Vox Populi, Vox Dei? The Politicisation of Abortion in the United States

July 2023

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Presented in partial fulfilment of the requirements for the Degree

of

International Master in Security, Intelligence and Strategic Studies

Word Count: 20.552

Supervisor: Nik Hynek

Date of Submission: 26 July 2023

Abstract

The Supreme Court's recent overturning of Roe v. Wade, and with it the constitutional right of abortion, has sparked a debate on the limits of state interference with certain fundamental and private rights. This thesis aims to explore the legal and theoretical framework that allows putting certain fundamental rights, and more specifically that of abortion, up for a vote, and analyses the particularities of the abortion debate through liberalism's political conceptions of justice as fairness. In addition, a conceptualisation of abortion as a human security matter than can be incorporated into the security agenda is provided, which allows for the protection of abortion as a fundamental right.

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1. Introduction

On June 24, 2022, in a landmark decision the Supreme Court of the United States overturned the *Roe v. Wade* decision that guaranteed American women the fundamental right of abortion. The unprecedented nature of the Court's ruling added fuel to a fire that could have used some water instead, for the abortion debate is often deemed the single most polarising issue in American politics. More importantly, the apparent ease with which the Court's justices had justified their decision to deprive women of a right that the law had considered as 'fundamental' for over fifty years raised serious concerns regarding the government's protection of individual rights, and more specifically of women's basic rights and liberties. Moreover, some voices emerged putting into question the neutral stance of the government in matters of basic justice, grounded on the liberal political conception of justice as fairness, which constitutes the prioritisation of individual rights over the common good.

The aim of this thesis is to explore the politicised and divisive debate of abortion rights in the contemporary context of the United States. More specifically, it aims to identify and analyse the theoretical and legal context that allows for individual rights to be put up for a vote, rather than being protected by the central government. Therefore, it will analyse the reasons why it is possible to local governments with politically powerful minorities to determine the status of the fundamental rights that the majority of the population should be able to enjoy, as part of the liberal basic political conception of justice.

The research questions with which this thesis is concerned are the following:

1. What is the legal and theoretical framework that allows for the putting of certain individual rights, namely reproductive rights, up for a vote?
2. Is the dual federalist system on which the United States is based compatible with the protection of individual rights?
3. In what way can abortion rights be incorporated into the security agenda?

This paper is divided into four parts. First, the historical origins and development of the abortion debate in the United States are analysed, putting especial emphasis on the distinctive narratives that dominated the framing of the debate at every given time. The paper then turns to the matter of the liberal political conception of justice as fairness, and its ideals of the neutral state and 'the right over the good' doctrine are analysed, also from the critical perspective that the communitarianism strand of thought represents. In the third section, the argument in defense of state police powers that constrain the exercise of individual fundamental rights is considered, and the differences between 'individual' rights and 'fundamental' rights are highlighted. Finally, the last section provides a conceptualisation of abortion as a human security matter that can be introduced into the security agenda.

In regards to the methodology employed, the United States is taken as a single case study. This decision was made on the grounds that this method is the most effective in providing an in-depth analysis and a deeper, more comprehensive understanding of the particularities that define the American abortion debate.

The added value of this thesis lies on two interconnected elements.

First, it provides and in-depth exploration of the concepts of 'fundamental rights' and 'individual' rights, putting especial emphasis in the way the terms are constructed and defined to serve the interests of the actors that hold this definitional power. In other words, the focus is put on the link between framing abilities and power, which allow for the unveiling of socially constructed conceptions of the good and the right. Furthermore, the analysis is conducted both

in terms of political philosophy and abstract reasoning, and in the context of the application of these abstract findings to the more tangible realm of public policy and the political in general.

Secondly, this thesis provides a re-conceptualisation of abortion rights from a human security approach, in a manner that allows for the incorporation of reproductive freedom into the security agenda. The singularity of the framing suggested is that it has been designed to potentially transcend the clashing opinions of the sides engaged in the abortion debate, therefore increasing the odds of abortion being deemed permissible by all comprehensive doctrines. In other words, the conceptualisation of abortion presented offers a successful framework for the re- constitutionalisation of abortion, thus protecting women's basic rights and liberties.

Last but not least, it is worth mentioning a couple considerations that should be taken into account in the reading of this thesis.

First, this paper uses the term 'women' to refer to all individuals that can get pregnant, and who are therefore directly affected by restrictive abortion regulations. Nevertheless, it is important to note that the reason behind this choice is purely based on simplification purposes. This paper is in no way assuming that only women can get pregnant, nor does it have the ill-intention of overlooking the very real and distinct experiences of discrimination posing additional abortion access barriers to individuals that do not identify with the political category of women.

Second, it is not within the scope of this thesis to determine the specific steps and processes that a liberalisation of abortion in the context of the United States would entail. More importantly, this thesis is certainly not concerned with settling once and for all the lifetime-old question of abortion, and does not aim to establish the superiority of one particular moral, religious or philosophical comprehensive

doctrine over the other. Having said that, the author is aware that some subjective views may be reflected on some of the arguments presented, even if an effort has been made to ensure that this would not be the case.

2. Contextualising the Abortion Debate in the United States

2.1. Origins and Criminalisation of Abortion

The history of the regulation of women's reproductive health by the state is a relatively recent one. Before the first pieces of abortion legislation in the United States appeared in the first half of the nineteenth century, it was British common law, and in particular the quickening doctrine, which defined the legality of the termination of pregnancy (Mohr, 1978). According to this ancient perspective, and because the separate existence of a fetus could not be medically proven until fetal movement, abortion before quickening was not criminal. Mohr (1978) notes that, up until mid-nineteenth century, both public opinion and government remained mostly compassionate and empathetic towards women seeking abortions before quickening. The quickening doctrine, Mohr points out, continued to be at the core of the first abortion laws enacted between 1821 and 1841, which for the first time in the United States designated abortion as a statute crime.

Nevertheless, physicians would lead a paradigm change that resulted into a national wave of abortion restrictions between 1860 and 1880, which banned abortion from the moment of conception (Siegel, 1992). The new legislation criminalizing abortion granted very few exceptions; Siegel (1992) observes that the majority of states' statutes allowed doctors to conduct so-called 'therapeutic' abortions only whenever they were considered necessary to preserve a woman's life. Historians like Luker (1984) argue that behind the criminalization efforts initiated by physicians, which were mostly organised through the American Medical Association (AMA), lied a need of the medical profession to assert its professionalism and irreplaceable role in the healthcare field. Indeed, the severe abortion restrictions enacted during the nineteenth century were the product of the

physicians' 'moral crusade' aimed at regaining the status needed to justify their complete monopolization of women's reproductive health (Luker, 1984; Mohr, 1978). As Luker puts it, ' persuading the public that embryos where human lives and then persuading state legislatures to protect these lives by outlawing abortion may have been one of the few life-saving projects actually available to physicians' (Luker, 1984, p. 31).

Therefore, through a rhetoric based on defending the rights of embryonic life doctors ruled out all competitors within the reproductive health arena, and successfully framed abortion as a purely medical matter. This narrative legitimised anti-abortion legislation, which remained widely accepted an uncontested in American society; in fact, Luker (1984) defines the period between 1890 and the late 1950s as the 'century of silence', during which the status quo regarding abortion restrictions was generally unchallenged by both public opinion and government. However, Luker argues that medical and technological progress during this time would eventually expose the divisions within the medical profession regarding the moral status of the unborn. As medical science evolved and fewer abortions fit the criteria of necessary to preserve a woman's life, a debate emerged regarding abortions given on grounds of psychiatric and general wellbeing, which were starting to become the norm. Since the existing laws were ambiguous on the issue of abortion, physicians were joined by elite legal and clerical groups in an effort to liberalize abortion and grant more autonomy to the medical practice (Burns, 2005).

In this context of medical influence on state legislation, and especially from mid-1960s, the Americal Law Institute (ALI) issued a proposal that influenced some states in introducing abortion reform bills that decriminalized abortion in certain cases, namely in pregnancies resulting for rape or incest, and in pregnancies posing a threat to the physical and psychological wellbeing of a woman and/or her potential child (Burns, 2005). In his account of the history of abortion law reform, Gene Burns (2005) defends that, although the American society has

always had mixed views on abortion, up until 1970 the issue was neither politicized, nor understood as an essentially moral or ethical dilemma. To illustrate this point, the author points out that particularly in the Southern states, which currently have some of the most conservative legislation in the country, abortion reform laws were passed in higher frequency that in any other states.

Burns (2005) argues that this apparent paradox can be explained by two main factors. On one hand, in this new wave of abortion liberalization the topic continued to be presented as a medical, humanitarian concern, not a morally charged one. The central role that the framing of abortion by diverse interest groups had in shaping contemporary abortion national policy will be further explored in subsequent sections. On the other hand, the second element that Burns identifies as having contributed to liberalization success in certain states is the fact that prior to 1970, the abortion debate was a discussion taking place almost exclusively within elite groups. Grassroots movements were still in their early stages of development, and in states with weak feminist movements and a minimal Catholic population there was no alternative perspective that could challenge the predominant medical framing of abortion (Burns, 2005).

Nevertheless, Burns asserts that despite the small scale of the abortion rights movement, supporters' pressure to remove medical control and restrictive interpretations of reform laws initiated a repeal movement that marked the beginning of abortion as a highly divisive and controversial topic. As a result, groups including women's movement and abortion rights organizations, such as NARAL, started lobbying for the total repeal of abortion restrictions through an abortion rights frame, which presented repeal as essential to humanitarian goals. The subsequent passing of controversial repeal laws decriminalizing abortion and expanding the reasons for the practice in the states of Hawaii, New York, Alaska and Washington increased visibility and public awareness of abortion, which set the stage for the 1973 *Roe v. Wade* U.S. Supreme Court decision.

2.2. Roe v. Wade and Privacy Rights

In 1973, Jane Roe, an unmarried pregnant woman, filed the *Roe v. Wade,* 410 U.S. 113 (1973) lawsuit against the state of Texas, which at the time prohibited abortion in all circumstances except where the life of the pregnant woman was at risk. In a landmark decision, the Supreme Court found implicit in the Due Process Clause of the Fourteenth Amendment in the Bill of Rights a right to privacy, which included the right of women to decide whether to terminate their pregnancy (410 U.S. 113, 1973). The right to privacy on which the Court based its reasoning in determining the constitutional protection of privacy rights built on preceding cases, notably that of *Griswold v. Connecticut* , 381 U.S. 479 (1965). In response to a Connecticut law that prohibited birth control use, the Supreme Court ruled that it was unconstitutional for the government authorities to ban the use of contraceptives. Although *Griswold* would be the first case in which the right to privacy was recognised as integral to the Constitution, the Court endorsed the traditional notion of privacy, whereby intimate matters were not to be surveilled by the state (Sandel, 1989).

However, a new conception of privacy was reflected in the *Roe* ruling. The privacy rights recognised under *Roe* limited the nature and legitimacy of state interference in women's reproductive choices, through a framework that distinguished three trimesters of pregnancy according to medical conceptions on the development of the fetus; indeed, privacy came to be understood as the right to freely make certain choices without state interference (Sandel, 1989) . Through its decision the Court also overturned abortion restrictions at the state level, and banned state governments from imposing any restrictions on abortion at any time and under no circumstances. The Court framed its reasoning on two distinctive and intersecting matters: on the one hand, it invoked the right to privacy of women in reproductive matters, in consultation with their physicians; on the other

hand, it simultaneously argued for the states' interest in protecting the rights of the fetus, the moral status of which remained ambiguous (Araujo, 1993) .

At the same time and also in relation to abortion rights, the *Doe v. Bolton* (1973) decision, which the Court claimed should be understood altogether with *Roe* in a complementary manner, redefined the term 'health' in broader terms; the Court ruled that the health of pregnant women referred not only to physical integrity, but also encompassed psychological and emotional elements relevant to women's well-being (Forsythe and Presser, 2005). The expansion of the concept of health constituted a clear departure from the traditional life-or-death doctrine on the permissibility of abortion, contingent on judgements regarding the threat that a pregnancy posed to a woman's life (Burns, 2005). This new notion of health was also incorporated in *Roe*, in which the opinion included in the reasons why a woman may wish to terminate her pregnancy factors like psychological harm, the strain that childcare has on the mental and physical health of mothers, or the social stigma associated with motherhood outside of marriage (Siegel, 1992). Taken together, then, through the *Doe* and *Roe* decisions the Court justified the conceptualization of abortion rights as a 'fundamental right' worthy of constitutional protection (Burns, 2005).

Nevertheless, critics argue that the *Roe* ruling should not be interpreted as having recognized women's rights on gender equality grounds, which are concerned with freedoms such as bodily autonomy and the liberty to choose over private matters. Instead, the framing in which the Court placed its decision maintained the dependency of the decision-making rights of pregnant women on the decision-making rights of physician's (Hunter, 2006; Garrow, 1994). As Araujo (1993) states, *Roe* established that the permissibility of abortion in the first trimester relied not on the right of women to terminate their pregnancy, but rather on the medical judgment that has the authority to decide if an abortion is permissible in any given case. Therefore, it can be argued that while the Court's decision did

limit the state's role in controlling women's reproductive choices, it also partly reinforced the medical frame and therapeutic abortion rhetoric and that had historically validated the case for the physician's exclusive authority in abortion decisions (Siegel, 1992). The medical framing, however, would be modified in subsequent cases dealing with reproductive rights, allowing more space for the recognition of women's individual rights.

Indeed, the constitutional protection of abortion provided by Roe was reinforced by the Supreme Court in the 1992 landmark decision *Planned Parenthood v. Casey,* 505 U.S. 833 (1992)*,* which introduced the concept of the 'viability' of the fetus as a substitute for the trimester framework that limited state interference in decisions involving the termination of pregnancy. As a consequence of this modification the Court allowed states to establish abortion bans beyond the point of viability, as well as pre-viability abortion restrictions as long as they did not constitute an 'undue burden' for the woman (505 U.S. 833, 1992). Besides supporting *Roe*, part of the relevance of the *Casey* decision lies on its expanding views regarding the permissibility of abortion beyond the uncontested authority of the physician; indeed, in *Casey* Justice Blackmun referred directly to the woman's right to both privacy and bodily integrity, therefore modifying the Court's neutral tone and in Roe and starting to adopt the language of individual rights *(*Araujo, 1993). This shift was already reflected in the *Thornburg v. American College of Obstetricians & Gynaecologists* (476 U.S. 747, 1986), with Justice Blackmun writing his opinion for the Court stating that ' few decisions are more personal and intimate, more properly private, or more basic to i*ndividual dignity and autonomy*, than a woman's decision - with the guidance of her physician and within the limits specified in *Roe* - whether to end her pregnancy. A woman's right to make that choice freely is fundamental.' (476 U.S. 747, 1986, *emphasis mine*).

2.3. The End of Roe: Overturning a Constitutional Right

The constitutional protection that *Roe* had awarded for abortion rights would come to an end on June 24, 2022. In the *Dobbs v. Jackson Women's Health Organization* (597 U.S._, 2022) decision the Supreme Court ruled that the previously established categorisation of the right of women to abortion as a fundamental was to be revoked. The the Supreme Court's ruling in the *Dobbs* decision was synthesised into three main conclusions. First, the Court found that the Constitution did not in fact recognise a right to abortion, and claimed that the ruling in *Roe* holding that a right to privacy, which encompassed women's liberty in making decisions free from state interference, did not include a constitutional right to abortion. Further, the Court justified its decision by stating that the right to privacy in abortion decisions was not to be compared to the right to make decisions free from state interference regarding intimate matters like sexual relations, marriage or contraception; abortion was different in essence, the Court claimed, for it 'destroyed what those decisions called 'fetal life' and what the law now before us describes as an 'unborn human being' (597 U.S._, 2022). It is in line with this argument that the Court also held that, *Roe* and *Casey* were to be overruled, since as argued by the Court, the decisions had been ruled erroneously. Consequently, the third decision stemming from *Dobbs* placed under the authority of the states the responsibility to freely regulate abortion with virtually no restrictions, something that *Roe* had previously erased (597 U.S._, 2022).

It is worth stressing for the purposes of this analysis that the significance of the ruling in *Dobbs*, besides the overarching impact that would come to have on the individual rights of women in the United States, is that the overturning of a right that had already been recognised as constitutional in *Roe*, and which had in addition been reinforced by the Supreme Court in subsequent cases like *Casey*, was quite unprecedented (Niehoff, 2023). Indeed, in *Dobbs* the Court overturned a *c*rucial precedent that had prevailed for almost 50 years, an action that overlooked the value of precedents that have come to be an essential part of a

certain legal doctrine, and which also triggered a plethora of dissenting voices claiming that ‘everything we think we know about the Constitution seems up for grabs’ (Niehoff, 2023). Indeed, the analysis on the Court’s ruling in *Dobbs* reveals inconsistencies that are not coherent with the position of neutrality that the Court deems as the foundation for its exercise of judicial power, and which entails refraining from making any value judgements on competing claims of the good life (Supreme Court of the United States, n.d.). It is precisely to the dilemma embedded in competing political conception of justice, including the notion of justice as fairness articulated by John Rawls, that this paper now turns .

3. Pluralism, the Right and the Good

3.1. The State and Conceptions of the Good Life

Unavoidable conflict is the common denominator in all diverse and pluralistic societies (Kekes, 1996). The reason for this lies on the notion of 'value pluralism' coined by Isaiah Berlin (1958) , which rejects moral absolutism's claims on the intrinsic priority of certain values as part of an objective universal truth. In contrast, value pluralism recognises that fundamental human values are diverse and conflicting, as they depend on a wide variety personal moral, religious and philosophical beliefs, which are defined as 'comprehensive doctrines' by Rawls, and through which individuals make sense of the world. Kekes (1996) agrees on Berlin's approach, and states that pluralism is the most effective tool for managing unavoidable conflict over values that are plural and conditional. In light of this, Rawls (1993) regards the existence of reasonable pluralism as an element intrinsic to democratic societies, as they are constituted by the coexistence of multiple conceptions of the good. The difficulty in finding common ground stems then from the fact that the values endorsed by diverse comprehensive doctrines are understood by Berlin's value pluralism as incommensurable; in other words, because no value is inherently 'more true' than others, there is 'more than one valid, rational solution to a conflict of ends' (de Ureta, 2018). So fundamental and undeniable is this multiplicity of perspectives in well-ordered societies, that Rawls believes imposing one comprehensive doctrine over the others would inevitably entail the use of coercive power (Rawls, 1993).

Therefore, taking that into account the question arises regarding how can the government establish the principles of justice on which legitimate state power is based. Put differently, under what terms should any potential agreement on the basic conceptions of justice that are to rule society be discussed, given the fact of reasonable pluralism? Should political deliberation on questions of justice

incorporate conceptions of the food, or should it avoid issuing value judgements altogether? The dilemma that is presented, in other words, is whether the priority of the good should precede that of the right, or if the contrary is required to reach common ground in pluralistic societies.

The two main philosophical schools of thought concerned with the order and priority of the right and the good and the implications that the divide has for justice are the communitarian and liberal approaches. Due to length limitations and for the sake of an efficient analysis on the case of abortion in the liberal democratic context of the United States, Robert Nozik's philosophy of libertarianism and its portrayal of the minimal state as the only form of government that does not violate individual rights will not be considered (Coleman, Frankel and Phillips, 1976). The subsequent sections will then explore in a critical manner some of the most influential viewpoints on each side of the debate, with the aim of shedding some light on the dominant perspectives concerned with the question of whether the ideal of the neutral state is attainable and/or desirable. As this paper takes as a case study the United States a special emphasis will be put on the Rawlsian idea of the liberal 'neutral' state, and Sandel's communitarian approach will be explored in relation to his critique of Rawls's philosophy.

3.1.1. The Liberal Ideal of the Neutral State

For John Rawls, one of the central figures in the development of the political philosophy of liberalism, the priority of the right over the good is a central component to the conception of justice that he defines as 'justice as fairness'(Rawls, 1971). In his book *Political Liberalism* (1993), justice as fairness is presented as the framework establishing the guidelines through which institutional structures can guarantee the liberty and equality of all citizens, which is an

essential feature of a just democratic society. In other words, justice as fairness conceptualizes society as a 'fair system of cooperation', based on two premises: that citizens are free and equal, and that a public political conception of justice is key to the maintenance of a well-ordered society (Rawls, 1993: 35). It is through justice as fairness, then, that a political conception of justice that all reasonable citizens are able to endorse can be reached.

Rawls (1971) contends that through the moral reasoning that stems from what he calls 'the original position' all rational citizens can agree on the two principles of justice that constitute the justice as fairness doctrine: first, each person has an equal right to basic rights and liberties, in line with egalitarianism and the idea of equal opportunity ; second, which is what Rawls calls the difference principle, all social and economic inequalities must 'benefit the least advantaged in society' (Rawls, 1971: 15). As Rawls explains in his work *A Theory of Justice (*1971), the fairness of the basic principles of justice agreed upon by all citizens is grounded on the hypothetical moral reasoning that he calls ' the veil of ignorance'. The veil of ignorance refers to the original position from which the principles of basic justice are selected , since citizens participating in the bargaining process have no information on their own conditions and position in society, so that they are not inclined to choose principles that may favor their personal interests. The outcome of this process is the agreement on basic principles of justice on which an overlapping consensus can then be built (Rawls, 1993).

Once this is established, it is on the basis of this commonly-agreed political conception of justice that citizens ought to discuss 'questions of basic justice and constitutional essentials', if consensus is to be achieved and stability sustained in pluralistic societies (Rawls, 1993: 214). Therefore, when dilemmas of basic justice and constitutional essentials arise, such as questions on the permissibility of abortion, Rawls contends that the opposing views of diverse comprehensive doctrines can be transcended only if the questions discussed are argued in line with public reason, which imposes certain restrictions. Indeed, public reason

determines that the only values that can be invoked when discussing questions of basic justice are those that are independent of any moral, religious or philosophical comprehensive doctrines (Rawls, 1993). Rawls defines these values as 'political', for they are articulated in terms that align with the principles of justice, which can be accepted by all citizens altogether with their own comprehensive doctrines.

To elaborate, what political values have in common is that they exclude judgements on conceptions of the good from political discussion for the sake of finding common ground on basic questions of justice, while at the same time allowing the existence of a plurality of reasonable moral, religious and philosophical perspectives that coexist in any democratic society (Rawls, 1993). According to Rawls, then, public policy must therefore find its justification in political values that do not assume any conception of the good. Moreover, the right is placed before the good in the sense that principles of justice establish limits in the ways of life that are permissible; as a result, ' the claims that citizens make to pursue ends transgressing those limits have no weight' (Rawls, 1993: 209). Rawls clarifies, however, that the priority of the right does not rule out ideas of the good; instead, justice as fairness must be understood as being able to combine the right and the good in a complementary manner (Rawls, 1993). Differently put, citizens can and inevitably do draw on their moral and religious comprehensive doctrines when considering questions of basic justice; public reason simply demands that, in the political realm, citizens present their arguments in political values.

Following this line of reasoning it is worth noting that, despite political liberalism's central notion of neutrality, the political values that are already embedded in the concept of justice as fairness itself can and should be prioritized (Rawls, 1993). Rawls mentions the political values of tolerance or civility, to mention one example, as automatically overriding the permissibility of religious or racial discrimination, for instance. This argument will be discussed more

extensively in Chapter 4, which will further explore how a balance of rights considering political values can provide a consensus for questions of basic justice, and more specifically for the question of abortion with which this paper is concerned.

Having said that, it is important to recall that in general terms the author identifies the liberal principle of legitimacy, and therefore the exercise of 'fully proper' political power, with respect for the 'constitution the essentials of which all citizens…may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason' (Rawls, 1993: 137). Therefore, it can be argued that any political institutions or actions that do not comply with the commonly agreed principles of basic justice in pluralistic societies, such as any attempts to impose a particular comprehensive doctrine over all citizens, can be deemed as coercive practices, which undermine the legitimacy of government (Rawls, 1993). It is in this way that that the priority of the right over the good requires government neutrality under the framework of political liberalism.

To summarise, according to Rawls it is only through an overlapping consensus stemming from a political conception of justice that social unity and stability can be achieved, in line with the idea of justice as fairness based on a position of neutrality regarding the diversity in conceptions of the good endorsed by diverse reasonable comprehensive doctrines.

3.1.2 . Communitarianism

In the 1980s, the work of a limited group of mostly American thinkers that challenged the liberal and libertarian paradigm came to constitute the political philosophy that is referred to as communitarianism (Bell, 2001). Taking the focus away from the autonomy and individual rights approach underlying the ideal of state neutrality that liberals defend, and emphasizing instead the ties between individuals and the community as a whole, communitarianism rejects the idea that the government is not to promote any particular conception of the good way of life (Bell, 2001). Indeed, communitarianism regards with certain nostalgia Aristotelian ideas of morality and virtue, which the liberal individualistic and rights-based approach that gained prominence during the Enlightenment has obscured (MacIntyre, 1992). The classical tradition and its emphasis on virtues, which promoted political values necessary to sustain political life, conceptualised justice as the exercise of certain virtues in behalf of the common good. The defence for the priority of the good is particularly quite vehemently by Charles Taylor, who confers a universal character to the priority of the good in a manner that shapes any potential universal ideas of the right (Huang, 1998). In contemporary political philosophy however, and in particular in the field of work posing some criticism to the United States political conception of justice, Michael Sandel must be highlighted as one of the most prominent figures of communitarianism.

Michael Sandel (1984) criticises America's current liberal political philosophy, arguing that because it overlooks and neglects the values of civic engagement and the concept of community, it fails to protect the liberty that liberalism so greatly cherishes. His criticism of the prioritisation of the good, is focused on the notion of the 'unencumbered self', or what he regards as an individual rights-based erroneous understanding of the citizen as unconstrained by the politics of common good that a national republic requires ; as the author puts it, in the ethics of the unencumbered self the individual is ' cast as the author of the only moral

meanings there are'(Sandel, 1984: 87). As a result of what he refers to as the 'universalizing logic of rights', in his essay 'The Procedural Republic and the Unencumbered Self' (1984) Sandel goes on to condemn the transformation of the national republic into a 'procedural republic', where fair procedures are prioritised over a diluted common good in a manner that the author considers to be contrary to democracy. The primary outcome of this shift, according to Sandel, is that the moral duties that stem from the attachments and commitments involved in the understanding of individual identity as part of a broader community are overridden by a sovereign self, whose unencumbered nature cannot sustain a republican government like the United States (Dagger, 1999).

Sandel (1996) rejects the possibility of tackling morally controversial issues from a neutral standpoint based on the liberal ideal of the right over the good, arguing that any efforts to bracket moral dilemmas raises serious doubts regarding what counts as bracketing. As the author puts it, the bracketing practices that minimalist liberalism advocates for run the risk of implying ' a putatively political conception of justice in precisely the moral and philosophical commitments that it seeks to avoid' (Sandel, 1996: 533). Under the communitarian point of view, then, debates on matters of basic justice cannot aim to escape the moral, political and philosophical doctrines that underpin their nature (Sandel 1996; Kramer 2017)

Communitarian authors like Sandel (1996) and Kramer (2017), therefore, claim that any attempt to detach the abortion debate from any moral considerations for the sake of consensus in a reasonable pluralistic society is doomed to fail; for the balance of rights and order of values that must be considered in attempting to settle a basic principles of justice is not inherently neutral, but rather tied to a certain subjective perspective on the weight and preference that is attributed to each value. As a result, it is unclear whether the liberal promise of separating the right from the good can even be achieved (Sandel, 1996), According to this interpretation, political liberalism promotes certain values in a manner consistent with just another comprehensive doctrine, which delegitimise its claims to act as a

political conception of justice on which social and political stability can rest (Sandel, 1996).

This criticism, however, overlooks the nature of political liberalism altogether. Values cherished by political liberalism, such as freedom and equality of all citizens, are not exclusive to political liberalism, which is therefore not a conception of justice or comprehensive view in and of itself. In other words, the notion of Rawlsian public reason that is central to the author's defence of political liberalism does not affirm a set of principles of justice or an immutable value system (Quinn 1995) ; rather, the mere notion of an overlapping consensus asserts that democratic regimes allow for disagreement and deliberation among diverse coexisting comprehensive doctrines and political conceptions of justice (Rawls, 1993). As a matter of fact, Rawls does not make a case against religion as scholars like Greenawalt (1995) have argued. Nor does it fail to acknowledge the validity of religion as a reasonable doctrine, in the majority of instances (Quinn, 1995). In other words, he does not claim that arguments coming from comprehensive doctrines have no space in public discussion; he simply states that if they are to be considered when basic questions of justice arise, all arguments must be articulated in terms of political values , in line with the requirements of public reason (Rawls 1993) .

3.2. The Priority of the Right in the United States' Conception of Justice

3.2.1. The 'Wall of Separation' and the Supreme Court

Having analysed the dominant narratives of political philosophy theorising on the nature of the relationship between political power and the priority of the right or the good, the approaches explored can now be applied to our analysis of the abortion rights dilemma in the United States. To do so, it is paramount to examine

the federal system that distinguishes the duties and competencies of the federal government from those attributed to state governments. This section will focus on the right over the good principle and its central role in the conception of justice according to which the Supreme Court operates. In contrast, Chapter 4 will explore how state governments are not bounded by the same neutrality principle, and often invoke conceptions of the good in the exercise of their authority.

When referring to the conception of justice on which the Supreme Court is based, it is paramount to link it to the Rawlsian principle of justice as fairness. Indeed, at the core of the Supreme Court's most cherished values lies the liberal political ideal of neutrality, whereby it is not the Court's responsibility, nor it ought be, to make any judgments on the competing claims of the good that exist in the highly diverse and pluralistic American society (Supreme Court of the United States, n.d.) . In accordance with the Constitution that establishes the guidelines on the American dual federal system, and which divides political powers and responsibilities between the federal and state governments so that no abuse of power can take place, the Supreme Court's authority lies in its 'balanced judgement', a claim that is relevant to the discussion of the federal-federated division that is presented in Chapter 3. The Supreme Court itself clarifies that this 'balanced judgement' is enforced by the Constitution, the aim of which was to ensure a `balance between society's need for order and the individual's right to freedom' (Supreme Court of the United States, n.d.). According to this distinction, then, the responsibility of 'order' lies on the federal government, while individual rights are to be guaranteed by the states.

Also important to the matter of abortion discussed, the government of the United States establishes itself as independent from the influence of any particular religion in its exercise of power through the rhetoric grounded on Jefferson's 'wall of separation between Church and State' (Library of Congress, n.d.). The secularism that underpins this doctrine is consistent with Rawl's argument for the exclusion of values rooted in religious, moral and philosophical comprehensive

doctrines, i.e. non-political values, in deciding on questions of basic justice (Rawls, 1993). Therefore, the realm in which the Supreme Court operates is that of the political, secular fundamental rights, as established in the Bill of Rights that compiles the basic values on which the US political conception of justice is based (The U.S. National Archives and Records Administration, n.d.). Indeed, the special category of the bundle of rights that the Court deems fundamental is given by the fact that these rights cannot be overridden by majority rule, as they are not to be subject to the political process; in Rawlsian terms, these rights () The principle of the right over the good, then, defines the political conception on which the Supreme Court bases its judgments.

From his communitarian perspective, Sandel (1996) clearly states his skepticism regarding the possibility of bracketing moral issues, i.e.: prioritising the right over the good, even for legal purposes. To illustrate his point he comments on the Court's ruling in *Roe v. Wade*, which despite attempting to adopt a neutral position, ended up relying on a moral comprehensive view to establish fetus viability as a guideline to determine the legitimacy of abortion. This communitarian critique advanced by Sandel, namely that the Court's official neutral stance does not apply in practice to its rulings, is particularly valuable when analysing the evolution of the Court's framing of privacy rights and abortion matters (Phillips, 1991) . For instance, the radically opposed ways in which the Court argued for the existence or lack of a constitutional right to privacy, in the *Roe* and *Dobbs* decisions respectively, seems to uphold Sandel's (1996) claim against the possibility of prioritising the right over the good.

3.2.2. Neutrality for Whom? Gender Equality in Legislation

The US is one of the few liberal democratic countries whose government presents a consistent history of abstaining from ratifying proposed conventions and

agreements concerning women's right to equality, both at the national and international level. Some examples that illustrate this trend include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the over a century-long efforts to include to Constitution the Equal Rights Amendment (ERA), aimed to prohibit any sort of discrimination on the basis of sex and gender identity (Ginsburg, 1979).

Taking the case of CEDAW, adopted in 1979 by the UN General Assembly, Al Shraideh (2017) argues that the reasons why the United States has not yet ratified what is deemed the international 'bill of rights' for women, signed by 186 countries and counting with the ratification of states like South Sudan, could be related to the vagueness that surrounds the status of gender equality rights in the United States' legal system. Indeed, although the Fourteenth Amendment and its Equal Protection Clause are often invoked to extend civil rights, as a legal tool it is perceived as being too abstract in its formulation to effectively protect women's rights of liberty and equality, due to the lack of explicit references to women in its wording (Ginsburg, 1979). However, and going back to Al Shraideh (2017), the author presents the possibility that the reasoning lying behind the United States avoidance of gender-specific legislation and conventions, and in this case of CEDAW, is tied to the government's efforts to maintain a neutral position on widely- contested matters. Al Shraideh elaborates on this claim, and states that what is perhaps at stake for the government of the United States is his image as a secular institution protecting the basic freedoms and civil liberties of all its citizens through the exercise of power in an impartial manner. Al Shraideh (2017) hypothesises that this might be so given the purposes of the Convention regarding the elimination of all sorts of discrimination between men and women. More specifically, and to give just one relevant example, Article 5 of the Convention contends that all state parties must take the measures necessary to change ' the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices

which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women' (Convention on the Elimination of All Sorts of Discrimination Against Women, 1979).

Correctly understood, there is no doubt that this article is to be interpreted as aiming to eradicate the unequal gender dynamics embedded in society at the deepest level; an illustration of this statement can be found in subsection b) of the same article, which addresses the need to establishing ' an understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children' (Convention on the Elimination of All Sorts of Discrimination Against Women, 1979). Al Shraideh (2017) contends that, in light of the content of articles like Article 5, the United States might perceive ratifying the Convention as an acknowledgement that certain American traditional core moral values embedded in the unit of the family or in some institutions like that of marriage need to be abolished. The highly sensitive nature of these values , which are often considered to be the cornerstone of societies, might put the United States government in a position in which public opinion may regard its actions as an attempt against to the division of rights and obligations ingrained in the family, which could be perceived as having a damaging effect on society as a whole (Al Shraideh, 2017).

Adding up to this argument, some critics like Becker (1992) also denounce that the United States Constitution, and more specifically its Bill of Rights, is particularly ambiguous regarding gender considerations in general and women's rights in particular, which she attributes to the exclusion of women from the political sphere at the time that male founders drafted the document. Becker points out the detrimental effects of the gender bias present in constitutional legislation, alluding to the Fourth Amendment right, among others, to sustain her claims. The Fourth Amendment establishes the right of individuals to be safe from

government interference, in the sense of surveillance or searching processes, in their homes ; nevertheless, as Becker (1992) argues, because the government is distinguished as the only element that can adversely affect the safety of the home, the Fourth Amendment fails to recognise that in most cases women's experiences of safety in the household are put in jeopardy not by the government, but rather by their own life partners. As a result, the Fourth Amendment does not contemplate the possibility of marital rape, seriously compromising women's safety as a result (Becker, 1992).

The consequences of the United States' neutral position in assessing the morality of traditional institutions like marriage and motherhood are explored by Sandel (1996), who puts forward an argument highlighting the downsides and counterproductive effects of the liberal case for toleration. The author criticises the liberal ideal of neutrality and its refusal to make any judgements on the moral permissibility of contested practices and actions, and he bases his argument on the dissenter's justification for toleration in the *Bowers v. Hardwick* (478 U.S. 186, 1986). In *Bowers,* Hardwick (the respondent) filed a lawsuit against the state of Georgia, which prohibited homosexual intimate relations under the claim of 'homosexual sodomy' (478 U.S. 186, 1986). Although the Court ended up ruling that the Georgia statue was not unconstitutional, and that homosexual relations were not to be compared to other cases related to marriage or procreation, Sandel (1996) notes that the dissenters defended the toleration of homosexual intimate relations by invoking solely autonomy rights, in an attempt to remain neutral on the morality of homosexuality itself.

This approach, Sandel argues, ensures only surface-level toleration in that it does not require or imply respect; in other words, the viewpoints that regard homosexuality as abhorrent and sinful remain uncontested, which negatively impacts the public discourse regarding the fundamental right of homosexual individuals to full respect. Sandel's criticism has important implications for the abortion case, and more specifically for the potential of gender equality being

recognised as a fundamental right. It is worth noting however that there is a lack of conclusive empirical evidence proving the assumption underlying Sandel's argument that law shapes morality, with some research pointing out to the influence that public morals have on legislation instead (Bilz and Nadler, 2009).

4. Minority Rights, Majority Rule?

4.1. Dual Federalism and State Police Powers

Conflicting conceptions of the good and the inability to reach a sustainable consensus constitute the motivations from which the United States federal system, with its clear established divisions between the federal and state authorities, was born. Indeed, Edling (2003) contends that the origins of the Constitution can be traced back to disagreements between founders on the share of power and influence that was to be attributed to the Congress of the Confederation on one hand, and the separate states on the other. In fact, he illustrates how the project of the Constitution, which had the purpose of creating a 'more perfect union', was from the start a divisive matter that led to the emergence of two opposing sides; namely, the Federalists that were in favor of its adoption, and the Anti- Federalist that were concerned about the potential for an abuse of power that could undermine their essential civil rights. As Edling's (2003) account explains, Anti-Federalists' worries translated into a long ratification process, which was ultimately possible thanks to the states' introduction of amendments that could guarantee their autonomy and rights. As a consequence, the Bill of Rights was incorporated in the Constitution. It is worth noting that, originally, the rights whose violation opponents to federalism were most concerned about were particularly related to the possibility of a coercive use of force that could emerge from a centralised government with extensive military capabilities (Edling, 2003).

The contemporary American society no longer contemplates as a plausible possibility the threat of a federal national army violating the freedom of individual states. However, what appears to have remained from the original ideals of federalism in the Founding era is the tension that characterises the dual federalism

diving sovereignty in the United States (Miner'56, 1987). More specifically, Miner'56 (1987) highlights that a particularly contentious factor has been the dual court system formed by both federal and state courts, which entail the coexistence of two parallel judicial processes. The author contends that the inevitable outcome of this dual distribution of judicial power is a diversity in rules of decision in similar matters, which often leads to a clash between the federal and the state level.

The heterogenous interpretation of the judiciary that Miner '56 alludes to is in fact closely tied to the contrasting roles and responsibilities that have been attributed to the Supreme Court and the state courts, respectively. Delahunty (2007) exposes the different relationship that the governments at the local and national level have in relation to the enforcement and promotion of the virtues that a good life entail. To begin with, and representing the generalised perspective that is prevalent among proponents of federalism, Delahunty justifies his supports for federalism's organisation in agreeing with the claim that only this system can guarantee a 'decentralised government that will be more sensitive to the diverse needs of a heterogeneous society' (501 U.S. 452, 1991: 458, as cited in Delahunty, 2007: 75). He partly rests his argument on historical claims, as he states that the Bill of Rights was not originally supposed to constrain state power, but rather apply only to the federal government. What is more, the author goes on to stress that the Constitution did not entail that the national government make any judgements on different conceptions of the good; rather, states were assigned this responsibility, referred to as state police power. This division has always been 'natural and common' in America, Delahunty states, as the matters that fall under the legislation of state police power, such as family law, criminal law or education, have a 'specifically moral content' (Delahunty, 2007).

According to Delahunty's (2007) claims, then, social unity and cohesiveness in pluralistic societies can only be achieved through a decentralized system of governance that allows for the existence of conceptions of the good varying from

state to state, and which is able to avoid polarising attitudes in refusing to impose a particular understanding of morality. This line of reasoning leads him to conclude that the irreconcilable values embedded in the question of abortion could be overcome if the responsibility to regulate the matter was left to the independent legislation of states, unconstrained by Supreme Court rulings.

A similar position is endorsed by Forsythe and Presser and (2005), who present a case in favor of federalism in the context of abortion rights and concur with Delahunty on the idea that it is through states police power that dilemmas on controversial matters can be settled. What is more, the authors argue that the Court's constitutionalising of abortion rights left pregnant women seeking abortions exposed to the damaging impact of abortion methods, and therefore failed to fulfil what they regard as its 30-year long self-appointed role of 'national abortion control board' (Forsythe and Presser, 2005: 87).

Nevertheless, the arguments that Forsythe and Presser (2005) bring forward appear to heavily rely on their subjective perspective on the morality and permissibility of abortion. In presenting their argument, the authors rely on the medical framework rejecting rights-based claims on the need to constitutionalise abortion that had historically been central to criminalisation of abortion practices (Burns, 2005). Indeed, they base their justification for maintaining abortion rights outside the scope of the Constitution on the 'negative consequences' that abortion has brought to women; they claim, for instance, that the Court's ruling in *Roe* put the health and lives of women in jeopardy, as the doctrine did not take into account the risks that abortion practices entail, and that the states could have regulated if they had not been constrained by the limitations that the Court had imposed through *Roe*. The mere fact that at no point do the authors consider the possibility of some states ruling for legalised abortion, as they assume that state governments would generally enact legislations restricting abortion, is indicative of the moral views that underpin their justification for a decentralised approach to legislating abortion. In fact, the way of reasoning in the Forsythe and Presser's

(2005) article unveils the concern that is central to the next section. Namely, the hypothesis that is explored is that, in its quest for neutrality on questions of the good, central to the liberal political conception of justice, the United States may be failing to protect individual rights under its federal system.

4.2. State Governments and Individual Rights

First and foremost, and as preceding sections have established, it is worth recalling that the political philosophy of the United States is rooted in the liberal political conception of justice that Rawls (1993) endorses as agreeable by all reasonable citizens, that is, justice as fairness. Again, as Rawl'*s Theory of Justice* (1971) states, justice as fairness establishes two main principles of justice: first, the equal opportunity principle affirms the equal right of all persons to basic rights and liberties; and second, the difference principle includes the notion that inequalities in society must be tot he benefit of the least advantaged. Added to that, before proceeding it is key to point out that the principles of justice that follow from Rawlsian public reason are not deduced from any moral, religious or philosophical comprehensive doctrines and their diverse, conflicting conceptions of the good; if they were, pluralistic societies would never reach a consensus on basic questions of justice in a manner that all reasonable individuals can agree on, independently of their comprehensive doctrines, for they are desirable by all reasonable citizens (Rawls, 1993). With this in mind, this paper now turns to the question of the protection of individual rights in the United States' federal system.

To address the question at hand, it is central to stress that because rights that are not deemed fundamental are subjected to the electoral process at the state level, their protection can therefore vary from state to state, in line with the diversity of court rulings that emanate from state courts (Miner'56, 1987). Nevertheless, some voices argue that the principle of neutrality in conceptions of the good in which the Supreme Court bases its decisions sometimes fails in protecting values that are widely considered as individual or fundamental rights (Spann, 1994). In other

words, from the fact that the Supreme Court has not constitutionalised a certain right, and therefore explicitly deemed it 'fundamental', it does not follow that said right is not an essential or inalienable right (Cox, 1978). To give just one example among the many available, this claim can be sustained by looking at the recent development of LGBTI+ rights in the United States.

As a case study, the history of the differences in state legislation banning same-sex marriage can be considered. Before 2004, for instance, all state constitutions in the United States did not allow for the institution of marriage to be inclusive of same-sex couples (Pew Research Center, 2015). On June 26, 2015, in the landmark case of *Obergefell v. Hodges* (576 U.S. 644, 2015) the Supreme Court held for the first time that under the Fourteenth Amendment, states were required to issue marriage licenses to homosexual couples, as their union was lawful. Now, in line with the Rawlsian first principle of justice, it is reasonable to state that it would be a violation of the individual right to basic rights and liberties to prohibit the marriage of non-heterosexual couples. Furthermore, it can be argued that the constitutional right to privacy as invoked and understood in cases like *Roe* and *Casey,* would have in theory protected the permissibility of homosexual unions, on the grounds that the state is not to interference on matters so private to the individual and its liberty to choose freely (410 U.S. 113, 1973; 505 U.S. 833, 1992). Nevertheless, it was not until 2015, that the Supreme Court recognised the unconstitutionality of not extending the right to marriage to same-sex couples in *Obergefell.* It seems quite implausible, however, to argue that prior Obergefell, in times of *Bowers* (478 U.S. 186, 1986) for example, the principle of equality and basic rights did not implicitly encompass in its expression the right of individuals to not be discriminated against for their sexual orientation (217 A (III), 1948). Therefore, even if the Court did not declare that same-sex rights were fundamental rights until 2015, the right to equality in relation to same-sex marriage has always been an essential right, the inalienable nature of which was true independently of its protection by the Constitution (Hohengarten, 1994).

In line with this reasoning, Spann (1993) agrees on the view that regards the protection of rights by the Supreme Court as incomplete, especially when minority rights are at stake. The author advances his argument related to minority rights and racial equality in the United States in his book *Race Against the Court,* in which he justifies his standpoint on the inability of the Supreme Court to protect minority rights from the rule of the majority. The author provocatively uses the concept of 'veiled majoritarianism', and states that the Supreme Court is unable to incorporate minority interests in the United States pluralistic society due to its reliance on legal principles that have been articulated to preserve majoritarian values. In a quote that summarises his overall position on the matter, the author reflects on the conception of justice in the United States in the following way: ' Ironically, it is as if the very structure of American constitutional government, dedicating an entire branch to the protection of minority rights, was designed in a way that would ensure ultimate majoritarian control over minority interests' (Spann, 1993: 160). Spann's argument raises important questions regarding the liberal conception of justice as being able to bracket conceptions of the good; indeed, it hints to a structural bias that inhibits the enforcement of justice as fairness.

Going back to the question of the permissibility of abortion rights and the state's protection, or lack thereof, of minority rights, some voices have argued that what is particularly striking about the case of abortion is that it cannot qualify as a minority right, in line with the definition of the UN Human Rights Office describing these kind of rights as 'the rights of persons belonging to national or ethnic, religious and linguistic minorities' (OHCHR, n.d.); rather, abortion constitutes a right that is claimed to some degree by a majority of American citizens, especially before the point of viability of the fetus, regardless of whether or not they regard the practice of abortion as 'morally good' (Reverter, 2022). This claim is supported by recent available data, which challenges arguments that highlight an alleged increased polarisation of abortion views in the United States

(Mouw and Sobel, 2001). Indeed, the latest study conducted by the Pew Research Center (2022) finds that, as of 2022, a majority consisting of 61% of U.S. adults believes that abortion should be legal in most or all cases. Moreover, the study also found that among the 37% of respondents that believed abortion should be illegal in most or all cases, many agreed with it being legal in certain circumstances, such as in cases where the life of the woman was threatened (46%). Perhaps most telling, however, although 56% of adult Americans believed that human life begins at conception, and therefore defended the moral status of the fetus, overall a majority of 72% agreed with the view that abortion decisions should belong only to the pregnant woman (Pew Research Center, 2022).

From this data it is reasonable to conclude that state legislation prohibiting abortion does not accurately and effectively represent the will of the majority, as per the representative democracy principles on which the United States government bases the legitimacy of its authority (U.S. Mission to the Organization of American Sates, n.d.). From a Rawlsian approach, then, it could be argued that, not all reasonable citizens agree on the enactment of legislation banning abortion, and only a minority do; therefore, in passing restrictive abortion laws governments are imposing the conception of justice of a minority, which by definition relies on a particular moral, religious or philosophical comprehensive doctrine, on the rest of society (Rawls, 1993). Furthermore, in line with justice as fairness this practice could be deemed coercive. What is clear is that state abortion bans following the overturning of *Roe v. Wade,* have undeniable negative effects on the status of women as equal and free citizens, the most important of which are presented below.

4.3. ‘Return Abortion to the States’: Non-Fundamental Abortion Rights, Decentralised

The overturning of *Roe*, and with it the also the fundamental status that

guaranteed the constitutional protection of the right to abortion, has had an enormous impact on the well-being of women, which is briefly explored below. Indeed, the *Dobbs* decision that granted state governments complete freedom to enforce abortion restrictions has resulted in 14 states fully illegalizing abortion (OHCHR, 2023). Of particular interest are the variations present among states in terms of the degree of severity that their abortion legislation entails, and the multiple understandings on the morality of abortion that coexist under the same federal government. The map of abortion regulations across the United States has a lot of similarities with the traditional mapping of the Republican and Liberal states, which is otherwise referred to as the red-blue divide. This division confirms the status of abortion as a politicised matter; indeed, and in general terms, while most states with a liberal majority have not enacted particularly restrictive abortion legislation, most states with a republican government have done the opposite, with some going as far as deeming abortion illegal (The New York Times, 2022). This mapping of the state of abortion across states also hints at the moral and religious comprehensive doctrines that underpin more 'pro-life' and 'pro-choice' states, and how these affect their perspective on the permissibility of abortion (Cook, 1992). It could be argued, then, that the divide illustrated in the abortion map is representative of how the conceptions of the good of certain minorities with access to governmental power have the ability to impose their subjective value doctrines on the rest of society (Reverter, 2022). If this is so, it can be said that the American federal system officially upholding the liberal principles of justice as fairness is not suitable for the protection of the two most basic principles of justice, including the equal rights of all citizens to basic rights and liberties (Rawls, 1993).

It is precisely this alleged inability of the government to guarantee women's individual rights that will be explored through the analysis of the implications that the rejection of abortion has on women's basic and civil liberties.

4.3.1. Healthcare

The direct negative effects on the physical and psychological health of women are perhaps the most well-known side effect stemming from the criminalisation of abortion, and they are so extensive that only some of the most notorious will be exposed in this section. Central to a comprehensive understanding of how the overturning of *Roe* impacts the rights of women to safety and well-being is the data on abortions performed since the *Dobbs* decision. Ever since the right to abortion was overturned, studies agree on the fact that the total number of abortions performed remained relatively stable (Diamant and Mohamed, 2023). Indeed, it can be concluded that making abortion illegal does not reduce abortions; rather it changes the methods through which they are performed, and women feel forced to turn to unsafe and unregulated procedures due to a lack of better alternatives available to them (Human Rights Watch 2023). In its discussion of safe abortions, the WHO contends that restricting access to 'safe, timely and affordable' abortions constitutes a 'critical public health and human rights issue' (WHO, 2021)

The destructive and even fatal consequences of extreme limitations on the conditions under which abortions are permissible are denounced by Human Rights Watch (2023), which states that only allowing abortion in circumstances where the mother's life is at risk often results into destructive effects and long-term health conditions, if not death. However, the impact that the *Dobbs* ruling has in women's healthcare is even broader than it appears to be at first glance. Indeed, the criminalisation of abortion also involves a direct and explicit repudiation of women's essential and inalienable rights of dignity, equality, and agency, just to mention a few, which are widely recognised as human rights protected by the principles of international law (Human Rights Watch, 2023). Moreover, studies like that of Biggs, Brown and Foster (2020) conclude that women's mental health is further put in jeopardy by the stigma that the forbidden and restrictive status of abortion entails. Through interviews with women seeking abortions, the authors observed that over half of women aiming to terminate their pregnancy perceived

that people close to them or within their community would look down upon them if they came to know that they were having an abortion. What is more, high perceived stigma was identified as tied to a higher possibility of being affected by psychological issues later in life (Biggs , Brown, and Foster, 2020).

Another dimension that is paramount to consider is the effect of restrictive abortion laws on healthcare providers like hospitals and clinics, which has an impact on the quality of healthcare services that women can have access to. For instance, 13 out of the 26 states enacted so-called 'trigger laws' before *Roe* was overturned, which allowed them to quickly enter into force with minimal state action and ban abortion almost immediately, with very limited exceptions (Guttmacher Institute, 2022). It was through these laws that states like Texas criminalised not only pregnant women seeking an abortion, but also any actions aimed at providing assistance in abortion procedures that did not match the extremely narrow criteria for permissibility (Texas State Law Library). Moreover, in such states where the only exception granted consists of the pregnancy threatening the physical integrity of the pregnant woman, physicians sometimes purposefully wait until the woman's life is in serious risk to perform an abortion,with the consequences that this has on individual safety, in order to avoid any legal repercussions (Human Rights Watch, 2023).

4.3.2. Socioeconomic Inequalities

Aside from the physical and psychological effects outlined, the overwhelming majority of studies point out to the denied access to abortion as a contributor to deepening the socioeconomic inequalities existing in the United States society. For instance, the economic consequences of prohibiting abortions to women who seek them include a lower possibility of being employed, a higher likelihood of falling into poverty, also in the near future, and an overall increased risk of having financial issues in the following years (Banerjee, 2022). Added to that, reports

highlight that the costs of abortion bans disproportionately fall on marginalised groups, as there are several factors that limit even further their access to abortion and reproductive health services (CAP, 2023). Therefore, the consequences for groups that already find themselves in a disadvantaged social and economic position are particularly brutal, as they add up and intensify the inequalities constraining their fundamental rights. In fact, studies show that about half of all women who seek abortions live below the federal poverty level; abortion bans would entail that in addition to their unfavorable economic situation, these women are to cope with an unwanted pregnancy (Lantz et al., 2023).

Moreover, race is also a factor in determining the nature and severity of the consequences of abortion criminalisation on women's well-being (Nelson, 2022). One clear indication reinforcing this statement is the data identifying the disproportionally higher rates of maternal mortality that Black women experience; a 2020 report by the Centers for Disease Control and Prevention found that the maternal mortality rate for non-Hispanic Black women was 55.3 deaths per 100.000 live births, which constituted almost three times the maternal mortality rate for non-Hispanic White Women, which was 2.9 (Hoyert, 2020). Furthermore, Shaw (n.d.) advances the point that the Supreme Court's regulation of women's reproductive rights strengthens a legal system rooted in racially discriminatory practices that reinforce the privilege of some and the disadvantage of others. As an example, the author contends that the lens through which the Court analyses the 'undue burden' standard does not take into account the experiences of racialised women, whose daily life is shaped and constrained by 'identities that typically act as sites of oppression' (Shaw, n.d.).

Although this section has exposed some of the very real ways in which the criminalisation of abortion puts women's well-being at risk, the right to abortion encompasses an extensive range of factors, all of which are essential to not only women's safety, but also to their equality and liberty as citizens. With this established, the moral duty to protect women's rights is highlighted by Tribe (1992). In his discussion of the permissibility of abortion, he states that in the

same way that the personhood and moral status of the fetus is not agreed upon by individuals with clashing beliefs, the right of women to health and safety is universal and undeniable, regardless of any subjective moral comprehensive doctrines or political conceptions of justice (Tribe, 1992). Based on this premise, Chapter 4 suggests a rationale on the grounds of which a right of abortion could be invoked as a fundamental right, worthy of Constitutional protection from the political process and the tyranny of the majority.

5. Reframing the Abortion Debate

If there is any takeaway message embedded in the historical development of abortion criminalization in the United States, is that the impact that debate framing has on public opinion and governmental action cannot be overlooked. Indeed, as previous sections have analysed, the legitimacy of the goals and initiatives carried out by government actors and interest groups involved in the debate is grounded on diverse subjective rhetoric, which present the nature and balance of rights that each side believes to be involved in the abortion issue in a particular manner.

This chapter explores the possibility of a reconceptualization of abortion as a human security issue, which ultimately constitutes an argument in favor of the governmental protection of a right to abortion access. The reframing suggested stems from the combination of two fundamental elements: first, an agreed-upon rights-based framework emphasizing the inalienable right of liberty; and second, the Rawlsian theory of basic justice, taken as a starting point to highlight the already existing areas of consensus between the diverse comprehensive doctrines shaping the abortion debate. This approach ultimately has the potential of minimizing opinion polarisation, and thus reincorporating abortion into the bundle of inalienable rights worthy of constitutional character and protected status.

5.1. Transcending Polarisation

The current nature of the abortion debate as a partisan issue that reinforces the association of pro-choice proponents with liberal ideology and pro-life defenders with more conservative politics makes finding common ground on the abortion

debate a particularly complex task (Cook, 1992; Burns, 2005). The so-called abortion culture war stemming from the over politicization of the debate is fuelled by polarized opinions and disagreements that appear to be irreconcilable at first glance, which makes the prospect of reaching a consensus on the permissibility of abortion seem quite unlikely (Hunter, 1991; Kodapanakkal et al., 2022). The motivation for finding common ground, however, is provided by Rawls's claim that an agreed consensus on the basic principles of justice on which a pluralistic society is to be based is ain indispensable condition to a well-ordered society, supported by a robust and stable conception of justice (Rawls, 1993).

Some of the dominant framings of the abortion debate, namely rights-based narratives and utilitarian perspectives, are considered in the subsequent sections, which also briefly analyse the main obstacles that these perspectives pose to the reconciliation between competing values and the finding of common ground between comprehensive doctrines.

5.1.1. The Dilemma of Rights-Based Narratives

One of the dominant ethical theories shaping the abortion debate can be categorized as the rights-based or principle perspective (Araujo, 1993). This approach is linked to a voluntarist conception of the person, according to which respect for human dignity is closely tied to the capacity of individuals to freely choose for themselves (Sandel, 1989). As previous sections have explored, and as Sandel (1989) points out, the contemporary notion of the right to privacy understood as the liberty to independently make decisions on certain matters without interference from external actors has increasingly been connected to autonomy; this has resulted in the construction of a conception of privacy rights which rests on an assumed voluntarist view of the person.

Nevertheless, arguments in defense of abortion based on the principles of privacy and autonomy are hardly stable grounds for an agreement on the permissibility of abortion, as they cannot be universalized. For instance, Araujo (1993) correctly hints at the subjective moral understandings on which the principle of autonomy rests. To illustrate this point Araujo notes that the notion of autonomy that is central to pro-choice rhetorics and in cases like *Planned Parenthood v. Casey* or *Webster* v. *Reproductive Health Services* has its focus on the right of the pregnant woman, whose freedom to choose would trump the interests of the fetus. Nevertheless, the same principle of autonomy can also make the case for the immorality of abortion, if it is instead understood as the autonomy of all human beings and not just that of the mother; in other words, and in line with the conception of life defended by the Catholic Church, when the autonomy of the fetus is taken into consideration a moral dilemma emerges (Araujo, 1993). Indeed, there is no shared understanding on whose autonomy rights are to be protected.

Authors like Judith Jarvis Thomson have attempted to solve the dilemma and reconcile the right to life of the fetus with women's right to autonomy. In her widely contested essay *A Defense of Abortion* (1971), Thomson states in discussing abortions past the point of viability that the diversity of perspectives on a fetus' moral status does not affect the morality of abortion per se. According to Thomson's argument then, even if the fetus is considered a moral agent it is not the right to life that is central to assess the permissibility of abortion, but rather the dispute on the 'special responsibility' that a woman has towards a fetus. This is so because, the author argues, 'the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly' (Thomson, 1971, p. 57). Therefore, Thomson concludes that individuals have no particular moral responsibility to make large sacrifices just to guarantee another person's right to life; and although she considers that some fetuses past the point of viability may have a right to not be killed unjustly, for instance in circumstances where pregnancy has been a voluntary choice, in all other cases pregnant women have no

moral duty to give another person the right to their body. Thomson's case for autonomy, however, has been challenged by authors like Finnis (1973) on the grounds that her argument is based on the assumption that everyone would recognize the right of individuals to decide what happens to their own bodies. Finnis states that this assumption belongs to a certain subjective conception on the right of bodily autonomy, as other doctrines such as traditional Western ethics reject it.

Cook (1992) further elaborates on the lack of compatibility between a rights-based approach and a consensus on abortion in stressing that the language of individual rights is in fact counterproductive to democratic discourse and compromise in a pluralistic society. The author argues that the contemporary American system regards rights as 'unrestrictable prerogatives'; as a result, civil conversations aimed at finding common ground are inhibited, as 'the successful assertion of a right means that the political system cannot consider the merits of opposing points of view' (Cook, 1992, p. 194). Cook accurately points out that the mere wording that distinguishes the main two sides of the abortion debate, namely the apparently irreconcilable 'right to life' and 'right to choose' framings, use the rights language to 'claim the primacy of the consideration in question' (Cook, 1992, p. 195). Therefore, Cook goes on to argue that although it does not follow from the incivility present in abortion narratives that rights are not relevant or appropriate in the abortion discussion, limiting frames based on individual rights do trump the possibilities of reaching a satisfactory compromise.

5.1.2. Alternative Framings and the Common Good

Besides discourses based on the principles of individual rights and freedoms, some scholars have built the case in favor of the permissibility of abortion around the implications that criminalizing abortion entails for society as a whole, rather than for individual rights. This framing of the debate could be defined as the utilitarian approach, which puts the notion of the common good at the center of its

conception of morality and relies on the 'Principle of Utility' in its distinction between right and wrong (Bentham, 1789). From a utilitarian perspective as conceptualized by Bentham, then, an action is morally permissible if its consequences maximize general utility; in other words, if it provides the greatest good for the greatest number, which utilitarianism assesses through an 'hedonic calculus' balancing the pain and pleasure of all individuals affected.

In the case of abortion, utilitarian views then tend to favour the right of the mother to choose on a variety of arguments alluding to the common good. It is often claimed, for instance, that the socioeconomic costs that unwanted pregnancies entail for individuals and society justify the protection of a woman's right to choose (Knight, 2021). Sonfield et al. (2013) point to the negative impact that restrictive abortion laws have on the mental health of both women and children, as well as on the family's economic stability. Moreover, the authors stress that unwanted births interfere with women's education, which jeopardizes the possibility of closing the gender pay gap (Sonfield et al., 2013). However, this line of argument is challenged by abortion opponents that vouch for the reduction of these burdens without relying on abortion, for example with the help of alternative methods like enhanced support social structures, better sexual and contraceptive education and more effective adoption processes (Gensler, 1986).

Added to that, the hedonic calculus on which utilitarianism relies to assess whether a certain action or practice is morally right cannot be regarded as the basis for a potential agreement on the moral permissibility of abortion. The reason for this lies on the fact that, as already mentioned, the lack of consensus on the moral status of the fetus is highly likely to remain; therefore, it is not possible to settle the question of whether or not the pleasure and pain of the fetus should be included in the equation calculating which action maximizes utility, especially during early-term pregnancies. Furthermore, consequentialist discourses that take outcomes as the ultimate and unique variable to measure the morality of certain

actions completely obscure any considerations regarding individual and human rights, which is inherently problematic (Scarre, 1996). The utilitarian rationale raises serious doubts on the protection of minority rights, which would be contingent on the collective pleasure and will of the majority according to the balance of preferences that aims to maximize utility (Sandel, 1996). With this established, a utilitarian approach is therefore unable to reconcile the incommensurable values present in the abortion debate in an effective and comprehensive manner.

5.2. Securitising Abortion: The Indisputable Fundamental Right to Liberty and Equality

In line with the argument presented above, framings based on women's bodily agency or freedom of choice alone, as well as utilitarian perspectives merely concerned with the collective maximization of pleasure and pain , have proven to be inefficient as reconciliatory comprehensive arguments aiming to achieve the decriminalisation of abortion (Cook, 1992; Hunter, 1991) . Taking this into consideration, this thesis suggests a contextualization of abortion that goes beyond traditional versions of the rights-based argument for liberalisation. Indeed, the permissibility of abortion will be defended drawing on the expanded notions of security provided by the critical security studies literature, and more specifically by human security, which offer a promising approach from which an understanding of abortion rights as a security matter can emerge, as well as a subsequent sustainable social consensus favouring abortion legalisation.

This section presents the case, then, for the permissibility of abortion stemming from its incorporation in the security agenda, which is possible in the reconceptualization of the abortion matter as a human security issue. For the sake of clarity, it is worth noting that it is divided in the following manner: First, a Rawlsian approach is considered to examine the possibility of agreement on abortion as a question of basic justice, which is therefore compatible with, and

thus not opposed to, any moral, religious or philosophical comprehensive doctrines and their divergent conceptions of the good. Secondly, once the priority and undeniable essence of the right to liberty and equality of women has been established, the human security framework will be introduced, putting especial emphasis on the factors that are applicable to the abortion matter at hand. Finally, the combination of the Rawlsian rationale for abortion rights and the approach offered by human security approach will culminate into a reconceptualised right of abortion that can be granted urgency and protection as part of the security agenda.

5.2.1. Irreconciliable Values and Common Ground

As the critique of the rights-based and utilitarian approaches presented in this chapter manifests, whenever a right to life of the fetus is assumed the difficulty to find common ground on the morality of abortion seems to increase (Torcello, 2009). The Rawlsian approach to balancing incommensurable values in democratic pluralistic societies, however, seems to provide a solution to this matter by altogether removing the discordant element of fetal rights from the debate, in a manner that does not depend on individual comprehensive doctrines' beliefs on the moral status of the fetus.

Before proceeding with Rawls's reasoning, it is worth recalling why conceptualising abortion rights in the terminology of fundamental rights is necessary in the first place. As noted in the preceding chapters, the rights to which the Supreme Court attributes a 'fundamental' status are enshrined in the Constitution, which entails that they are so essential to the country's political conception of justice that no majority can overrule them, not even through democratic voting procedures (Rawls, 1993). Again, in justice as fairness, the fact that a value has the characteristics required to be given the category of

fundamental right necessarily implies that it is a right desirable by all individuals, regardless of their moral or religious comprehensive doctrines. In other words, it is a political value that belongs to the bundle of rights constituting the basic principles of political justice (Rawls, 1993). In the case of abortion, the interest in ensuring that is taken out of the political process is both particularly strong and urgent for two reasons. On one hand, the high degree of politicisation present in the United States abortion debate leaves abortion rights particularly vulnerable to the shifting interests of activist groups and political forces (Cook, 1992). At the same time, and as the previous chapter has noted, the threat that denying the possibility to get an abortion poses to women's wellbeing needs to be mitigated if the rights of all citizens are to be equally protected. Taking this into consideration, it is only by attributing a fundamental status to abortion rights that state legislation ruling against abortion will be deemed as being in conflict with the basic principles of justice; as a consequence, and in line with political liberalism's principle of legitimacy articulated by Rawls (1993), the legitimacy of restrictive abortion laws will not be sustained.

Having established that, to make the case for abortion as a constitutional right it is fundamental to first turn to Rawls. As previously explored, Rawls (1993) argues that public discussion carried out in accordance with the principles of public reason will develop into a political conception of justice that all reasonable citizens can agree on, irrespective of their personal moral, philosophical or religious values. In line with this argument, Rawls states that through deliberation based on political values equally reasonable to all citizens and detached from any comprehensive doctrines' conceptions of the good, some matters can be removed from the political agenda. Rawls clarifies that this removal means that certain agreed-upon subjects are no longer vulnerable to changes brought by majority voting, since they are then taken as values that are 'equal basic liberties in the constitution… correctly settled once and for all' (Rawls, 1993, p.151). To illustrate this point, the Rawls points out that once common values such as equal civil liberties are established, institutions like slavery or serfdom that violate this

principle are taken off the agenda and deemed unsuitable for deliberation; in other words, they become matters that are out of the voting majority's reach, since equal civil liberties are integral to the constitutional regime.

Therefore, Rawlsian public reason offers a promising account on how democratic pluralistic societies can reach common ground when disagreements arise regarding matters of basic justice or 'constitutional essentials' (Rawls, 1993). However, some authors argue that the Rawlsian view overestimates the capacity for consensus on such polarizing and morally-charged matters as abortion (Sandel, 1996; Kramer, 2017). Sandel (1996), for example, argues that if the pro-life view on the moral status of the fetus is accurate, then it is not clear why political values like tolerance and women's equality should be overriding any other rights, for this balance of rights implies holding certain moral values as part of a comprehensive doctrine. As a result, the author argues that a defense of abortion rights cannot escape judgments on the moral status of the fetus, since the justification for the practice depends on the prioritizing of certain values in balancing the rights that are relevant to the abortion debate.

Sandel's argument, although accurate in its focus and concerns on the order of values present in the balance of rights, appears to be deceptive. Implying that the values of tolerance and women's equality can and should be discussed in the same way as the right to life of a fetus completely disregards that these values are, in fact, fundamentally different. Tolerance and equality among individuals, individuals being a category that obviously includes women, are not just liberal values subject to deliberation. Rather, they are integral to the political conception of justice in the vast majority of democratic countries such as the United States, at least theoretically (Siegel, 2001). In the case of the United States with which this thesis is concerned, this is illustrated by constitutional legislation like the 14th Amendment's Equal Protection Clause ratified in 1868, guaranteeing the 'equal protection of the laws' to any person within the United States' jurisdiction (U.S. Const. amend. XIV). Moreover, the government of the United States officially

declares that one of the primary objectives of its foreign policy is the protection of human rights 'as embodied in the Universal Declaration of Human Rights' (U.S. Department of State n.d.). Therefore, it is safe to argue that women's equality is included in the United States' political conception of justice as one of its basic values, since the Declaration defends that 'everyone has the right to life, liberty and security of person' (UDHR 1948, art.3).

Moreover, Sandel fails to acknowledge that assessing the degree of personhood of the fetus is nothing but another way of framing the abortion debate, characteristically employed by pro-life supporters (Burns, 2005). In line with this claim, a strand of objection represented by authors like Arrel (2019) defends that the fact that public reason cannot provide a definitive answer on the matter of the moral status of the fetus does not mean that it is also incomplete regarding the permissibility of abortion before the point of viability. More precisely put, the mere existence of irreconcilable moral, religious and philosophical views on the question of pre-natal personhood is indicative that the extension of the right to life to the fetus is not a political value, i.e.: a value that does not depend on any comprehensive doctrines. Arrel's argument is rooted on Rawls's widely discussed footnote in *Political Liberalism,* in which the author aims to illustrate that a reasonable balance of political values can allow for a reasonable argument in matters where no political values seem to be involved at first glance, as it is the case with abortion (Rawls, 1993).

Despite being the subject of much controversy, Rawls's footnote in *Political Liberalism* provides a valuable starting point towards a potential agreement to decriminalize abortion, at least during the first trimester or up to the point of viability. The author presents his argument in the following manner:

Suppose first that the society in question is well-ordered and that we are dealing with the normal case of mature adult women…suppose further that we consider the question in terms of these three important political values: the due respect for

human life, the ordered reproduction of political society over time, including the family in some form, and finally the equality of women as equal citizens…Now I believe any *reasonable balance* of these three values will give a woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester. The reason for this is that at this early stage of pregnancy the *political value of the equality of women* is overriding, and this right is required to give it substance and force. Other political values, if tallied in, would not, I think, affect this conclusion (Rawls, 1993, p. 243, *emphasis mine*).

From Rawls' specification of the time frame in which the value of women's equality would trump the other values considered, namely the first trimester of pregnancy, a conclusion similar to Arrel's (2019) can be reached: the value of respect for human life, which is widely contested at least to the point of viability, does not qualify as a political value, following the same reasoning way the undeniable value of women as equal citizens does. In other words, as a non-political value the right to life of the fetus can be 'taken off' the agenda when balancing rights in the abortion debate for, unlike women's equality, fetal rights are likely to remain a widely contested moral matter (Quinn, 1995; Torcello, 2009).

Torcello (2009) brings forward the same argument by invoking precautionary ethics. His argument is that, according to the precautionary principle, when there is uncertainty on the morality of an action, then that action must be regarded from a position of caution and tolerance. Arguments based on this reasoning do not run counter to public reason, as the precautionary principle is not contingent on any particular comprehensive doctrine (Torcello, 2009). Having established that, and referring to just liberal societies, Torcello states that the need to appeal to certain philosophical, religious or moral doctrines to justify the moral status of the fetus is in direct contrast with the undisputed recognition of women as moral agents. Therefore, the most cautious option is to avoid imposing oppressive measures like

abortion restrictions that directly affect women's autonomy, as women's moral status is not ambiguous and it is the perspective that 'requires the least amount of comprehensive assumptions' (Torcello, 2009, p. 26).

Taking this line of thinking into account, it can be argued that abortion laws would not be in line with the principles of justice of a liberal society, at least before the established point of viability of the fetus; after all, they would be restricting the undisputed freedom and equality of citizens, integral to the basic conception of justice that legitimizes the government of the United States, in favor of the right to life of a fetus that is dependent on subjective comprehensive doctrines. In fact, Rawls claims that although it is possible for reasonable doctrines to sometimes deliver unreasonable outcomes, any doctrine that does not include in its balance of political values relevant to the question of abortion women's right to equality during the first trimester, can be deemed 'unreasonable', for it does not comply with the requirements of public reason (Rawls, 1993).

Therefore, a Rawlsian framework provides the basis for the conceptualization of abortion as a matter of basic justice, and specifically one centred on the irrefutable right of women to equality. Once the question of the moral status of the fetus is taken out of the centre of the debate, due to the irreconcilable moral, religious and philosophical standpoints on the topic, an already existing compromise on women's rights to be treated as equal citizens is unveiled. It is from this reasoning that a defense of the decriminalization of abortion access can be articulated, which can ultimately lead to the incorporation of the matter of abortion in the security agenda.

5. 2.2. Abortion as a Human Security Matter

5.2.2.1. Critical Security Studies and Human Security

The traditional identification of security with military and state-centered issues began to lose its monopoly on security studies literature after the end of the Cold War, when alternative conceptions of security considering matters beyond the orthodox concern with territory and defense from external forces started to emerge (Newman, 2010). A branch of critical security studies developed, challenging realist and neo-realist interpretations of security that were mostly limited by issues regarding the protection of a states' territory and its defense against external actors (Newman, 2010). Although different in their criticisms to diverse dimensions of security and systems and interests of analysis, what however united the 'Aberystwyth or Welsh School', 'Copenhagen School', and 'Paris School' schools of thought that emerged from this critical security branch, was the claim that there was a need to broaden the security agenda, making space to include relevant and pressing security matters that the traditional focus on military threats and use of force neglected (Vaughan-Williams, 2015).

Particularly relevant to this thesis' aim to incorporate access to abortion into the security agenda is the security perspective that Human Security provides. The concept of human security was developed in the 1990s, in an era when for the first time in a very long period marked by warfare and tensions at both the national and international levels, there seemed to be a slim possibility for sustained stability and peace (Tadjbackhsh and Chenoy, 2007). The first use of the concept of human security can be traced to the United Nations, which coined the term in its 1994 UNDP Human Development Report (United Nations Development Programme, 1994). In this document, the UN defined the main definition characteristics of human security, namely universal, people- centred, interdependent and early prevention (United Nations Development Report, 1994). In addition, it established the main elements of security, which the report regarded as being interconnected and mutually reinforcing: economic, food, health, environmental, personal, community and political (United Nations Development Report, 1994). Taking

these factors into consideration, the human security approach puts emphasis on the overlap of threats and insecurities of distinct nature that can pose a threat to individuals and their ability to lead a fulfilling, safe life (United Nations Trust Fund For Human Security, 2016).

Differently put, human security acknowledges and highlights that a person's experience of security, or lack thereof, is contingent on a wide variety of external factors, ranging from warfare to economic regression and global health pandemics. This phenomenon is reflected on the case of abortion restrictions, as the previous chapter has explored. Indeed, denying an abortion to a woman not only poses a threat to her physical and mental wellbeing; it also has long-term consequences in her socioeconomic status or the quality of her relations with others, to mention just two examples.

In addition, this realisation has two important implications regarding how an effective and all-encompassing approach to security is to be understood and applied to real-life crises. First, in tackling individual and collective experiences of insecurity it is paramount that a comprehensive approach is used; due to the interconnected nature of the different threats involved, failure to do so would result into an unsuccessful attempt at addressing the problem in its entirety and root cause (United Nations Trust Fund For Human Security, 2016).

Furthermore, human security highlights that the detrimental effects of these overlapping adversities do not affect only one aspect of individual's life; indeed, their impact is characterised by having a spillover effect into all areas of people's lives, in a manner that, especially in our globalised world, is not limited to national borders (United Nations Trust Fund For Human Security, 2016). This phenomenon leads to the second pillar of human security, whereby the key principle of internal sovereignty on which international law and relations are based, which recognises states as the supreme and exclusive authority in regulating affairs within their territorial jurisdiction, does not hold true for matters of individual rights according to the human security approach (

Orakhelashvili, 2019). That is, because overlapping threats that affect individuals or communities have not only an impact on them, but also in the global society of interconnected world, under human security state sovereignty lines are transcended, and the duty to ensure the wellbeing of all individuals is rested on the international community as one.

It should be noted that, despite the inherent appeal of its individual-centered approach and the humanitarian implications that it entails, human security has historically been a widely contested notion (Tadjbackhsh and Chenoy, 2007) . Despite the contemporary expansion of its use both at the national and international level, as it is proven by Japan's adoption of the human security 'freedom from want' understanding of the threshold under which the life of individuals is threatened by the inability to have its basic human rights secured, human security continues to be a controversial approach that has received much criticism on its formulation and the wider policy-making implications of the broadened security agenda that it contends (Newman, 2010).

One of the major strands of opposition to human security lies within the unorthodox field of critical security studies. Indeed, this branch of security studies has centered the nature of its dissenting views around an alleged vagueness inherent in the definitional understanding of human security itself, which, critics state, does little service to the critical field aiming at challenging traditional neo-realist conceptualisations of security (Newman, 2010; Paris, 2001). In this line of argument, Newman (2010), criticises human security's arguments, for according to him they merely present a surface-level approach to security studies; putt otherwise, human security seems to be more concerned with problem-solving than with challenging and contributing to epistemological and ontological debates within the field of security. What is more, Newman (2010) points out that definitional heterogeneity and ambiguity translate into human security being ' analytically weak', as there is no agreed common framework on core conceptual

ideas; for example, the author states, the definition for the category of 'threat' has found no consensus within the field of human security itself, which leads to studies with diverging and inconclusive outcomes. Besides this, Newman highlights as one of human security's greatest weaknesses its broad approach to security studies, and he expresses his concerns on the possibility that the indeterminate limits of its scope, which are not clear what can be considered as a security threat, might undermine the value of human security in rendering it rather meaningless (Newman, 2010).

Newman's concerns are echoed by Paris (2001), who in his article 'Human Security: Paradigm Shift or Hot Air?' presents his doubts regarding the practical application of the human security paradigm in the policymaking field. Like Newman, he advances his worries regarding the lack of a concise framework, and how, this could translate into policymakers having added difficulties to determine which policy objectives should be prioritised over others (Paris, 2001). In in his critique Paris does not shy away from admitting that human security has some commendable characteristics; it is precisely its refusal to establish a narrower frame for security matters that facilitate the task of finding common ground , acting as a conciliatory agent among sometimes apparently irreconcilable viewpoints. However, that judgement only applies if the success or effectiveness of human security is to be measured in its ability to serve as a 'rallying cry' building bridges between diverse actors that hold very heterogeneous interests and often completely opposite perspectives on a given issue (Paris, 2001). Nevertheless, if the value of human security is instead assessed in terms of its usefulness as a potential framework for analysis, Paris states that it complicates a meaningful exploration of causal relationships in studies, since a very wide variety of factors are considered. As the author puts it, 'given the hodgepodge of principles and objectives associated with the concept, it is far from clear what academics should even be studying' (Paris, 2001:93). Furthermore, in terms of its value in the policymaking arena, which is mainly concerned with finding effective concise solutions to specific political problems, Paris (2010) equally argues that

the main obstacle presented by human security lies on its treatment of threats as almost equal and compatible in their degree of impact and urgency, which leads to confusion as to what reasoning should be employed to mark certain security matters as a priority on the one hand, and how to allocate what are often very limited resources among diverse objectives on the other.

In spite of this strand of opposition, it is undeniable that the potential for consensus that is embedded in the human security concept has not been matched by any other alternative framework of critical security studies, a phenomenon that is even recognised by those scholars that are otherwise not convinced by human security's approach (Paris, 2010). Indeed, authors like Muguruza (2007) defend the worth of the varied applications that human security has in policymaking processes by highlighting notable triumphs in the international arena that can be attributed to the broadened security agenda that it presents. What could be regarded as some of the greatest accomplishments of human security, for example, is the adoption of essential treaties to international law, such as the Rome Statue on which the International Criminal Court is based, the Optional Protocol to the Convention on the Rights of the Child, and the Ottawa or Anti-Personnel Mine Ban Convention (Daft, 2022). As Daft (2022) notes, although the term of 'human security' as such is absent in these treaties, human security advocates, and non-governmental organisations in particular, played a key role in their successful development and in establishing a consensus among parties that often came about after previously failed negotiations. Daft highlights that in the case of the Ottawa Treaty, for example, its origins were constituted by the disagreements that defined the First Review Conference of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW), which found its basis on definitional disputes regarding the concept 'anti-personnel mine'. However, although not explicitly recognised as a human security approach, the framework that ultimately achieved a compromise between the parties involved had the characteristic of putting the individual subject at the

centre of the debate, which framed the security matters discussed as necessary for the protection of all humankind (Daft, 2022).

Muguruza (2007) also illustrates human security's value as a unifying concept with the example of the United Nations Millenium Declaration, the outcome of a summit in which none of the United Nation's member states refrained from recognising the categories of 'freedom from fear' and 'freedom from want' on which the human security concept is based, and found agreement in the statement that the two categories constituted fundamental values that could not be overlooked in the current era (Muguruza, 2007).

The widely criticised element of ambiguity that characterises the human security approach, then, is precisely the factor that unlocks the potential for polarised, clashing discussions to find common ground and sustain a reasonable agreement. Undoubtedly, this finding has implications for the reconceptualization of abortion as a human security issue that is presented below. Indeed, a broad framing of the abortion issue, which focuses on the wide array of factors that constitute a threat to the wellbeing of women that seek abortions as well as to their community, is of less controversial nature, which means that it can be adapted by a wider diversity of comprehensive doctrines that will not feel like they are making a big compromise on the moral, religious and philosophical values that they dearly hold. As a result, common ground on the permissibility of abortion is possible.

5.2.2. The Incorporation of Abortion Rights into the Security Agenda

The starting point of this section is the removal of the right to life of the fetus from the balance of rights on the grounds of which the permissibility of abortion is to be considered. Once the moral status of the fetus is no longer in the equation as a right against which women's equality has to be balanced, there is no

remaining obstacle to reaching the conclusion that the political value of women's right to equality would override any other political value that is brought into competition with it (Rawls, 1993) . The outcome that would emanate from public reason and deliberations of women's rights, then, would be an agreement on the permissibility to choose to terminate a pregnancy, at least before the commonly established doctrine of the 'point of viability'.

The overriding power of the women's right to equality finds its justification on Rawls's two principles of justice, product of citizens' deliberations in the original position and behind the veil of ignorance. Indeed, the egalitarian principle that establishes every individual as worthy of equality and liberty provides the reasoning needed to conclude that women's right to equality are nothing other than fundamental rights (Rawls, 1971) . Once the value of women's equality is framed as a fundamental right, and unrestricted abortion access as an essential precondition to women's equality, it necessarily follows that abortion must be reconceptualized as a fundamental right in and of itself, for it becomes ingrained in a society's basic political conception of justice.

In this section, this paper has made the case for a solution to the problem of the apparent impossibility to find common ground on the permissibility of abortion, addressing the dilemma of value pluralism and incommensurability that defines the abortion debate.

Nevertheless, the conciliatory framework suggested operates in the abstract realm of ideas within political philosophy. It is true that without the basis that said realm provides, the nature of abortion as an essential right could not be established; therefore its great value to political and philosophical discussion cannot be overlooked. However, the reality is that once a satisfactory conclusion is reached through deliberations on political philosophy, putting findings into practice based solely on the political-value-based reasoning is unfeasible. What is more, it may be particularly challenging to try doing so in the contemporary political and legal

context of the United States, especially in the case of the sensitive matter of abortion. Indeed, it is worth noting that the *Dobbs* (2022) decision alone was able to overturn a right of abortion that had already been regarded as fundamental for over half a century, in a legal paradigm that had come to recognise abortion rights as integral to American's basic rights and liberties (Niehoff, 2023).

From this reasoning, it follows that the framing establishing abortion access as part of women's basic right to liberty and equality would benefit from the approach that human security provides. What follows below is the suggestion of a reconceptualization of abortion as a human security matter, able to transcend polarising opinions and securing the re- constitutionalisation of abortion rights in the United States.

First and foremost, it is worth noting that, as Cook (1992) points out, the 'American political experience' is no stranger to the language of political rights, in the sense that 'most Americans believe they have certain inalienable rights' (Cook, 1992: 196). Indeed, individual rights are profoundly cherished in the United States, and this understanding 'right over the good' doctrine is often at the center of political and social unrest; so much so, that Lithwick (2020) describes the refusal of a substantial part of the American population to wear a mask as a 'uniquely American pathology'. Taking this into account, and going back to abortion, the failure of the rights-based approach in decriminalizing abortion that this chapter has explored cannot be solely attributed to the mere fact that the language of rights is introduced in its main arguments; rather, it is the particular context in which rights are invoked that cannot be accepted by moral comprehensive doctrines that believe in the sacredness and personhood of the fetus. Put differently, what prevents these type of doctrines from recognising the overriding nature of the right to equality of the woman when this value is put in a balance of rights altogether with the right to life of the fetus, is the fact that both political values are, according to their belief system, incommensurable (Rawls, 1993). Consequently, it can be concluded that appealing to individual rights in

discussion does not automatically mean that the two debating sides will find it impossible to reach an agreement, especially when what is at the center of the debate is only the value of a universal human right, i.e.: women's rights to liberty and equality, in contrast to values that are not in nature as essential to the wellbeing of individuals as human rights.

It is at this point where human security can be of great service to the liberalisation of abortion. The added value of the human security approach to abortion rights is that it presents women's reproductive freedom in the language of security, which increases the capacity for political and social consensus in fitting the criteria that a morally limiting frame requires. In order for the argument presented here to be understandable, it is key to recall the notion of morally limiting frames, as well as their importance in their ability to transcend conflicts of an apparently irreconcilable nature. The concept of the morally limiting frame, advanced by Burns, is particularly important to a successful reframing of abortion. A morally limiting frame can be understood as the presentation of a matter that 'limits its claims- whether moral or pragmatic- so that its intended audience …does not feel that it must commit itself to new views on a range of issues all at once' (Burns, 2005: 279). The potential for consensus that these types of frames present is clearly illustrated by the example of the medical frame that was prevalent in the pre-*Roe* abortion debate.

Burns (2005) contends that the success of the medical frame, success being understood as the ability to advance abortion rights, can be attributed to the fact that it was , in its essence, a morally limiting frame; that is, the medical frame on which early abortion legislation relied did not contain language that made any value judgements regarding neither the moral status of the fetus, nor the right of women to bodily autonomy and freedom to choose whether to get an abortion .

The efficiency of the medical framing, and therefore of morally limiting frames as a whole, is illustrated by the high amount of abortion reform laws that were being passed in Southern states pre-*Rode* (Burns, 2005). Indeed, this phenomenon can consolidate morally limiting frames as an effective framing of controversial matters in which apparently irreconcilable values clash in an incommensurable way (de Eureta, 2018); to highlight the added value of the morally limiting frame approach it is worth recalling that the overall more conservative political, religious and moral comprehensive doctrines that characterise Southern states has been proven to be in direct opposition to abortion legalisation in the contemporary post-Dobbs American context (The New York Times, 2022). Indeed, as Burns (2005) points out, the success of the medical framing was based on the uncontroversial nature of its claims, coming from a perspective devoid of any particular understanding of morality.

To fit the criteria of a morally limiting frame, as previously mentioned, the human security approach presents the uncontested right of women to freedom and equality, which inevitable encompasses the right to abortion. The denial of abortion, then, is presented as just another threat that, in overlapping with others, seriously jeopardizes women's health. Understood in this manner, abortion legalisation is not framed as an attempt to ensure that women's interests override those of the fetus; rather, the permissibility of abortion is based on the fact that the reason for a woman to seek an abortion is not to inflict harm on a fetus, but to protect herself from the negative consequences that being denied an abortion would have on all aspects of her life. What is more, the detrimental effects of criminalising the right to terminate one's pregnancy 'spill' over not only the woman herself, but also her connections and humanity, as the previous section has explored. As a result, abortion bans risk the undisputable rights of freedom and equality of multiple individuals, not just pregnant women.

In line with this, the conceptualisation of abortion as a human security matter can

be integrated in the security agenda as a security concern precisely because of the balance that constitutes its core. In other words, the human security approach presents a balance of rights that has, on one hand, the individual basic rights and liberties of abortion seekers, which is relative to women's rights; and, on the other hand; the uncontested right of all human beings to safe and affordable healthcare, relative to universal human rights, on the other. Abortion access framed in security terms, then, is able to transcend polarisation in promoting a conceptualisation of the debate presented in terms of rights that all reasonable citizens can agree on. As a result, the emphasis of abortion as a security issue jeopardizing the wellbeing of not only the women seeking abortions, but also that of their families, allows for the potential of the incorporation of abortion into the United States' national agenda, as a high priority issue that needs immediate governmental action .

It can be argued that , perhaps paradoxically, the high potential for consensus that is found in abortion rights understood as a human security concern lies on a framing of the matter that has some shared similarities with the historical medical framing that preceded *Roe* (Siegel, 1992). Nevertheless, the key difference between the traditional medical frame and the one suggested here is that the human security approach considers the individual rights of women in its protection on freedom and equality, and no mention is made to the rights of the physician.

It is possible that, when considering the approach suggested here aiming at the decriminalisation of abortion, critical voices may argue that there is nothing new in the framing of abortion provided, as it can be regarded as being virtually the same as the one that 'pro-choice' citizens endorse. This is a valid claim; after all, women's rights to liberty and equality have always been invoked by the views that defend the rights-based arguments supporting freedom of choice and bodily autonomy. Nevertheless, it can be stated that in the conceptualisation of abortion

rights that is presented here it is not the content of the argument, but rather the framing in which abortion rights are to be understood. For, as the literature on morally limiting frames contends, it is the way in which a particular issue is presented that is key to reaching a consensus that liberalises abortion access (Burns, 2005). In fact, it is certainly true that citizens in the United States have always known that denying abortion access to women who seek it has an enormous detrimental impact on their wellbeing; advocacy groups and the pro-chocie movement in general, to mention just one example, have been using since their origins the symbol of the wire coat hanger as a reminder of the women who do not have access to legal methods of abortion and therefore are forced to find alternatives that put their wellbeing at serious risk Saultes, Devita and Heiner, 2009).

Taking that into account, the attention as to why no political or social agreement on the matter of the permissibility of abortion can be reached needs to be turned to the rhetoric employed by 'pro-choice' and 'pro-life' sides, which frame the abortion debate in a manner that does nothing but increase opinion polarisation (Cook, 1992). As Cook states in her book *Between two absolutes: public opinion and the politics of abortion*, 'the activities of many pro-life as well as pro-choice activists do not seem calculated to find common ground…but rather seem intended to disparage the motivations and character of those who disagree' (Cook, 1992: 195). Indeed, each of the sides frames the debate in a manner that contraposes, even in their descriptions of their attitudes towards abortion as 'right to life' and 'right to choose'; or what is the same, the right to wellbeing of the mother with the right to life of the fetus (Cook, 1992). The result is that, when considering the opinions advanced by the social movements involved in the abortion debate, citizens feel the pressure to agree with one *or* the other. Nevertheless, this framing inhibiting consensus is not what the human security approach to abortion rights offers. In its emphasis on not only the basic right to equality of the pregnant woman but also on the spillover effects that criminalising abortion has on all aspects of women's lives, the safety is of the mother is not

presented as opposed to, but rather inherently tied to that of her future children . The reason why this clarification matters is that, although from a theoretical standpoint the right to life of the fetus as a political right has been taken off the political agenda, as per the balance of rights advanced by Rawls (1993), in practice some sections of the American society continue to equate abortion with infanticide.

Having clarified this point, it is safe to argue that the conceptualisation of abortion as a constituent aspect of human security is a morally limiting frame, which through its safety approach does not build its case on the framing of abortion as a zero-sum deal according to which either the rights of the pregnant woman or the rights of the fetus must be sacrificed in favour of the other.

Before concluding, it is paramount to bear in mind that there is another component intrinsic to the equality of women as citizens, which is equality *among* women. Protecting the freedom to choose and the right to bodily autonomy of women also implies guaranteeing that every single woman; to do so, an intersectional approach to reproductive rights is needed, paying special attention to how intersecting social categories like gender, race and class overlap and shape women's identities and diverse individual experiences of oppression and discrimination (Thakkilapati, 2019). Variables like socioeconomic status and race/ethnicity, as previously mentioned, greatly determine the resources that women have access to when preventing and dealing with unwanted pregnancies (Dehlendorf, Harris and Weitz, 2013). Dehlendorf, Harris and Weitz (2013) are part of the growing literature that points out the barriers faced by women of colour and women of low socioeconomic status in accessing abortion care, including a lack of insurance coverage and adequate sexual education, as well as difficulties in obtaining effective contraceptive methods. Therefore, this leads to the conclusion that no conceptualisation of abortion rights can be deemed truly fair if it is not articulated through an intersectional lense.

6. Concluding Thoughts

The theoretical framework through which this thesis has explored the particularities of the abortion debate in the United States has allowed for the unveiling of the theoretical and policy framework on which the justification of putting the right of abortion to vote lies. The analysis of the diverse manners in which both the abortion debate and the individual rights relevant to its were framed has revealed that political liberalism's notion of the liberal neutral state, which is in line with its political conception of justice that can be described as justice as fairness, seems more of an ideal to which a state should aspire, rather than an objective reality. This raises serious questions related to the legitimacy of the liberal state in exercising its power. For instance, if state neutrality is truly a myth, but the rights to privacy concerned with the freedom of women to terminate their pregnancy is not (or at least it should not be), what is the degree to which the state can interfere in private matters, and under what criteria can this line be drawn?

Moreover, one of the key findings of this thesis lies on the nature of the process of framing itself. This paper has found that the way in which certain matters are framed is completely dependent on subjective criteria; in other words, it is contingent on what exactly do we want to highlight, how, and for what reasons. But also, and perhaps more importantly, the framing process puts into manifest what an individual or actor chooses to omit.

The third major finding, as a final note, entails the nature of fundamental right. It appears that fundamental rights are so not because of their inherent value or

nature; rather their categorisation as fundamental depends on the Supreme Court's subjective decision that they are, in fact, essential to the basic political conception of justice in the United States. This leads, as this thesis has stated, to a lack of protection of essential rights that do not have the 'fundamental' seal from the Supreme Court, as it is the case with abortion rights.

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