Not only Dobbs v. Jackson. Abortion Laws and Private Enforcement

by Vittoria Barsotti

Abstract: At the end of the 2022 Term, the US Supreme Court handed down three important decisions that, taken together, can be considered a sort of manifesto for the conservative ideology of the present majority: Dobbs v. Jackson, New York State Rifle and Pistol Association v. Bruen, West Virginia v. Environmental Protection Agency.
Of the three decisions, Dobbs is the one that has been mostly commented, analyzed, and criticized for various and important reasons. Dobbs fiercely overrules two longstanding precedents defining them "egregiously wrong". Dobbs deepens state by state health inequities by overturning a 50-year understanding that the XIV Amendment protects a right to privacy that includes abortion, among other intimate decisions. Moreover, the Dobbs majority is committed to Due Process Traditionalism according to which other unenumerated rights, such as those related to the most intimate sphere of individual life, are probably at risk.
In order to have a complete understanding of it, Dobbs must be placed within the complex net of litigation that took stage both at the federal and state level – a drama that ended with Alito's majority opinion. And state laws different from the one challenged in Dobbs must also be taken into consideration. Through the analysis of this intricated net, Whole Woman's v. Jackson, decided a few months before Dobbs, becomes of great importance. At issue in Whole Woman's was a Texas statute that prohibited abortion after a fetal heartbeat is detected and that does not allow state officials to bring criminal prosecutions or civil actions to enforce the law but instead directs enforcement through "private civil actions".
The unprecedented way in which the Texas statute is framed can be dangerous for reasons going far beyond the abortion issue. In the first place, the Texas statute creates a bounty-hunting scheme that encourages the general public to bring harassing lawsuits against anyone who they believe has violated the ban. Secondly, the statute, in excluding from enforcement state officials, seems to be designed as a maneuver to avoid federal court review. The Supreme Court had the occasion of evaluating the constitutionality of statutes framed with the scope of evading judicial review. Instead, Whole Woman's Health v. Jackson was decided on very technical procedural grounds and carefully avoided all the crucial issues present in the case.
Dobbs is a dramatic decision for women's rights and perhaps for the future of other fundamental rights protected under a substantive reading of the XIV Amendment.
But Whole Woman's can be dangerous for the future of judicial review.

Keywords: US Supreme Court, abortion, fundamental rights, unenumerated rights, judicial review, private enforcement, traditionalism, originalism

1. The end of the 2022 Term

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June 2022 was a dramatically significant month for the position and public perception of the Supreme Court within the American constitutional system and for the future of many unenumerated fundamental rights.[1]

As it is well known, at the end of the 2022 Term, the US Supreme Court handed down three important decisions that, taken together, can be considered a sort of manifesto for the conservative ideology of the present majority.[2] But Donald Trump's three appointees (Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett)[3], along with Samuel Alito, Clarence Thomas and the Chief Justice, John Roberts, are not only "conservative" in the ideological sense: their core project seems to refashion, not just conserve, America's legal structures.

The first decision, issued on June 22nd,[4] is *Dobbs, State Health Office of the Mississippi Department of Health v. Jackson Women's Health Organization*.[5]

[1] The measure of the importance of June 2022 for the position and public perception of the Supreme Court is given by the unusual great number of articles and comments on the decisions published immediately after the end of the Term in newspapers and on the web in the US and in Europe. As an example, see A. Palmieri, R. Pardolesi, *Diritti costituzionali effimeri? L'overruling di "Roe v. Wade"*, in *Foro it.*, IV, 2022, 432 ff. With specific reference to the public perception of the Supreme Court as a consequence of the 2021 Term, Michele Goodwin notes: "In the wake of its 2021 Term, confidence in the Court has waned, likely due to the public's perception of personal and political influences infecting the Court's judicial process and decisions"". M. Goodwin, *Complicit Bias and the Supreme Court*, in 136 *Harv. L. Rev.*, 119, 136 (2022).

[2] Among Italian scholars, the strict doctrinal and political relationship between the three decision was promptly underlined by E. Grande, *Le recenti sentenze della Corte Suprema statunitense su armi, aborto e clima: una sfida alla sua sopravvivenza*?, in *Questione giustizia*, 12/07/2022. Commenting on *Dobbs* and the contemporary decisions, Laurence Tribe significantly notes: "It's hard not to see this rogue's gallery of decisions as reflecting little beyond the political party platform of the justices comprising the majority with respect to abortion, religion, guns, climate change and the administrative state rather than any coherent constitutional philosophy." L.H. Tribe, *Deconstructing Dobbs*, in *NY Rev. of Books*, September 22, 2022, 81, 84. See also G. Karmen, *The Things we Bear: On Guns, Abortion, and Substantive Due Process*, in 23 *Geo. J. Gender and L.* 479 (2022). For a parallel analysis of *Dobbs* and *Bruen* explaining how both decisions reflect the position of the Court as not willing to recognize and provide remedies for nonwhite people's racial injuries, see Khiara M. Bridges, *The Supreme Court 2021 Term, Foreword: Race in the Robert's Court*, in 136 *Harv. L. Rev.*, 23 (2022).

[3] The nomination process itself of Neil Gorsuch and Amy Coney Barrett has been politically and constitutionally dubious. In February 2016, at the outset of his last year of presidency, President Obama had the possibility of filling a vacancy following the sudden death of Antonin Scalia. The Senate, led by Republican Mitch McConnell, denied President Obama the possibility of pursuing the nomination claiming that a nomination at the end of the President's term was not possible. Justice Gorsuch was then nominated as one President Trump first acts. The rule applied to Obama in 2016 was not applied in 2020. Indeed, when Justice Ruth Bader Ginsburg passed away in September 2020, President Trump was able to rapidly nominate Amy Coney Barrett within a few weeks from the new presidential elections.

[4] On May 2, 2022, *Politico*, one of the greatest intelligence platforms in the world, released a draft of Justice Alito's majority opinion circulated among the justices in February 2022. This almost unique circumstance confirms how intense, hot, and disturbing was the political debate.

[5] 597 U.S. _ (2022), slip opinion.

The case concerned the constitutional validity of a Mississippi law that prohibited abortion "if the probable gestational age of the unborn human being has been determined to be greater than 15 weeks".[6] The answer to the question, in a 6-3 decision authored by Justice Alito, is clear and simple: The Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must return to the people and their elective representatives.[7] *Roe*[8] and *Casey*[9] are the two precedents that, in 1973 and 1992, respectively recognized and reaffirmed the constitutional right of women to have an abortion within the first trimester of pregnancy (*Roe*) and then before viability (*Casey*). Following *Casey*'s holding, no state could constitutionally regulate abortion before viability, generally around the 24th week of a pregnancy, if the regulation resulted in an "undue burden" for the woman.[10]

The second decision is *New York State Rifle and Pistol Association v. Bruen*[11] and dates June 23rd. The case concerned the constitutionality of the 1911 Sullivan Act, a New York State law requiring applicants for an unrestricted license to carry a concealed pistol on their person to show "proper cause", or a special need distinguishable from the general public, in their application. In a 6–3 opinion delivered by Justice Thomas, the majority ruled that New York's law was unconstitutional, and held that the ability to carry a gun in public is a constitutional right under the II Amendment.

West Virginia v. Environmental Protection Agency was released on June 30th. Again, a 6–3 opinion written by the Chief Justice ruled that the regulation of existing power plants in Section 7411(d) of the Clean Air Act fell under the "major question doctrine" and within that, Congress did not grant the EPA authority to regulate emissions from existing plants based on generation shifting mechanisms.[12]

What *Dobbs* and *Bruen* have in common is an originalist (more precisely: a traditionalist)[13] approach to the interpretation of the Constitution. Probably the only difference in the hermeneutics of both majority opinions attaches to the fact that privacy and the right to have an abortion (at least in the first stages of pregnancy) are rights not expressly spelled in the Constitution but derived from a substantive interpretation of the Due Process Clause of the XIV Amendment, whereas the right "to keep and bear arms" is protected by the letter of the II Amendment. What the two cases do not have in common is the relation between the federal government and the states. In *Dobbs*, the Court gives back to the States the

[6] Miss. Code Ann. §41-41-191.
[7] 597 U.S. _ (2022), slip op., see, e.g., opinion of the Court, 79.
[8] *Roe v. Wade*, 410 U.S. 113 (1973).
[9] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).
[10] *Casey* is translated into Italian and commented in *Foro it.*, IV, 1992, 527 ff..
[11] 597 U.S. _ (2022), slip opinion.
[12] The "major question" doctrine provides that when a government agency seeks to decide an issue of "vast economic or political significance", a vague or general delegation of authority from Congress is not enough. Rather, the agency must have clear statutory authorization to decide the issue.
[13] For an Italian account on constitutional interpretation in common law countries see, G. Romeo, *L'argomentazione costituzionale di* common law, Turin, Giappichelli, 2020. See infra, text and note 19.

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power to freely regulate abortion which, in the Court's view, entirely belongs to the popular will; in *Bruen*, the Court denies the State's authority to regulate arms, which authority evidently does not pertain to the general will of New Yorkers.

West Virginia v. EPA fits well in this picture because, through an unusual and strategic use of the doctrine known as "major question", does not recognize EPA's possibility of setting limits to electric power plants' carbon emissions; another 6-3 conservative decision that severely jeopardizes the struggle against climate change.

2. *Dobbs v. Jackson*: An uncertain future for fundamental unenumerated rights

Of the three decisions just mentioned, *Dobbs* is the one that has been mostly commented, analyzed, and criticized (not only in the US) for various and important reasons.[14]

First of all, *Dobbs* fiercely overrules two longstanding precedents defining them "egregiously wrong".[15] Indeed, *Casey* can be considered a super precedent (a precedent about precedent)[16] which upheld the central meaning of *Roe*, that is the constitutional right to abortion, after having carefully examined its precedential value and reaffirmed its ever-present strength. *Dobbs* adopts a dangerously weak reading of *stare decisis* - a reading that, erasing from the Constitution *Roe*, *Casey* and more than twenty cases applying the right to abortion, although often conceding some regulatory power to the states, moves away from the rule of law.[17]

Secondly, *Dobbs* deepens state by state health inequities by overturning a 50-year understanding that the XIV Amendment protects a right to privacy that includes abortion, among other intimate decisions.[18]

[14] In *Dobbs* Justice Alito delivered the opinion of the Court, in which Justices Thomas, Gorsuch, Kavanaugh and Barrett joined; Justices Thomas and Kavanaugh filed concurring opinions; Chief Justice Roberts filed an opinion concurring in the judgment; Justices Breyer, Sotomayor and Kagan filed a dissenting opinion. It is important to notice that the Chief Justice concurs only in the Judgment: in his opinion he joins the majority as for holding the Mississippi law constitutionally valid, but he underlines that this should have been done without overruling two fundamental precedents as *Roe* and *Casey*.

[15] "Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences", 597 U.S. _ (2022), slip op., opinion of the Court, 6. On the critical relation between originalism and the theory of binding precedent, see N. Iacono, *Stare (In)decisis: The Elusive Role of Precedent in Originalist Theory and Practice*, in 20 *Geo. J. L. and Public Policy* 389 (2022).

[16] "Casey is in significant measure a precedent about the doctrine of precedent - until today, one of the Court's most important". 597 U.S. _ (2022), slip op., Justices Breyer, Sotomayor, and Kagan, dissenting, 9.

[17] During the seminar on "*The American Presidency after Two Years of President Biden*", November 25-26, 2022, Graziella Romeo noted that probably the most important feature of the newly appointed Justice Jackson Brown is related to the importance and value of the principle of *stare decisis*.

[18] On the various meanings of the right to privacy and its relation to the most intimate personal choices in US case law, see V. Barsotti, *Privacy e orientamento sessuale. Una storia americana*, Turin, Giappichelli, 2005.

Moreover, *Dobbs* offers a peculiar understanding of the Due Process Clause. In short, the *Dobbs* majority is committed not very much to originalism but to Due Process Traditionalism.[19] That commitment is the engine for the Court's ruling and is also the most important feature of the *Dobbs* opinion.[20] The Court urges that while the Due Process Clause "has been held to guarantee some rights that are not mentioned in the Constitution," its reach is limited to rights that are (1) "deeply rooted in this Nation's history and tradition" *and* (2) "implicit in the concept of ordered liberty".[21] The Court emphasizes that the very idea of "substantive due process," by which the Due Process Clause extends beyond procedural guarantees, "has long been controversial".[22] It is worth recalling that such a traditionalist approach was adopted by the Supreme Court in 1997 in *Washington v. Glucksberg*[23] but successfully rejected six years later in *Lawrence v. Texas*.[24] In addition, Alito's two prong test is notoriously susceptible of manipulation and ends up in excluding many rights associated particularly with the bodies and lives of women.[25]

Furthermore, according to the traditionalist understanding of the Due Process Clause adopted in *Dobbs*, no matter what Justice Alito writes it the majority opinion,[26] other unenumerated rights, such as those related to the most intimate sphere of individual life, are probably at risk. This is well evident in Justice Thomas concurring opinion: "… in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, *Obergefell*. Because any substantive due process decision is demonstrably erroneous".[27] This brings directly to reconsidering the right to buy and use contraceptives,[28] the right to entertain intimate relations of one's choice,[29] the right to same sex marriage.[30]

[19] For a general account on originalism, see W. Baude, *Is Originalism Our Law?*, in 115 *Columbia law Rev.* 2349 (2015); R.W. Bennett, L.B. Solum, *Constitutional Originalism: A Debate*, Ithaca, N.Y., 2022. With specific reference to Due Process, see L.B. Solum, M. Crema, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, in 108 *Va. Law. Rev.* 447 (2022). For a brief account on the distinction between originalism and traditionalism as referred to *Dobbs*, see A. Sperti, *Il diritto all'aborto ed il ruolo della tradizione nel controverso overruling di Roe v. Wade*, in *La Rivista Gruppo di Pisa*, 3/2022, 23 ff.; see also Id., *"Dobbs" e il controverso overruling di "Roe v. Wade" sullo sfondo del confronto tra opposte visioni del rapporto tra storia e Costituzione*, in *Foro it.*, IV, 2022, 449 ff.. See also A. Buratti, *Diritti fondamentali e tradizione storica: il contributo della Corte suprema degli Stati Uniti*, in *Riv. it. per le scienze giuridiche*, 10/2019, 423 ff..

[20] C. Sunstein, *Dobbs and the Travails of Due Process Traditionalism*, preliminary draft, online, 6/25/2022. See also, C. Sunstein, *Due Process Traditionalism*, in 106 *Mich. Law Rev.* 447 (2008).

[21] 597 U.S. _ (2022), slip op., opinion of the Court, 7.

[22] Id., at 2.

[23] 511 U.S. 702 (1997).

[24] 539 U.S. 558 (2003).

[25] See L.H. Tribe, *Deconstructing Dobbs*, cit., 82.

[26] 597 U.S. _ (2022), slip op., see, e.g., opinion of the Court, 32, 71.

[27] 597 U.S. _ (2022), slip op., Justice Thomas, concurring, 3.

[28] *Griswold v. Connecticut*, 381 U.S. 479 (1965). But see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

[29] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[30] *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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An additional reason that justifies the high resonance of *Dobbs* concerns the fact that it changes the level of scrutiny: under *Dobbs*, judges will decide the fate of state abortion restrictions with a "rational basis" review standard, not *Casey*'s heightened "undue burden" test. This minimal test only requires government action to have a legitimate state purpose and the law in question to be rationally related to that purpose with the consequence of admitting practically any kind of regulation, including the ones completely banning any abortion in any situation. In the end, in *Dobbs* the Supreme Court retreats from balancing between competing fundamental rights and allows each state to strike its own balance between the conflicting values of the survival of the fetus and the bodily integrity of the mother.[31]

Another troubling consequence of *Dobbs* is related to the position of the Supreme Court in the constitutional system. Leaving the protection of a fundamental right such as abortion to the states' majority of the time, the Court considers itself no longer a countermajoritarian institution – the Court is no longer part of a system of government in which the views of the majority are supposed to resolve policy disputes subject to the antimajoritarian protection of beleaguered minorities and fundamental personal rights.[32]

There is a further aspect of *Dobbs* that is worth noting, especially if commenting the case from a comparative perspective. The number of *amici curiae* at the merit level is significantly high, even considering that big numbers are typical in cases of great political and social momentum.[33] What is relatively unusual in *Dobbs* is the presence of two comparative law briefs filed by "International and Comparative Legal Scholars" and by "European Law Professors" in support of Respondents, that is Women's Health Organization. Both briefs are extensively cited in the dissent[34] and, more surprisingly, significant comparative law references can also be found in the Chief Justice's concurring opinion. Indeed, the general negative attitude of the Supreme Court toward extra-national references when interpreting the Constitution is well known – negative attitude which is a classic feature of an originalist approach whereas a more open attitude is usual when the Constitution is considered a living document.[35] This aspect of the case

[31] On the issue of balancing the words of the dissenting opinion in Dobbs are particularly strong: "Today the Court discards that balance. It says that from the very moment of fertilization a woman has no rights to speak of". 597 U.S. _ (2022), slip op., Justices Breyer, Sotomayor, and Kagan, dissenting, 2.

[32] This is the vision of the role of the Court that famously was asserted in *Carolene Products* and since then advanced, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), footnote 4. In the words of the dissenters in *Dobbs*: "We believe in a Court that puts some issues of limits to majority rule". 597 U.S. _ (2022), slip op., Justices Breyer, Sotomayor, and Kagan, dissenting, 7.

[33] In *Dobbs* the Supreme Court accepted 140 *amici curiae* briefs.

[34] 597 U.S. _ (2022), slip op., Justices Breyer, Sotomayor, and Kagan, dissenting, 42-43.

[35] The scholarship discussing the use of foreign sources when deciding new and complex cases is extremely rich both in the U.S. and from a comparative perspective. I limit here the reference to three comparative seminal works: T. Groppi, M.-C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford-Portland, Hart Publishing, 2014; M. Andenas, F. Fairgrieve, *Courts and Comparative Law*, Oxford, Oxford University Press, 2015; G.F. Ferrari (Ed.), *Judicial*

testifies a worldwide interest in *Dobbs* and perhaps contributes to understanding its relations with European legal systems.

Lastly, it is remarkable that the majority opinion never directly and expressly mentions the position of women in society and how the overruling of *Roe* and *Casey* will affect their lives, especially the lives of nonwhite women.[36] Even the word "woman" is absent from the grammatic of Alito's opinion.[37]

3. Justice Alito's opinion in Dobbs as the final act of a complex drama

In order to have a more complete understanding of *Dobbs*, to comprehend its profound interactions with a large section of American society, and to grasp the bitterness of the political debate, a step backward should be taken. *Dobbs* must therefore be placed within the complex net of litigation that took stage both at the federal and state level – a drama that ended with Alito's majority opinion as final act. And state laws different from the one challenged in *Dobbs* must also be taken into consideration.

Before June 2022, the situation regarding access to abortion procedures varied much from state to state.

Nearly half states had regulations severely limiting access to abortion. More precisely, thirteen states had "trigger laws" enacted after 1973 forbidding doctors from providing abortions upon the court overturning *Roe* (half of which have now sprung into effect). And in recent years, states (among which Texas) enacted other measures like "fetal heartbeat" laws restricting abortion very early in pregnancy, such as at six weeks. Nine states had laws pre-dating *Roe* banning abortion that were never removed from the books.[38] Most federal courts stopped the implementation of such state actions until *Dobbs*, but following Justice Alito's opinion these kinds of restrictions will now be considered constitutionally valid.

On the other hand, sixteen states protect access to abortion through various methods, such as state constitutional amendments and laws that protect the right to privacy, state supreme court decisions interpreting equal protection to include reproductive care, and statutes that protect access to reproductive care.

Against this background, the results of November 2022 midterm elections in California, Michigan, and Vermont, are worthy of notice and can be considered a direct reaction to *Dobbs*.

Since long time California state law allows abortions before the fetus is viable and abortions can also be performed after viability if a doctor

Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems, Leiden and Boston, Brill-Nijhoff, 2020.

[36] See K. M. Bridges, *Race in the Roberts Court*, cit.: "The analysis of *Dobbs* shows that the Court failed to appreciate that the reversal of *Roe* is devastating to black people with the capacity of pregnancy", 32.

[37] See M.R. Marella, *"Dobbs" e la geopolitica dei diritti*, in *Foro it.*, IV, 2022, 442 ff., 443.

[38] For a brief account of such laws see, A. Sperti, *Il diritto all'aborto ed il ruolo della tradizione nel controverso overruling di Roe v. Wade*, cit., 32-33.

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determines a pregnant person's life or health is in danger. But in November 2022, California voters added to the statutory provision an additional layer of guarantee approving a constitutional amendment that reads: "the state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives".[39]

In Michigan, voters approved a state constitutional right to "reproductive freedom", which is defined as "the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care".[40]

In Vermont, where the right to an abortion is already protected under a 2019 state law, voters approved the Reproductive Liberty Amendment that broadly protects "personal reproductive autonomy unless justified by a compelling State interest".[41]

Presently, when the regulation of abortion is taken into consideration, the US map looks like a patchwork quilt with colors going from dark red (more restrictive states) to deep blue (more liberal states) with different nuances of red and blue between the two ends of the spectrum.[42]

4. Abortion law and private enforcement

Among the laws providing very restrictive abortion regulation adopted before *Dobbs*, the above-mentioned Texas "fetal heartbeat" law is particularly relevant. It is relevant not only because it practically prohibits any kind of abortion at any time – after *Dobbs* this is no longer an issue. The relevance lies in the way in which the law, known as Senate Bill 8, is drafted.

Texas Senate Bill 8, entered into force on September 1st, 2021, prohibits physicians from performing or inducing an abortion if the physician detects a fetal heartbeat. SB8 does not allow state officials to bring criminal prosecutions or civil actions to enforce the law but instead directs enforcement through "private civil actions" culminating in injunctions and statutory damages awards against those who perform or assist with prohibited abortions.[43]

In order to enforce its extremely severe provisions (now constitutionally valid under *Dobbs*), SB8 expressly excludes criminal prosecution by state officials and provides *only* for "private civil actions". More precisely, SB8 establishes that "any person" who successfully sues an abortion provider, a health center worker, or any person who helps a woman

[39] The new Amendment approved is known as Proposition 1. See https://www.assembly.ca.gov.
[40] https://www.michigan.gov/som/government/branches-of-government/legislative-branch.
[41] https://legislature.vermont.gov.
[42] One can find many US maps showing the patchwork browsing in the web.
[43] Tex. Health and Safety Code Ann. §§ 171.204(a), 171.207(a), 171.208(a)(2), (3).

access an abortion after six weeks of pregnancy, will be rewarded with 10,000 $ to be paid by the person sued.[44]

The unprecedented way in which SB8 is framed can be dangerous for reasons going far beyond the abortion issue. In the first place, SB8 creates a bounty-hunting scheme that encourages the general public to bring costly and harassing lawsuits against anyone who they believe has violated the ban.[45] Secondly, but probably more threatening, SB8, in excluding from enforcement state officials, seems to be designed as a maneuver to avoid federal court review.[46]

Before SB8 entered into force, a complex litigation was commenced at the state and at the federal level that ended in *Whole Woman's Health v. Jackson, Judge, District Court of Texas, 114th District*[47] decided by the U.S. Supreme Court in December 2021, a few months before *Dobbs*.

The intricacies of the litigation reached an unusual high level – a level that recalls most of the difficult notions of a Law School's civil procedure and federal courts syllabus: lack of federal question and diversity subject matter jurisdiction, the questionable applicability of *Ex parte Young* to state judges, abstention doctrines, doctrines of justiciability.[48]

Leaving aside the procedural subtleties, understanding the meaning of "private civil actions" and the implications of *Whole Woman's Health* decision can help to assess the potential problematic impact of laws such as SB8.

Statutes that empower private plaintiffs to enforce special provisions are not unknown in the United States system, both at the federal and at the state level. Private civil actions can be found in contexts like antitrust, environmental pollution and securities fraud.[49]

Most private enforcement regimes empower *only* citizens who have been injured or suffered damages in some way. What is unusual is statutory enforcement by private plaintiffs who have *not* suffered a direct injury. For instance, antitrust provisions cover consumers and competitors who have suffered from monopolization. SB8, by contrast, seems to empower anyone, regardless the existence of a direct or even indirect injury.

A significant and clarifying comparison can be made between SB8 and laws protecting the environment.

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[44] Id.

[45] This problematic aspect of the Texas Statute was brilliantly and immediately noticed by an Italian scholar. See, S. Ferreri, *La rivincita del delatore. Il privato promotore di giustizia*, in *Revista General de Derecho Pùblico Comparado*, (2022) forthcoming. I express my gratitude to Professor Silvia Ferreri for having drawn my attention on the issue of private enforcement. On this aspect of the Texas statute see M. Goodwin, *Complicit Bias and the Supreme Court*, cit., 154.

[46] This aspect of SB8 is evidenced in the dissenting opinion in *Whole Woman's*. See infra text and notes 59-62.

[47] 595 U.S. _ (2021), slip opinion.

[48] See, e.g., E. Chemerinsky, *Federal Jurisdiction*, Boston, Massachusetts, Aspen Publ., 8th ed., 2021; R.H. Fallon, J.E. Manning, D.J. Meltzer, D.L. Shapiro, *Hart and Wechsler's, The Federal Courts and the Federal System*, Westbury, NY, The Foundation Press, 7th ed., 2015.

[49] For the use of private civil action in the field of anti-corruption laws, see W.T. Loris, *Private Civil Actions. A Tool for a Citizen-Led Battle against Corruption*, in 5 *World Bank Legal Rev.* 437 (2014).

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Across the United States, environmental statutes include provisions that give enforcement power to almost any member of the public. For instance, under the New Jersey Environmental Rights Act, "any person may commence a civil action in a court of competent jurisdiction against any other person alleged to be in violation of any statute, regulation, or ordinance which is designed to prevent or minimize pollution, impairment, or destruction of the environment".[50] Similarly, a Massachusetts pollution control provision mentions that any resident of the State can enforce its requirements.[51] Like the Texas bill, these statutes don't say anything about a direct or indirect injury.

Environmental claims are, in other respects, radically distinct from SB8.[52] One easy way to distinguish them is that environmental enforcement regimes are geared towards vindicating recognized state rights (constitutional or statutory) to a clean environment. SB8, by contrast, does not vindicate an established right recognized by law. Moreover, in the environmental context the community arguably suffers an injury in the form of environmental pollution and degradation. The right to a clean environment is typically a "diffuse" and "collective" right; consequently, everyone is at least indirectly harmed. By contrast, random members of the public are neither directly nor indirectly harmed by someone else procuring an abortion.

This aspect of SB8 has provoked charges of "vigilantism". And this is so true that the dissenters in *Dobbs* wrote: "And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so".[53]

The second problem with the Texas statute is the adoption of a private enforcement regime with the explicit purpose of avoiding federal constitutional review.[54]

Following civil procedure theory and case law, an SB8 claim by a random member of the public against an abortion clinic would be dismissed in federal court for lack of Article III standing. Article III of the Constitution limits judicial power to the resolution of "cases" and "controversies" in which a plaintiff suffered a concrete injury.[55] The Supreme Court held in *Lujan v. Defenders of Wildlife*[56] that indirect or speculative harms do not confer

[50] In 1974, the New Jersey Legislature passed the Environmental Rights Act ("ERA"), N.J.S.A. 2A:35-1. The ERA enables citizens to enforce certain environmental statutes in New Jersey should the New Jersey Department of Environmental Protection ("NJDEP") be unable or unwilling to enforce these specific environmental laws.
[51] https://www.mass.gov/lists/massachusetts-environmental-law-references.
[52] For a general account of U.S. environmental law and litigation, see A. Rowell, J. van Zeben, *A Guide to U.S. Environmental Law*, Berkeley, University of California Press, 2021.
[53] 597 U.S. _ (2022), slip op., Justices Breyer, Sotomayor, and Kagan, dissenting, 3.
[54] Again, this is well evidenced in the dissenting opinion in *Dobbs*.
[55] E. Chemerinsky, *Federal Jurisdiction*, cit, Chapter 2; R.H. Fallon, J.E. Manning, D.J. Meltzer, D.L. Shapiro, *Hart and Wechsler's, The Federal Courts and the Federal System*, cit., Chapter II. For an account in Italian of article III standing rules, see V. Barsotti, *L'arte di tacere. Strumenti e tecniche di non decisione della Corte Suprema degli Stati Uniti*, Turin, Giappichelli, 1999, 47-52.
[56] 404 U.S. 555 (1992).

standing. In that case, plaintiffs attempted to use a private enforcement provision in the Endangered Species Act that empowered "any person" to "commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter".[57] Plaintiffs challenged a regulation issued by the Interior Department because it was not, in their view, sufficiently protective of endangered species. But the Supreme Court concluded that this was a speculative harm that did not confer standing because Article III requires much more than a mere generalized grievance.[58] In the end, under *Lujan* and its progeny, federal courts would easily hold that an SB8 plaintiff lacks a concrete injury and therefore can have no Article III standing.

Article III refers only to federal jurisdiction and does not apply in state courts, therefore Texas standing rules could in theory be broad enough to recognize standing to SB8 claims. But, given the general political situation that paved the way to SB8, it is highly unlikely that Texas will entertain SB8 litigation.

Result: federal court review is avoided, state court review is uncertain, and SB8 immediately generated a heavy deterrent effect for anyone willing to help a pregnant woman to obtain an abortion (and this before *Dobbs*).[59]

5. *Whole Woman's Health v. Jackson*: An uncertain future for judicial review

The litigation over SB8 commenced in a state court through a pre-enforcement challenge pursued by a group of abortion providers and ended up in the US Supreme Court on the assumption that the law violated the Federal Constitution. The Supreme Court had thus the occasion of evaluating the legitimacy of statutes framed with the scope of evading judicial review. Instead, *Whole Woman's Health v. Jackson*[60] was decided on very technical procedural grounds and the majority opinion, authored by Justice Gorsuch, carefully avoided all the crucial issues present in the case.

A significant difference between *Whole Woman's* and *Dobbs* must, however, be taken into consideration.

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[57] 16 U.S.C. nn. 1531-1544 (1988).

[58] In *Lujan* the Supreme Court restricted the requisites of standing requiring that the plaintiff should have a direct arm in order to bring suit in a federal court according to Article III of the Constitution. Limiting access to federal courts for the so-called ideological plaintiff, the Supreme Court partly vanished the purpose of the Endangered Species Act which provided for "citizen suits" – that is, private civil actions. On *Lujan* and the relation between standing and environmental litigation, see V. Barsotti, *La sentenza Lujan della Corte Suprema degli Stati Uniti sulla legittimazione ad agire delle associazioni ambientaliste*, in *Riv. trim. dir. e proc civ.*, 1996, 1175 ff..

[59] Michele Goodwin reports that: "In a study published in the New England Journal of Medicine, researchers conclude that the Texas abortion ban 'has had a chilling effect on a broad range of health care professionals, adversely affecting patient care and endangering people's lives'". M. Goodwin, *Complicit Bias and the Supreme Court*, cit., 158.

[60] 595 U.S. _ (2021), slip opinion.

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The opinion drafted by Justice Gorsuch in *Whole Woman's* was not entirely joined by the Chief Justice. Justice Roberts wrote an opinion concurring in the judgment in part and dissenting in part, with whom the "liberal" wing of the Court joined.

Chief Justice Roberts was well aware of the dangers statues framed as SB8 presented. Indeed, at the outset of his concurring opinion he underlined that "Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review"[61] and he then closed the opinion with seriously alarmed words: "The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake".[62]

In a separate dissent Justice Sotomayor, with whom Justices Breyer and Kagan joined, expressed her deepest worries about laws such as SB8 and also conveyed her bitter disappointment for the apathetic position of the conservative majority of the Court. After having outlined SB8's "numerous procedural and substantive anomalies",[63] Justice Sotomayor sadly concluded: "By foreclosing suit against state-court officials and the state attorney general, the Court effectively invites other states to refine SB8's model for nullifying federal rights. The Court thus betrays not only the citizens of Texas, but also our constitutional system of government".[64]

Dobbs is a dramatic decision for women's rights and perhaps for the future of other fundamental rights protected under a substantive reading of the XIV Amendment.

But *Whole Woman's* can be dangerous for the future of judicial review.

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[61] 595 U.S. _ (2021), slip op., Chief Justice Roberts, with whom Justices Breyer, Sotomayor, and Kagan join, concurring in the judgment in part and dissenting in part, 1.

[62] 595 U.S. _ (2021), slip op., id, 4.

[63] 595 U.S. _ (2021), slip op., Justice Sotomayor, with whom Justices Breyer and Kagan join, concurring in the judgment in part and dissenting in part, 2.

[64] 595 U.S. _ (2021), slip op., id. See also, id., 10 "The dispute is over whether States may nullify federal constitutional rights by employing schemes like the one at hand".