after *WHOLE WOMAN'S HEALTH v. HELLERSTEDT*.
- Center for Reproductive Rights. (Constantly Updating). Interactive Map of Abortion Laws b US States. <https://reproductiverights.org/maps/abortion-laws-by-state/>
- Deflem, M. The Boundaries of Abortion Law: Systems Theory from Parsons to Luhmann and Habermas, *Social Forces*, Volume 76, Issue 3, March 1998, Pages 775–818
- De Vogue, A.(June 24, 2022). *"Supreme Court overturns Roe v. Wade"*. CNN.
- Dershowitz, A. M. (2004). In Memoriam: John Hart Ely. *Harvard Law Review*, 117(6), 1743–1745.
- Duncan, R. F. (2016). Justice Scalia and the Rule of Law: Originalism vs. the Living Constitution. *Regent UL Rev.*, 29, 9.
- Gerard JB. Roe v. Wade is constitutionally unprincipled and logically incoherent: a brief in support of judicial restraint. *Am J Law Med*. 1989;15(2-3):222-6. PMID: 2603866.
- Gramlich, J. (2021) *How Trump compares with other recent presidents in appointing federal judges*. Pew Research Center.
- Habermas, J. (2004). *To μέλλον της ανθρωπίνης φύσης-Πίστη και γνώση*. Αθήνα: Εκδόσεις Scripta.
- Hart, E. (1973). The Wages of Crying Wolf: A Comment on Roe v. Wade.
- Hessini, L. (2007). "Abortion and Islam: Policies and Practice in the Middle East and North Africa". *Reproductive Health Matters*. 15 (29): 75–84.
- Hoover Institute. (2009). *Law and Justice with Antonin Scalia*.
- Hoover Institute. (2012). *Uncommon Knowledge with Justice Antonin Scalia*.
- Ingram, D. (2019). Consensus. In A. Allen & E. Mendieta (Eds.), *The Cambridge Habermas Lexicon* (pp. 60-62). Cambridge: Cambridge University Press.
- International Planned Parenthood Federation, (2007). *Abortion Legislation in Europe*.

- Jimenez, L. (2022). *60 Days After Dobbs: State Legal Developments on Abortion*. Brennan Center.
- Karrer, R. N. (2011). The Pro-Life Movement and Its First Years under "Roe." *American Catholic Studies*, 122(4), 47-72.
- Morin, R et Looker, R. (2022). *Donations to abortion groups poured in after Roe v. Wade overturned. Here's what it means. USA Today*.
- Μαγουλάς, Α. (1997) *Η ιστορία των Ηνωμένων Πολιτειών της Αμερικής*. Β Έκδοση. Αθήνα: Εκδόσεις Ακίδα.
- Pew Research Center. (2022). *Majority of Public Disapproves of Supreme Court's Decision To Overturn Roe v. Wade*.
- Posner, P. (ed.) (1995). *Overcoming Law*. Harvard University Press.
- Ratner, L. G. (1978). Constitutions, Majoritarianism, and Judicial Review: The Function of a Bill of Rights in Israel and the United States. *The American Journal of Comparative Law*, 26(3), 373-396.
- Rebouche, R. (2022). *Roe Is as Good as Dead. It Was Never Enough Anyway*. Boston Review.
- Riley, T, Enquobahrie, D et Katz, A. (2022). *Why abortion criminalization is a public health issue, from UW School of Public Health researchers*. UW School of Public Health.
- Scalia, A. (1989) "The Rule of Law as a Law of Rules," *University of Chicago Law Review*: Vol. 56: Iss. 4, Article 1.
- Scalia, A. (2011). *Opening Testimony on the US Senate Judiciary Committee*. C-SPAN.
- Segall, E.J. (2017). *Judicial Engagement, New Originalism, and the Fortieth Anniversary of 'Government by the Judiciary'*. Fordham Law Review.
- Strauss, D.A., (2010). *The living constitution*, Oxford University Press.
- Συντακτική Ομάδα ΕΠΤ. (2022). Ποτάμι διαδηλώσεων υπέρ του δικαιώματος των αμβλώσεων – Φόβοι ότι θα καταργηθούν κι άλλα δικαιώματα
- Tang, A. *The Originalist Case for an Abortion Middle Ground*. (2021). University of California, Davis - School of Law.
- Warnke, G. (1996). Legitimacy and consensus: Comments on part of the work of Thomas McCarthy. *Philosophy & Social Criticism*, 22(2), 67-81.
- Wiliarty, S. (2010). *The CDU and the Politics of Gender in Germany: Bringing Women to the Party*. Cambridge: Cambridge University Press.

Biographical Note

Pavlos Karagrigoris is a sociologist (contact: paulos.karagrigoris@gmail.com)