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Legal and Demographic Perspectives on Abortion: A Comparative Study of Argentina and The United States

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Abstract

In recent years, the countries of the international community have been going through two opposing routes regarding the legalization of abortion. On the one hand, some countries have committed themselves to legalizing the issue in recent years. In contrast, countries that have historically allowed abortion are now facing conservative movements that, in some cases, have led to reversals in the legality of abortion. In this comparative study, two countries will be considered that, although similar in several aspects, present two divergent paths and current outcomes concerning the legalization of abortion. The two countries under analysis will be the United States and Argentina as they respond to the social science methodology of 'Most Similar Cases.' The United States Federation legalized abortion nationally in 1973 but has recently referred the issue back to the states. Argentina, a Latin American federation, following a long and tortuous path for recognizing and protecting reproductive rights, has only recently recognized the practice's legality.

The objective of this study will be to analyze the reasons behind the different paths and recent outcomes regarding abortion legalization in two countries. The reasons for the divergent approach of the two countries to the issue of abortion will be noted in the different organization of powers at the national level, the role played by reproductive activism movements in the debate, in the different division of power between central and federated units, and the highly different system of protection of human and reproductive rights.

The scope of this analysis is twofold. On the one hand, it is intended to outline and highlight what elements have led to the overruling of the abortion protection system in the United States. At the same time, the analysis of the variables that allowed Argentina to legalize abortion in 2020 is intended to outline a model that other countries of the region could follow.

Keywords: Abortion, Reproductive Activism, United States, Argentina, Roe v. Wade, Law 27.610, Maternal Mortality.

Introduction

Abortion is a medical procedure that ends with the termination of a pregnancy[1]. In states where the practice is accessible, legal, and without onerous social barriers, people can obtain this medical procedure safely and with little risk. During the first twelve weeks of pregnancy, the practice can even be self-managed safely by the pregnant person without having to access a healthcare facility, in case she has the correct information and technical support[2]. But in countries where abortion is stigmatized, criminalized, or restricted, people are compelled to use unsafe abortion services that can lead to death or severe physical and mental consequences for the pregnant person[3]. According to the World Health Organization, 23,000 people worldwide die due to unsafe abortion practices each year, and an additional estimated 10,000 suffer severe complications after the practice is completed[4]. When people are prevented or limited in their capacity to access abortion care, it results in the violation of a range of human rights protected by international instruments[5].

For a long time, women organizations around the world have been advocating for states to guarantee their citizens the right to access abortion. Their efforts have led to more substantial support from international human rights law and the legalization of the practice in several countries. Still, the abortion practice, especially in recent years, continues to be particularly divisive[6]. This has resulted in the multiplication of conservative movements, which have succeeded in pushing some countries toward regressive positions[7].

The difficulties in resolving the abortion issue are due to its complex nature involving political, social, ethical, and moral aspects. The ethical debate opposes those who believe that the fetus is a holder of rights that limit those of the pregnant person to those who state that the

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[1] Amnesty International, 'Abortion is a human right.' (Amnesty International, 2024) <www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts/> accessed 16 September 2024.
[2] World Health Organization, 'Abortion' (*World Health Organization (WHO)*, 17 May 2024) <www.who.int/news-room/fact-sheets/detail/abortion> accessed 16 September 2024.
[3] Human Rights Watch, 'Human Rights Watch: Women's Human Rights: Abortion' (*Human Rights Watch | Defending Human Rights Worldwide*, 2023) <www.hrw.org/legacy/women/abortion.html> accessed 16 September 2024.
[4] Harvard TH Chan, 'The negative health implications of restricting abortion access' (*Harvard T.H Chan: School of Public Health*, 13 December 2021) <www.hsph.harvard.edu/news/features/abortion-restrictions-health-implications/> accessed 16 September 2024.
[5] World Health Organization, [2024] (n.2).
[6] Center For Reproductive Rights, 'The World's Abortion Laws' (Center for Reproductive Rights, 11 April 2024) <https://reproductiverights.org/maps/worlds-abortion-laws/> accessed 19 September 2024.
[7] Louise Mariw Roth & Jennifer Hyunkyung Lee, 'Undue Burdens: State Abortion Laws in the United States, 1994–2022' (2023) 48 Journal of Health Politics, Policy and Law 511.

right to make independent decisions about one's own body and future should prevail[8]. The collective beliefs of some countries additionally exacerbate the debate. In these territories, while it is well-known that the practice is employed at the individual level, it is, in any case, condemned at the societal level[9].

All these factors have sparked a mobilization of political and social forces that give rise to a lively and highly polarized debate. To date, global legal systems are undergoing two socio-legal pushes with very different trajectories[10]. On the one hand, in some of the countries that had legalized abortion at the turn of the 1970s and 1980s through the intervention of the Courts or the passage of ad hoc laws, there are strong pushes to restrict abortion rights[11]. The United States is a prime example of this phenomenon.

The right to abortion was guaranteed in the country in 1973 through the Fourteenth Amendment to the U.S. Constitution, which guarantees U.S. citizens the right to privacy[12]. Civil rights in the country are protected by a combination of instruments, including the constitutional text, the Bill of Rights, and the Fourteenth Amendment. The role of protector of citizens' rights in the U.S. legal landscape is mainly reserved to the U.S. Supreme Court, which, through its decisions, interprets the Constitution and sets precedents on the protection of civil rights[13]. Despite all the rights-protecting instruments, a Supreme Court decision in 2022 overturned the precedent that had legalized abortion nationwide in 1973, putting the responsibility on the issue back to the states[14]. After the issue of the decision in 2022, several states promptly responded by enacting restrictive policies[15]. Additionally, restring a right that found its basis in the 'substantive due process' contained in the Fourteenth Amendment, the Supreme Court has created a condition of incertitude for other rights guaranteed through the same instrument, such as the right to contraception and same-sex marriage[16].

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[8] Andrea Smith, 'Beyond Pro-Choice versus Pro-Life: Women of Color and Reproductive Justice' (2005) 17 NWSA Journal 119.
[9] Bonnie Shepard, 'The "Double Discourse" on Sexual and Reproductive Rights in Latin America: The Chasm Between Public Policy and Private Actions'(2000) 4 Health and Human Rights 110.
[10] Carla Maria Reale, '¡ Abajo el patriarcado, se va a caer, se va a caer! La recente disciplina dell'interruzione volontaria di gravidanza in Argentina ed il ruolo dei movimenti femministi.' (2023) 1S BioLaw Journal-Rivista di BioDiritto 235.
[11] Id [10].
[12] *Roe v. Wade* [1973] 410 U.S. 113 Supreme Court.
[13] Martin Oyhanarte, 'Supreme Court Appointments in the U.S. And Argentina' (2021) 20 Washington University Global Studies Law Review 697.
[14] *Dobbs v. Jackson Women's Health Organization* [2022] US Supreme Court No. 19-1392, [2022] 597 U.S.
[15] Elizabeth Nash & Isabel Guarnieri, '13 States Have Abortion Trigger Bans-Here's What Happens When Roe Is Overturned' (*Guttmacher Institute*, 13 June 2022) <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> accessed 19 September 2024.
[16] Yvonne Lindgren, 'Dobbs v. Jackson Women's Health and the Post-Roe Landscape' (2022) 35 J Am Acad Matrimonial Law 235.

On the other hand, the legal systems of some countries, particularly those in Latin America, are entering a new season of decriminalization and liberalization of abortion[17]. Argentina's case is particularly crucial for that geographic area as it was the first major country to legalize the practice up to the fourteenth week in 2020. It is believed that this decision could have a symbolic impact on other countries in the region, creating a domino effect leading to further legalization[18].

This right has been guaranteed through a combination of domestic and international sources that aim to protect the rights of the citizens. The constitutional basis of law 27.610, unlike the case in the United States, is therefore found both in articles of the constitutional text and in international treaties that, as a result of the 1994 constitutional reform, were guaranteed to have constitutional status in the Argentine legal system[19]. By anchoring the right to abortion in the Argentine case to international treaties, citizens are offered another level of protection of the right from the emergence of possible conservative forces in the country.

This comparative analysis will consider the United States and Argentina case studies as they fall under the 'Most Similar Cases' methodology[20]. This methodology is employed in the political and social sciences to compare different political and social systems with several elements in common but differ in others that substantially delineate variations in a given area of study[21]. In the case of the United States and Argentina, the two countries have a similar colonial history and an almost identical constitutional text[22]. The Constitutions of both countries have led to the establishment of a federal system and a system of division of powers that, at least on paper, are meant to be similar[23]. While these similarities provide a basis for comparison, it is essential to recognize the differences between the two countries. These include variations in the legal system, different impacts of civil society on social issues and an entirely different approach to human rights protection.

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[17] Lindgren Y, [2022] (n.16).
[18] Katy Watson, '¿Puede la legalización del aborto en Argentina impulsar un cambio en toda América Latina?' (*BBC News Mundo*, 6 March 2021)
<www.bbc.com/mundo/noticias-america-latina-56281594> accessed 12 July 2024.
[19] Alejandro M. Garro, 'Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions' (2007) 45(3) Duquesne Law Review 409.
[20] Gilberto Capano et al., 'Metodi e strumenti della scienza politica', in Manuale di scienza politica (il Mulino 2014).
[21] Id [20].
[22] Franklyn D. Jr Rogers, 'Similarities and Differences in Letter and Spirit Between the Constitutions of the United States and Argentina' (1945) 40(4) Georgetown Law Journal 582.
[23] Santiago Legarre & Christopher R. Handy, 'A Civil Law State in a Common Law Nation, a Civil Law Nation with a Common Law Touch: Judicial Review and Precedent in Louisiana and Argentina' (2021) 95 Tul L Rev 445.

Considering the methodology employed in this study, the research question that the study aims to answer will be: What are the reasons that can explain the different paths and recent outcomes of abortion legalization in Argentina and the United States? The dependent variable would be the current abortion regimes of the two countries, the independent variables would be the differences in the application of the constitutional texts, the role of civil society in the debate on abortion, the different implementation of the national abortion regime at the state or provincial level and the system of protection of reproductive rights.

The objective of this study is twofold; on the one hand, through the study of the conditions that pushed for the legalization of abortion in Argentina, it is intended to outline the essential elements that could lead other countries to the same outcome. At the same time, the study of the reasons that led to the overruling of the Roe v. Wade framework in the United States is intended to delineate those faults in the system of protection of the right to abortion that could lead other countries to similar episodes.

The importance of this analysis, first, stems from the fact that the comparative cases of Argentina and the United States are scarcely analyzed with respect to the issue of abortion. Second, the literature on the Argentine case is mainly in Spanish; therefore, this study intends to provide information on Argentina's political and legal dynamics in a language that can be understood by those who could not read it in the original version. Finally, combining legal and social analysis with a demographic one allows the study to bring an innovative and practical approach to the abortion debate. Through the combination of legal changes and demographic effects, it is intended to observe the substantial impact on the health of pregnant women and children born as a result of reproductive policies, especially observing the concerning condition of the most fragile groups within the two societies. By looking at estimates and demographic data, the study intends to take an apolitical approach to emphasize the importance of ensuring access to a legal and safe abortion system in order to limit the number of maternal deaths and newborns deaths. In this part of the analysis, the study will also aim to develop a realist approach to suggest public policies that will help the two countries address mortality and morbidity rates.

The literature and sources that this project draws on are mostly secondary sources that provide a broad and detailed picture of the study's subject. The final chapter adopts a more analytical approach. In fact, in the final part of the study, in addition to the secondary sources, primary and official sources will be necessary to develop more adequate estimates for comparing the two case studies.

The thesis will be divided into three macro sections. The first part will cover the introduction of preliminary concepts essential for understanding the selection of case studies and the research question. In the first sections, the analysis will focus on the similarities and differences arising from the constitutional texts of the two countries. Starting from the great source of inspiration offered by the constitutional text of the United States for Argentina[24], the chapter will move on to the analysis of the two countries' legal families, emphasizing the use of precedent in the Argentine case[25]. The chapter will then study the federal system adopted by the two countries by observing the different organization of functions and power employed by the two cases.

Then the introductory chapter will focus specifically on the topic under analysis in this study. First, Argentina's approach to reproductive rights, anchored in a high consideration of international instruments and human rights framing, will be observed[26]. Next, the issue will be observed from the perspective of the United States by observing the concept of 'reproductive justice'[27]. The chapter will conclude with an overview of the introduction of abortion laws globally[28].

The second part will compare the legal and social mechanisms concerning abortion that have characterized the two countries up to today. The second chapter will cover the analysis of the landmark judgments of the US Supreme Court and the institutional elements that have led to the change in the legal nature of abortion from the 1970s to the present. The first section will briefly introduce the debate and state laws that preceded the landmark sentence of Roe v. Wade. The second and third sections will cover the landmark sentences of 1973[29] and 1992[30] that established and confirmed the legality of the abortion practice nationwide in the United States. Then, the chapter will deal with the responses from the state and the political and social groups to the Court's judgments. The final part of the chapter will look at the political and legal events

[24] Mitchell Gordon, 'Don't Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type' (2009) 487 Washington University Global Studies Law Review.
[25] Alberto F. Garay, 'A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law' (2019) 25 Sw J Int'l L 258.
[26] Barbara Sutton & Elizabeth Borland, 'Abortion and Human Rights for Women in Argentina' (2019) 40 Frontiers: A Journal of Women Studies 27.
[27] Kimala Price, 'What Is Reproductive Justice? How Women of Color Activists Are Redefining the pro-Choice Paradigm' (2010) 10 Meridians 42.
[28] Center For Reproductive Rights, [2024] (n.6).
[29] *Roe v. Wade* [1973] 410 U.S. 113 Supreme Court.
[30] *Planned Parenthood of Southeastern Pennsylvania v. Casey* [1992] 505 U.S. 833 Supreme Court.

that led to the overruling of Roe v. Wade that occurred in 2022 and the responses that emerged within the country[31] and in the international community[32] in the aftermath of that change.

The third chapter analyzes the long road that led to the legalization of abortion in Argentina. The Argentine path began with a long period of polarizing debate that pitted conservative forces against a pro-abortion movement that, over the years, gained the numerical and political strength to make its demands heard by Argentina's national institutions[33]. The third section of this chapter will mirror the analysis of the U.S. Supreme Court legal cases and analyze the cases brought before Argentine Courts by both sides of the abortion debate. Given that Argentina follows the civil law legal system, the upcoming sections will delve into the circumstances that resulted in the legalization of abortion via Law 27,610 in 2020[34]. Additionally, the law itself and its characteristics will be analyzed. Finally, the national, subnational and international response to the implementation of the law in the country will be observed.

The last part of the comparative study will involve a demographic analysis of the impact that legal changes have on the lives and health of pregnant persons and newborns born. The first part of the chapter will focus on the demographic rates of the United States by observing the changes in the numbers resulting from the introduction of restrictive legal doctrines that were once progressive[35]. After analyzing national data, the focus will shift to subnational data to observe possible demographic disparities between more and less conservative countries[36]. After considering the case of the United States, the study will then move on to Argentina, examining the changing demographic indicators related to the health of pregnant individuals and infants before and after the legalization of abortion, observing the slow but promising improvement in the indices in the last years[37]. Since Argentina also has a federal structure, data at the provincial level will be assessed to observe the best-performing and worst-performing

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[31] Adrienne R. Ghorashi & DeAnna Baumle, 'Legal and Health Risk of Abortion Criminalization: State Policy Responses in the Immediate Aftermath of Dobbs' (2023) 37 JL & Health 1.
[32] Lynn M. Morgan, 'Global Reproductive Governance after Dobbs' (2023) 122(840) Current History 22.
[33] Diego Alfredo Arangue & Miguel Ángel Jara, 'El movimiento por el aborto legal y gratuito en Argentina. Un problema social en clave histórica' (2022).
[34] Alicia Ely Yamin & Agustina Ramon Michel, 'Using Rights to Deepen Democracy: Making Sense of the Road to Legal Abortion in Argentina' (2023) 46 Fordham Int'l LJ 377.
[35] Emily Siron, 'This Is Not New: Addressing America's Maternal Mortality Crisis' (2022) 25 Rich Pub Int L Rev 177.
[36] Anne K. Driscoll et al., 'National Vital Statistics Reports' (2023) 72(1).
[37] Ministerio de Salud, 'El Ministerio de Salud de la Nación anunció el valor más bajo de mortalidad infantil en la historia del país' (*Argentina.gob.ar*, 6 February 2023) <www.argentina.gob.ar/noticias/el-ministerio-de-salud-de-la-nacion-anuncio-el-valor-mas-bajo-de-mortalidad-infantil-en-la#:~:text=historia%20del%20país-,El%20Ministerio%20de%20Salud%20de%20la%20Nación%20anunció%20el%20valor,un%20punto%20en%20dos%20años.> accessed 19 September 2024.

units in the country[38]. Finally, the study will conclude with possible policies that the national institutions of the two governments could implement to mitigate the maternal mortality ratios that are still high in Argentina despite recent legal changes and that are increasing in the United States due to recent legal change.

[38] Ianina Tuñón & Matías Maljar, 'Mortalidad infantil y materna: su asociación con las vulnerabilidades socioeconómica y geográfica en la Argentina' (2024).

Chapter I

The United States and Argentina: Basis for Comparison and Points of Divergence

Introduction

Some scholars believe that the original text of Argentina's 1853 Constitution is essentially just a copy of the United States' one[1]. For this reason, it should come as no surprise that Argentina's political and legal system, for certain aspects, closely resembles that of the United States. In any case, although the two systems share several similarities, they differ significantly in essential aspects, including their post-colonial history and the balance of powers between the institutional branches. Furthermore, when it comes to their approach to human rights, particularly reproductive rights, the two countries have taken different approaches, leading to divergent paths.

This opening chapter will establish the foundation for the rest of the study by outlining the reasons behind the different paths taken by the two countries toward the legalization of abortion. The chapter's starting point will cover both countries' constitutional foundations, highlighting the striking similarities in wording between the two texts and the practical points of divergence. Secondly the chapter will analyze the two legal families[2] of the countries considered in the study. The study of these ideal types is intended to help identify those tools and techniques that civil society, as well as state authorities, will employ in different countries to advance social justice and respect for reproductive rights. The second section of the chapter will concern the common law system. In this section, the history of the application of the legal system will be briefly analyzed before discussing the main characteristics of this legal family, namely the precedent and the principle of *stare decisis*.

In the third section of the chapter, the legal family of the 'civil law,' will be observed by applying it to the case of Argentina. Peculiar in the application of the civil law tradition to the case of Argentina, whose legal system, like many Latin American countries, has been influenced by both the former colonizers and the neighboring United States. Hence, even

[1] Santiago Legarre & Christopher R. Handy, 'A Civil Law State in a Common Law Nation, a Civil Law Nation with a Common Law Touch: Judicial Review and Precedent in Louisiana and Argentina' (2021) 95 Tul L Rev 445.

[2] The term "legal family" refers to a group of legal systems with common characteristics and histories in their approach to law and justice.

falling within the legal family of 'civil law,' Argentina uses precedents more extensively than the mere "soft obligation" prescribed by the legal tradition to which it belongs[3].

The fourth section will concern the application of federalism in the two countries. This section will demonstrate that it is noteworthy that the Argentine federal system drew inspiration from the United States' federal system, but there are significant differences between the two federalisms. Hence even if in both countries, there is a 'residual clause'[4] that grants certain powers to the states or provinces, the main difference between the two is that in the United States, states have more autonomy and power, while in Argentina, the federal system is highly centralized, limiting regional independence.

Following these preliminary sections, the chapter will analyze the issue at stake in this study, namely how reproductive rights have been adopted and legalized in the two countries. In the fifth section, the international instruments that enshrined the fact that reproductive rights are, in effect, human rights will be studied. Next, it will be observed how the human rights framework applies to Argentina, highlighting the strengths of using this approach in the country. The sixth section will discuss how the United States' perspective on human rights has resulted in a conflict between pro-life and pro-choice groups regarding reproductive rights, which has failed to tackle the problems related to women's human rights. Then, the emerging concept of "reproductive justice" will be analyzed, considering its impact on the reproductive rights debate.

Finally, the last section will provide a global overview of how abortion legalization laws have been and are enforced. This section will consider the progressive and regressive trends that have characterized the world, and particularly the American continent in recent years.

1.1 Not a copy but definitely a source of inspiration: the Constitutions of the United States and Argentina

The current Argentine Constitution is a revision of the one implemented in 1853 that is often described as inspired by the U.S. Constitution of 1787[5]. The birth of the Argentina

[3] Alberto F. Garay, 'Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitution Model' (1991) 22 U Miami Inter-Am L Rev 161.
[4] Raffaele Bifulco, 'Federalism' in The Cambridge Companion to Comparative Constitutional Law (Cambridge University Press 2019).
[5] Scholars disagree regarding the extent of the United States Constitution's influence on the Argentine one. Some argue that the US influence was minimal, emphasizing instead the role of the colonies in drafting the 1853 Constitution. The 1994 constitutional amendment, which incorporated several European institutions into Argentina's governmental system, confirmed the influence of European powers on Argentina's Constitution.

Constitution of 1853 has been frequently described as a case of 'constitutional borrowing'[6]. This term refers to the adoption and subsequent adaptation of one country's legal principles and structures in the legal framework of another country. Although many scholars are skeptical about the employment of the legal practice, constitutional borrowing also has its defenders[7]. These argue that while copying another country's Constitution is inappropriate, drawing inspiration from positive examples may help solidify the political institutions of those countries that find themselves in uncertain positions[8].

Among the supporters of constitutional borrowing is Juan Bautista Alberdi, the founding father of the Argentine constitutional text. Alberdi's proposed constitutional framing demonstrated significant admiration for the U.S. model, to which the country's progress is attributed[9]. Alberdi believed that by incorporating key aspects of the United States legal system, Argentina could address its economic and political instability, as he saw similarities in the history and foundational challenges of the two countries[10].

In any case, Alberdi was aware of the limitations and risks of merely copying a constitutional text foreign to the history and political culture of the country in which it is applied. However, the father of the Argentine Constitution acknowledged that while the words used in the two Constitutions were similar, if not identical at times, the Argentine Constitution had nonetheless been written with Argentina's unique history in mind[11].

Argentina's history shared lots of similarities with that of the United States. For this reason, the United States was in a favorable position to exert influence over Latin American countries[12]. As Argentina had spent more than three hundred years as a colony under the control of the Spanish crown, the United States also had a colonial origin. Another common element that linked the two countries' history was their gained independence after a successful revolution against their mother country[13]. However, unlike the United States, Argentina, following independence, had experienced a period of tyranny[14]. The different political paths

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[6] Franklyn D. Jr Rogers, 'Similarities and Differences in Letter and Spirit Between the Constitutions of the United States and Argentina' (1945) 40(4) Georgetown Law Journal 582.
[7] Mitchell Gordon, 'Don't Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type' (2009) 487 Washington University Global Studies Law Review
[8] Jonathan M. Miller, 'The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nintheenth Century Argenitna and the Argebtine Elite Leap of Faith' (1997) 46 American University Law Review 1483.
[9] Juan Bautista Alberdi, *Bases y puntos de partida para la organizacion politica de la republica argentina.* (W.M. Jackson, inc. 1938).
[10] Id [9].
[11] Rogers FD Jr, [1952] (n.6).
[12] Id [11].
[13] Id [11].
[14] Id [11].

experienced by the two countries following independence were reflected in a different organization of political power. Although Alberdi proposed a tripartite national government modeled on that of the United States for Argentina, the powers were balanced differently between the three national branches[15]. The rationale behind this lies in the founding fathers' belief that, given the historical context of the Latin American country, it was deemed necessary to grant the executive branch more extensive powers than those designated for the U.S. President by the Constitution[16].

Although the system of separation and coordination of powers is another element that the Argentine founding fathers "borrowed" from the U.S. 1787 Constitution, its application in the Argentine context resulted in a different outcome. The government is divided into three branches in the United States: executive, legislative, and judicial[17]. At the same time, the United States Constitution also implemented a complex system of 'checks and balances' to ensure that the branches of the government can control each other so that no one can become too powerful[18]. However, in recent years, and similar to what had happened in Argentina, the Presidents have sought to expand their powers at the expense of the delicate institutional balance created by the constitutional text[19].

While the Argentine Constitution of 1853 established a system of separation of powers similar to that of the U.S., with a more influential executive branch than its counterpart, in practice, the system has evolved into a vertical distribution of power with the executive branch holding the most authority[20]. This scenario allowed the President to override the other branches and exercise even legislative power through executive orders that, according to some constitutional scholars, are immune from judicial review[21]. Presidents have begun to use this tool more and more, and instead of performing their constitutional function of checking on abuses of executive power, Congress and the Courts have become partisan[22]. Executive orders promulgated by the President, with only the requirement of invoking conditions of necessity

[15] Alberdi JB, [1938] (n.9).
[16] Gordon M, [2009] (n.7).
[17] Article I grants Congress the "Legislative Power," which is the authority to create laws that reflect the policy preferences of the electorate. Article II assigns the "Executive Power" to the president, tasking him with the responsibility to faithfully enforce those laws. Lastly, Article III grants the "Judicial Power" to federal courts, giving them the authority to interpret existing legal rules in specific cases and controversies.
[18] Alejandro M Garro, 'Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions' (2007) 45(3) Duquesne Law Review 409.
[19] Manuel José Garcìa-Mansilla, 'Separation of Powers Crisis: The Case of Argentina' (2004) 32 Georgia Journal of International and Comparative Law 307.
[20] Id [19].
[21] Garro AM, [2007] (n.18).
[22] Mitchell Gordon, 'One Text, Two Tales: When Executive/Judicial Balances Diverged in Argentina and the United States' (2009) 19 Indiana International & Comparative Law Review 323.

or urgency, can also override laws and violate individual rights[23]. The future executive orders must be observed up close, considering Argentina's conservative overturn that occurred with the recent election of Javier Milei in October 2023.

Another difference between the two countries' constitutional texts is the allocation of powers between the central government and federated units. In Argentina, the national government has been given greater powers with respect to the provinces than those held by the U.S. national government with respect to the states[24]. This decision was prompted by the period of chaos and civil war that Argentina experienced in the forty years prior to the enactment of the Constitution, which suggested the need for greater control by the central government[25].

Another essential similarity between the two systems is noted in the Supreme Court and judiciary organization. In both countries, the apex of the judicial system is vested in the Supreme Court of Justice; this Court is the final instance for legal disputes and plays a crucial role in constitutional interpretation[26]. Supreme Court judges in both countries are appointed by the President and confirmed by the Senate. Although these systems are very similar on paper, in the case of Argentina, the system of the appointment of judges and their independence has yet to be found to comply with what the Constitution prescribes[27]. During the 20th century in Argentina, the Senate was convened in closed sessions to appoint judges, thus not allowing citizens to attend discussions regarding the nominee, and senators were often given minimal information regarding the Presidential candidates[28]. Moreover, even when appointed, judges were replaced if they did not reflect the ideas of the chief executive, making the judiciary totally dependent on the executive[29].

For what concerns the United States, it was believed that the appointment system of the Supreme Court justices guaranteed the independence of the highest judicial office in the U.S. system[30]. However, in recent years, the independence of the judiciary has been severely challenged. The close relationship between Presidents and Supreme Court justices, along with controversial rulings that overturn long-standing precedents, has led to a decline in public

[23] Garcìa-Mansilla MJ, [2004] (n.19).
[24] Gordon M, [2009] (n.22).
[25] Juan Bautista Alberdi, 'Estudios sobre la constitucion arjentina de 1853, en que se restablece su mente alterada por comentarios hostiles, y se designan los antecedentes nacionales que han sido bases de su formacion y deben serlo de su jurisprudencia' (Essay, 1963).
[26] Martin Oyhanarte, 'Supreme Court Appointments in the U.S. And Argentina' (2021) 20 Washington University Global Studies Law Review 697.
[27] Garcìa-Mansilla MJ, [2004] (n.19).
[28] Oyhanarte M, [2021] (n.26).
[29] Id [28].
[30] Garcìa-Mansilla MJ, [2004] (n.19).

confidence in the Supreme Court[31]. These conditions have led to the incessant demand for greater transparency for Supreme Court justices[32].

To conclude the section, the analysis will briefly discuss another essential difference between the two constitutional texts: how the countries dealt with human rights. Concerning individual freedoms and rights, both countries stipulate that these constitute the foundation of the state. In the case of the United States, individual rights were established in the first ten amendments to the federal Constitution; however, these rights were guaranteed only against the federal government's actions[33]. The Supreme Court then, on a case-by-case basis, applied the concepts of the Due Process Clause and the Fourteenth Amendment to make their application equally binding for the states[34]. Unlike Argentina and many other countries, the United States has not been involved in the internationalization of rights, preventing individual freedoms at the state level from being protected by international human rights law[35].

The founders of the Argentine Constitution sought to correct the mistakes made by the Philadelphia representatives and included a Bill of Rights in the text of the Constitution. Eliminating the problem of amending the Constitution and immediately making the Argentine Bill of Rights have full force throughout the nation, binding both the central and provincial governments[36]. The list of individual rights proposed by Alberdi in 1853 was richer than that contained in the U.S. Bill of Rights. With the 1957 and 1994 amendments, the list of rights protected by the Argentine Constitution was expanded to include civil and welfare rights[37]. The *amparo* mechanism also provides for the protection of citizens' rights. This is a legal concept typical of Latin America that allows citizens to seek protection of their fundamental rights against abuse by authorities[38].

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[31] Ariana Baio, 'As Biden Proposes Overhaul of Supreme Court, How Did We Get Here?' (*The Independent*, 17 July 2024) <www.independent.co.uk/news/world/americas/us-politics/supreme-court-reform-biden-trump-b2581567.html> accessed 9 September 2024.
[32] Id [31].
[33] Keith S. Rosenn, 'Federalism in the Americas in Comparative Perspective' (1994) 26 U Miami Inter-Am L Rev 1.
[34] Id [33].
[35] Francesca Rosa, 'Costituzionalismo e tutela dei diritti nella famiglia giuridica di common law' (2024) 6(1) Rivista di diritti comparati 32.
[36] Segundo V. Linares Quintana, 'Comparison of the Constitutional Basis of the United States and Argentine Political Systems' (1949) 97 U Pa L Rev 641.
[37] Garro AM, [2007] (n.18).
[38] J. A. C. Grant, 'Judicial Legislation and the Jurisdiction of the Federal Courts: A Comparative Study of the United States, Argentina and Mexico' (1976) 24 UCLA L Rev 193.

1.2 U.S. Common Law: the use of the precedent and the *stare decisis* paradigm

The common law system is a legal system that finds its historical origin in the British legal system. If a historical origin is to be given to this legal system, this is traced back to the Battle of Hastings in 1066, with the Norman conquest of England[39]. This event gave rise to a political and legal system characterized by stability, which, being characterized by the absence of traumatic historical events, made possible the emergence of a stratified legal system. As far as the United States of America is concerned, all states, except for Louisiana[40], have a common law legal system.

This legal family is distinguished from its historical nemesis by its reliance on cases and judicial decisions[41]. While judges interpret the law by its codification in the civil law system, common law judges derive it from earlier decisions[42]. According to the ideal type of the common law system, there is no codification or central monopolistic law-making system. Therefore, general principles do not precede judicial decisions but emerge from them[43]. The common law judge must consider each case's specific facts and circumstances, analyze analogous cases, and determine how to apply existing legal principles to the case under analysis[44].

The first concept characterizing the common law legal system is that of the 'precedent'. Justice Benjamin Cardozo defines precedents as a starting point from which the work of the Courts must begin[45]. According to the principle of the 'precedent', judicial decisions from previous cases serve as authoritative interpretations of the law for similar future cases[46]. The strength of precedent comes from its creation and repetition, which is reinforced by the succession of litigations that follow a similar pattern[47].

A complementary concept to that of precedent is the doctrine of '*stare decisis et quieta movere*'. Under the *stare decisis* doctrine, lower Courts must follow the decisions made by higher Courts in similar legal cases[48]. This definition refers to what is defined as 'vertical

[39] Kischel Uwe & Andrew Hammel, 'The Context of Common Law' in *Comparative Law* (Oxford Academic 2019).
[40] Louisiana operates under a civil law system based on the French civil code of the early 1800s.
[41] Kischel U & Hammel A, [2019] (n.39).
[42] Id [41].
[43] Harlan F. Stone, 'The Common Law in the United States' (1936) 50 Harv L Rev 4.
[44] Id [43].
[45] Benjamin N. Cardozo, *The Nature of the Judicial Process* (*Yale University Press*,1921).
[46] Stone HF, [1936] (n.43).
[47] Id [46].
[48] John C. Gray, *The Nature and Sources of the Law* (*Dartmouth Pub Co*,1972).

precedent'[49]. For example, for the U.S. jurisprudence, when the Supreme Court decides on an issue concerning the Constitution, its judgment binds all state and federal Courts in interpreting the same constitutional issue[50]. In addition to this concept, we find that of 'horizontal precedent', following which Courts need to place great importance on their own past decisions even if they are not bound to follow them[51].

In any case, the Courts of the United States do not consider themselves entirely bounded by past decisions. The literature emphasizes the importance of critically considering precedent and embracing innovations from non-legal sources in the United States[52]. However, as established by the Supreme Court in Planned Parenthood v. Casey[53], reversing a previous precedent is a complex process that requires identifying significant and specific changes that challenge the precedent's validity[54] [55].

The common law system apports several advantages to the countries that apply it within their jurisdiction[56]. It provides stability and consistency by basing decisions on prior cases, ensuring objectivity, and marginalizing personal viewpoints[57]. The strongly negative connotation given to subjectivity in the issue of Courts' decisions is related to the analysis of another concept whose interpretation is very troubled in the US landscape, namely that of 'judicial activism'[58]. Contrary to its modern definition, the term 'judicial activist' originally had a positive connotation, similar to that of a civil rights activist[59]. To date, the term judicial

[49] Vertical precedent refers to a legal principle where a higher Court's decision is binding on lower Courts within the same hierarchy.
[50] Garay AF, [1991] (n.3).
[51] Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 Iowa L Rev 601.
[52] Stone HF, [1936] (n.43).
[53] *Planned Parenthood v. Casey* [1992] US Supreme Court 833, [1992] PPFA 833.
[54] Hathaway OA, [2002] (n.51).
[55] To clarify how a precedent can be reversed, reference may be made to the cases of racial segregation in the USA. In the 1896 *Plessy v. Ferguson* case, the Supreme Court legalized racial segregation and allowed it to be applied in every aspect of the lives of its citizens. This precedent has been in force for over half a century. In 1954, at a time of increasing attention to social rights and when racial segregation was no longer in line with American societal values, the precedent established in 1896 was overturned in *Brown v. Board of Education*. With this decision, the Supreme Court highlighted that it is between its faculties and duties to review precedents when social and legal circumstances significantly change.
[56]For the common law system to effectively provide benefits certain conditions must be met. Among these, it is essential to establish a judicial system that is deeply rooted in the rule of law and is inclined towards collaboration, mutual respect, and cooperation.
[57]Thomas Reuters, 'What Is the Definition of Common Law?' (*Thomas Reuters*, 15 November 2022) <https://legal.thomsonreuters.com/en/insights/articles/what-is-common-law> accessed 9 May 2024.
[58] Keenan D. Kmiec, 'The Origin and Current Meanings of Judicial Activism' (2004) 92 Calif L Rev 1441.
[59] Id [58].

activism has acquired negative connotations due to judges' tendency to interpret laws according to their own values and political beliefs rather than following the law[60].

Thus, the concept of 'judicial activism' is often used to describe the process that leads judges to ignore or disregard precedent[61]. The most widely accepted interpretation, links judicial activism to judges' inclination to "legislate from the bench"[62]. This means that judges may disrupt the delicate balance established by the separation of powers in the U.S. system through their interpretations as they attempt to create new laws[63].

Finally, the system is described as flexible in that it seems able to quickly adapt to societal changes[64]. If the limits and requirements of the Constitution are met, it does not require new codes or statutes to change a doctrine that no longer reflects the society in which it operates[65]. Flexibility in the use of legal precedent is more noticeable when opposing parties highlight different aspects of the precedent that lead to conflicting outcomes. In such cases, the Court has the discretion to choose which interpretation to follow as long as both outcomes align with the precedent[66].

Many in the literature do not share this view on the precedent's flexibility, believing instead that the system is fundamentally complex to change or even inflexible[67]. Common law institutions are often described as "sticky" since they tend to remain stable for long periods of time. However, periods of rapid change, also referred to as 'historical junctures', can cause new laws to be introduced[68]. Once these opportunities for change have passed, the system returns to stability, making it difficult to implement further changes. Additionally, mechanisms like the rule of *stare decisis* are designed to resist change in common law systems, as noted by Holmes[69]. Many legal scholars, such as Bruce Ackerman, do not see this feature as inconvenient; by contrast, they celebrate it by stating that Courts have the function of preserving and protecting principles gained by citizens against possible erosion by the political elite[70].

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[60] Cornell Law School, 'Judicial Activism' (*Legal Information Institute*) <https://www.law.cornell.edu/wex/judicial_activism> accessed 9 May 2024.
[61] Greg Jones, Proper Judicial Activism, (2002) 14 REGENT U. L. REV. 141, 143.
[62] Kmiec KD, [2004] (n.58).
[63] Id [62].
[64] This feature is essential if one considers the substantial immutability of the U.S. Constitution, which has proven to be exceedingly resistant to change. As a result, the Supreme Court has played a crucial role in interpreting the Constitution by adapting the legal text to the needs of succeeding generations.
[65] Thomas Reuters, [2022] (n.57).
[66] Hathaway OA, [2002] (n.51).
[67] Id [66].
[68] Id [66].
[69] Id [66].
[70] Bruce Ackerman, *We the people: foundations* (1991).

1.3 Civil Law Legal Tradition: its peculiarities in the application to Argentina

The literature is wont to ascribe Latin American countries, including Argentina, to the civil or Roman law tradition, pitting this tradition against that of the common law[71]. In civil law systems, judgments should not constitute a source of law[72]. This is because, according to the Napoleonic code, the judiciary has the sole function of deciding legal disputes by applying laws enacted by the political branches of government, making the legislature the authentic interpreter of the law, and relegating the judiciary to a mere executor of the law[73]. In addition, in countries belonging to the civil law tradition, litigation is regarded as an *extrema ratio*, considering that civil society believes that change does not come from the judgments of the Courts but from the enactment of new laws by the legislature.

At this point, we can highlight an initial distinction between the idiotypically tradition of civil law and its application in Latin American countries, especially Argentina[74]. Contrary to the general tradition, which prescribes the supremacy of the legislative power, in Latin American countries, the executive power often seems to prevail over the others[75]. This phenomenon has led Argentina, like many other Latin American countries with similar political and legal cultures, to be characterized by "hyper-presidentialism"[76]. In cases of hyper-presidentialism, the President uses the rhetoric of separation of powers to defend his or her actions and prevent the imposition of checks and balances from other branches[77].

As previously noticed, the United States has had a significant impact on the Argentine constitutional system. As a result, several essential features of the United States' system have been exported to the Argentine one, between which the principle of *stare decisis*.

Before delving into the Argentine version of *stare decisis*, it is necessary to point out that although judgments are not considered a source of law in civil law systems, continental

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[71] Alberto F. Garay, 'A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law' (2019) 25 Sw J Int'l L 258.
[72] Id [71].
[73] Abelardo Levaggi, 'La Interpretaci6n del Derecho en la Argentina del Siglo XIX' (1980) 7 Revista de Historia del Derecho 23.
[74] Argentina's legal system could be included in the phenomenon known as the 'hybridization of legal families.' In this phenomenon, legal systems are influenced by multiple legal traditions, resulting in a new legal model that combines features from different legal families. Argentina, primarily an example of civil law tradition, has incorporated elements from the common law tradition during its legal history, displaying characteristics of hybridization.
[75] Linares Quintana SV, [1949] (n.36).
[76] Although the literature does not apply this concept to the United States, in recent years, the US system has taken on characteristics specific to this type of governmental imbalance.
[77] Susan Rose-Ackerman, Diane A. Desierto & Natalia Volosin, 'Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and Philippines' (2011) 29 Berkeley J Int'l L 246.

judges have developed a source of law defined as *jurisprudencia* that loosely echoes the concept characterizing common law systems[78]. The term refers to the stand held by a set of similar judicial decisions and is sometimes used to refer to past cases[79].

In Argentina, several scholars have given their own interpretation of this concept. Legal philosopher Carlos Nino explains that in European-style legal systems, such as the Argentine legal system, judges use case laws as a guide but are not obligated to strictly follow precedents in future decisions[80]. Generalizing, in civil law legal systems, *jurisprudencia* corresponds to two elements: the repetition of similar cases decided in the same way, and the persuasive character of this source of law[81]. These elements seem to outline a system whereby judicial precedents can enter the legal system of these countries as a "soft obligation"[82].

Turning to the application of the principle of *stare decisis* in Argentina, Although the principle is not explicitly prescribed in any written Argentine text for court decisions within the country's legal system, this does not necessarily hinder its potential application[83]. In fact, the doctrine of *stare decisis* is generally not codified in the Constitutions of common law countries. Moreover, the Argentine Supreme Court has expressly referred to the principle of *stare decisis* and its binding effect on several occasions. Among these, we find in the Baretta v. Provincia de Córdoba case[84] in which the Supreme Court stated that it would be highly inconvenient for the Argentine civil society if precedents were not duly considered and followed[85].

Regarding the adoption of 'horizontal *stare decisis*', in Argentina a Court would seem free to adopt a different position than that taken in its own precedents as long as the decision is rational, consistent, and not capricious[86]. According to the Argentine Supreme Court's historical record, it has often demonstrated a willingness to deviate from its own established legal precedents in cases where there have been shifts in the composition of the Court's majority or in response to changes in the country's legal, social, political, or economic landscape[87]. Regarding the application of the 'vertical *stare decisis*', while in civil law systems,

[78] Garay AF, [1991] (n.3).
[79] Id [78].
[80] Carlos S. Nino, *Introduccion al Analisis del Derecho* (editorial astrea 2d ed. 1980).
[81] Garay AF, [2019] (n.71).
[82] Legarre S. & Handy C.R., [2021] (n.1).
[83] Id [82].
[84] *Ekmekdjian v. Sofovich* [1939] C.J.N. 183 Fallos 409, [1939] 183 Fallos 409.
[85] Garay AF, [1991] (n.3).
[86] Id [85].
[87] Garay AF, [1991] (n.3).

Courts usually decide cases from scratch without considering previous decisions, in Argentina, both federal and provincial Courts tend to look at earlier judgments before issuing their own.

If an Argentine Court wishes to make a decision that differs from the one established by the precedent, it may do so only if it has valid reasons to support its decision. It is important to note that, in order to justify a decision that is not in line with the precedent set by the Argentine Supreme Court, a lower Court must demonstrate that there are new arguments that have arisen in relation to the case under analysis[88]. This option is not available in countries that strictly follow vertical *stare decisis*, meaning that lower Courts cannot deviate from a higher Court's doctrine, even with new arguments present. Although lower Courts theoretically can deviate from higher Court decisions, practical constraints often limit this possibility.

Additionally, the judiciary system is characterized by fragility generated by the uncertainty caused by the frequent replacement of justices, which sometimes includes the entire staff of the Supreme Court[89]. It is important to note that while historically the frequency with which Supreme Court justices are changed in the United States is less than that of Argentina, even a change in the composition of the US Supreme Court can lead to different interpretations of the precedents, particularly on issues that are divisive within society.

One reason for the confusion in the application of stare decisis in Argentina stems from the fact that Argentine judges were trained under a civil law legal system. This makes them ill-equipped and unprepared to properly adopt the technique of precedent in their decisions[90]. Instead, judges in Argentina are trained to rely on statutes rather than decisions. In conclusion, although the Supreme Court and, in some cases, lower Courts have adopted various mechanisms belonging to the common law system, the confusing and inconsistent application of these techniques to a civil law system such as Argentina has generated significant uncertainty[91]. In addition, since the doctrine of precedent and *stare decisis* are neither codified nor inscribed to any particular doctrine or theory, judgment toward how courts have been using these tools is difficult to express[92].

[88] Garay AF, [1991] (n.3).
[89] Id [88].
[90] Genaro R. Carrio, *Recurso de Amparo y Tecnica Judicial* (abeledo-perrot 2d Augmented ed. 1987).
[91] Garay AF, [2019] (n.71).
[92] Id [91].

1.4 Federal systems: Similarities and Differences Between Argentina and The United States

According to William Riker, a federal Constitution can be called such if two levels of government rule over a nation and a population, both with at least one area of autonomous rule and with guarantees of protection of their autonomy[93]. Federalism grants regional units significant political and economic autonomy, which is why it has been used with great success in the case of large countries with diverse regions and populations[94]. Sub-units in federalism typically only have residual powers, but in other cases, powers are equally enumerated between the two levels of government or even in favor of states with residual clauses for the central authority[95]. Sovereignty in a federation is not concentrated in one level of government but shared between central government and federated units. Additionally, the federal Constitution reserves specific powers for each level of government. The Constitution usually provides that some powers are exercised exclusively by the central government, others are reserved for regional units, and some powers are left to the joint exercise of both units[96].

Starting with the history of federalism in the United States, the United States was colonized by Great Britain, which historically granted its colonies substantial freedoms to govern themselves[97]. Under their rule, Great Britain always employed a form of federalism to grant autonomy to colonies that were part of a single nation. After gaining independence from British rule, the thirteen colonies declared themselves free and independent. However, following the rise of hostilities between them, the states recognized the importance of working together to function adequately. Federalism was therefore established as the form of organization for the United States territory with the drafting and ratification of the Constitution of 1787.

When it was decided that the government of the United States would be the result of the union between a powerful national government on the one hand and a relevant role on the part of the states on the other, the delegates spent the rest of the Constitutional Convention of Philadelphia on how to ensure this balance. One solution was found in the role of the Senate. As each branch at the national level had in the system of checks and balances a way to defend

[93] Daniel Halberstam, 'Federalism: Theory, Policy, Law', *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).
[94] Keith S. Rosenn, 'Federalism in the Americas in Comparative Perspective' (1994) 26 U Miami Inter-Am L Rev 1.
[95] Bifulco R, [2019] (n.4).
[96] Rosenn KS, [1994] (n.94).
[97] Id [96].

itself and limit other branches' powers, the states were given the ability to appoint the second branch of the executive to balance the national government.

In addition to this element, including the Tenth Amendment of the Bill of Rights to the Constitution, the framers assured that the states' rights would be protected. The Tenth Amendment gives the national government limited powers, leaving the rest of the functions to the states or the people. Although the constitutional text appears to leave broad powers to the federated states, the federal government's powers have been interpreted broadly, generating potential overlaps with state-level authorities. The motivations for limiting federated state powers are diverse and primarily rooted in the need for consistent application of laws and a homogenous protection of human rights. This is especially evident in cases such as reproductive rights, where referring the issue to individual states can result in inconsistent protection of citizens' rights.

Turning to Argentina, the Latin American country's federalism has very different roots from those of its North American counterpart. Latin American countries were colonized by Spain and Portugal, highly centralized countries that granted their colonies minimal freedoms to govern their internal affairs[98]. In Latin America, federalism was therefore seen as a compromise to decentralize historically highly concentrated governments over large territories. After gaining independence from Spain, between 1810 and 1816, the local organizations met to decide on the future form of state of the independent colonies[99]. Here began a lengthy discussion between the "*unitarios*", who were in favor of a centralized government based in Buenos Aires, and the "f*ederales*," the promoters of the federal system[100]. This discussion resulted from the several influences to which the Argentinians were subjected. Those more inclined towards a centralized government, especially because this was the system they already knew, were influenced by the ideas of Montesquieu and the French Revolution and the principles of Liberal Europe[101]. On the other hand, the *caudillos* who had emerged from the Argentinian civil wars were strongly inclined toward autonomous rule[102].

This conflict dominated the first part of the nineteenth century, bringing civil wars and anarchy to the territory. During this time, the political elites of Buenos Aires attempted through two constitutional initiatives, one in 1819 and the other in 1826, to organize the national

[98] Rosenn KS, [1994] (n.94).
[99] Alfredo M. Vítolo, 'The Argentine Federal Legislative System' *Federalism and Legal Unification: A Comparative Empirical Investigation of Twenty Systems* (Springer Science, 2014).
[100] Vítolo AM, [2014] (n.99).
[101] Garay AF, [2019] (n.71).
[102] Id [101].

government as a centralized and united regime[103]. Eventually, the *federales* prevailed, leading to the adoption of the 1853-1860 federal Constitution[104].

The Constitution, which was later amended several times, most recently in 1994, remains in effect to this day and explicitly dictates that the Argentine nation adopts a federal, representative, republican form of government[105]. Despite establishing a federal system, it grants extensive powers to the President, the national Congress, and federal Courts, which ultimately favors the centralization of the government[106].

As was already stated in a previous section, according to José B. Gorostiaga, when the Constitution was written, the only existing federation was that of the United States of America. Therefore, in his opinion, it can be confidently stated that the architects of the Argentine federal system used the US model as a foundation[107].

By observing the constitutional texts of the two countries what can be stated is that the final results achieved by the two countries were substantially different. The Argentine Constitution of 1853 upholds the principle of provincial autonomy and respect for the diverse identities within the country. However, it also includes mechanisms that restrict provincial power and limit the federal nature of the Latin American country[108]. Regarding the organization of federal judicial power, the Argentine Constitution establishes a system quite similar to that of the United States. As in the United States, the Argentine Constitution in Article 108 stipulates that the Argentine judicial system consists of federal and provincial Courts with a national Supreme Court at the apex of the judicial system[109]. This similarity between the two countries is also observed in the supremacy clause. In the case of the United States, constitutional supremacy is made explicit in Article VI at Clause 2, in which it is stated that the Constitution and the federal laws derived there are the laws that govern the whole nation[110]. Article 31 of the Argentine Constitution mirrors the supremacy clause of the United States with a slight modification. In Argentina, the Constitution, federal laws, and international treaties are all

[103] Vítolo AM, [2014] (n.99).
[104] While the Constitution was enacted in 1853, the largest province, Buenos Aires, did not participate in the Constitutional Convention, and de facto seceded from the federation. When in 1859, it re-joined the federation, the 1853 federal Constitution was subject to a broad reform the following year, giving rise to what is now known as the "1853/1860 Constitution".
[105] Vítolo AM, [2014] (n.99).
[106] Garay AF, [2019] (n.71).
[107] Vítolo AM, [2014] (n.99).
[108] Id [107].
[109] Garay AF, [2019] (n.71).
[110] Id [109].

considered the supreme law of the land. Argentina places particular emphasis on the role of international treaties in protecting human rights in its constitutional framework.

Turning to the analysis of legislative power, in a federation this is shared between the federal Congress and the provincial legislative powers. According to Section 121 of the Argentine Constitution, the federal Congress has specific functions and powers, while the provinces retain all other powers that have not been delegated to the federal legislature[111]. In this way, the text establishes that the residual legislative power is left to the provinces. This wording echoes the language of the Tenth Amendment of the United States, which reserves to the provinces all those powers that are not delegated to the federal government.

However, Argentina's system of government leans toward federal powers, which sets it apart significantly from the United States system of division of competencies. This characteristic has led to categorizing Argentina as a highly centralized federation[112]. The United States, on the other hand, grants more powers to the state governments, allowing them a greater degree of self-government than the Argentine provinces[113].

In Argentina, the federal Congress not only has the power to enact federal law in specific areas among which we find customs, interstate matters, foreign affairs, immigration and citizenship, trademarks, patents, and all required laws to accommodate the federal interest in federal areas within each province[114]. But Article 75 Section 12 provides that the Argentine Congress can enact laws in civil law, commercial law, criminal law, mining, labor, and social security. It is vital to point out this feature of the Argentine system since laws regarding abortion fall under criminal law[115]. In contrast to the Argentine case, the U.S. federal system limits the legislative powers of Congress, and to enact laws in areas reserved for the states, Congress must use shortcuts such as those granted through the commerce clause or the taxation system[116].

In summary, while the Argentine Constitution reserves the powers to enact laws on criminal and family matters to the federal government, the United States Constitution grants these powers to the states through the residual power clause. However, it is worth noting that in the United States, the federal government often interferes with state jurisdiction in these areas, just as the provinces in Argentina sometimes encroach upon the domain of criminal law[117].

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[111] Rosenn KS, [1994] (n.94).
[112] Vítolo AM, [2014] (n.99).
[113] Linares Quintana SV, [1949] (n.36).
[114] Vítolo AM, [2014] (n.99).
[115] Garay AF, [2019] (n.71).
[116] Garay AF, [1991] (n.3).
[117] Rosenn KS, [1994] (n.94).

It is worth underlying that Argentina has also undergone decentralization in certain areas, particularly in the healthcare sector, where the provinces have been given more responsibilities than what is mandated by the Constitution[118]. This is an important consideration, especially when discussing the topic of safe and free abortions. The decentralization trend in this sector has brought about significant changes in how services are delivered[119]. When it comes to reproductive rights, this phenomenon has created situations of significant disadvantage for women residing in more conservative provinces, particularly in the distribution of contraceptives. Uneven coverage of women's rights among different provinces does not necessarily indicate that decentralization worsens women's rights. However, it confirms the theory that women's opportunities and choices become constrained when subunits are more conservative[120].

1.5 Reproductive Rights as Human Rights: Application of the Human Rights Framework in Argentina

Before examining the historical, political, and legal context of reproductive rights in Argentina, it is necessary to review the international treaties that have incorporated these rights in international law. This approach is crucial since laws that restrict, obstruct or prohibit individuals from accessing reproductive health services may be challenged for violating human rights protected by international conventions[121]. Since international treaties, along with the Constitution and federal laws, are the highest law of the land, the Argentine authorities have a responsibility to abide by the legal instruments they have ratified[122].

The history of reproductive rights in the international arena begins in 1968 with the International Human Rights Conference in Tehran. During this conference, the right of parents to decide the number of their children was established for the first time[123]. In the 1970s, several

[118] Bonnie Shepard, 'The "Double Discourse" on Sexual and Reproductive Rights in Latin America: The Chasm Between Public Policy and Private Actions'(2000) 4 Health and Human Rights 110.
[119] Id [118].
[120] Id [118].
[121] Barbara Sutton & Elizabeth Borland, 'Abortion and Human Rights for Women in Argentina' (2019) 40 Frontiers: A Journal of Women Studies 27.
[122] ARTÍCULO 31.- Esta Constitución, las leyes de la Nación que en su consecuencia se dicten por el Congreso y los tratados con las potencias extranjeras son la ley Suprema de la Nación; y las autoridades de cada provincia están obligadas a conformarse a ella, no obstante cualquiera disposición en contrario que contengan las leyes o constituciones provinciales, salvo para la Provincia de Buenos Aires, los tratados ratificados después del pacto de 11 de noviembre de 1859.
[123] Natalie Sedacca, 'Abortion in Latin America in International Perspective: Limitations and Potentials of the Use of Human Rights Law to Challenge Restrictions' (2017) 32 Berkeley J Gender L & Just 109.

advancements were made in women's rights, such as gender-based violence[124]. Activists later employed the tools and platforms developed during that time to initiate mobilization towards more contentious issues, such as reproductive rights. The period between 1976 and 1985 was designated as the United Nations Women's Decade, during which several world conferences resulted in a series of demands concerning women's human rights[125].

Within this progressive landscape, 1981 was a significant year for women's rights as it marked the entry into force of the Convention on the Elimination of All Forms of Discrimination against Women[126]. This Convention contains specific articles, such as 10(h), 11(f), 14.2(b), and 16.1(e), that address women's health and reproductive rights[127]. In addition, the Convention explicitly requires that women are guaranteed the right to information with respect to reproductive health and family planning[128]. The Convention established The Committee on the Elimination of Discrimination against Women to protect women's rights. The committee is made up of independent experts who monitor the implementation of the convention. Their role is to advance women's reproductive rights by providing recommendations or standards to state parties to the Convention[129]. In any case, the treaty remains particularly controversial since, although 175 countries ratified it, many countries made numerous reservations at the time of ratification. Of these reservations, twenty-four relate to articles specifically addressing reproductive freedom[130]. It is worth mentioning that despite Nicaragua and El Salvador's strict abortion laws, both countries ratified CEDAW in 1981[131]. However, the Convention's effectiveness and the monitoring body's ability to ensure reproductive rights implementation remain uncertain.

Two other pivotal events that led to the global commitment to advancing women's rights were the Cairo International Conference on Population and Development in 1994 and the Beijing Fourth World Conference on Women in 1995. Regarding the first of these two conferences, scholars have mixed opinions about its impact on the global landscape. While many expected the Cairo Conference to have little effect on the participating nations, others

[124] Sedacca N, [2017] (n.123).
[125] Sutton B & Borland E, [2019] (n.121).
[126] UNGA 'Convention on the Elimination of All Forms of Discrimination against Women' UN GAOR, 34th Session Supp. No. 46, U.N. Doc. A/34/46 (1979).
[127] Dina Bogecho, 'Putting It to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health' (2004) 13 S Cal Rev L & Women's Stud 229.
[128] Rebecca J. Cook, 'International Human Rights and Women's Reproductive Health' (1993) Studies in Family Planning 37.
[129] Cook RJ, [1993] (n.128).
[130] Bogecho D, [2004] (n.127).
[131] Sedacca N, [2017] (n.123).

believed that it was the beginning of a movement to change laws and social policies on abortion, contraception, and women's rights in developing countries[132].

By the end of this conference, a general consensus emerged in Latin America and worldwide on recognizing reproductive rights as outlined in the program established during the discussions held in Cairo[133]. The final agreement includes the right of couples and individuals to choose the number of children to have, the right to information in making such decisions, and considering the issue of gender-based discrimination, the conference promoted women's empowerment, including their ability to make decisions regarding their reproductive and sexual health[134]. In any case, when asked about the application of these rights to adolescents, many delegations asserted that the rights of parents surpassed those of adolescents[135].

Finally, after a lengthy debate that saw the Vatican and the historically Catholic countries on one side, including Latin American one, and the developed countries on the other, as to whether or not abortion should be included in the Conference program, this issue was left to domestic jurisdiction[136]. This decision embodies the difficulty of tackling the contested topic of legal abortion at an international level. In fact, following the Cairo conference, the only regional instrument that emerged in support of the right to abortion came from Africa with the Maputo Protocol. An international treaty adopted by the African Union in 2003 aimed at promoting and protecting women's rights in Africa. Although this progressive document was adopted, distinctions between formal laws and actual access remain a significant problem in East Africa, where unsafe abortions remain prevalent despite permissive laws[137].

The Fourth World Conference on Women, held in Beijing in 1995, specifically examined women's rights as human rights[138]. The conference affirmed that women's rights are an integral part of human rights and called for the elimination of all forms of discrimination against women, whether in public or private spheres. The discussions held at the conference confirmed what had been previously discussed in Cairo, where it had already been considered that reproductive rights should be protected and guaranteed despite religious and cultural differences[139]. In addition to this, the Beijing conference emphasized the need for women to have the right to freely decide every aspect regarding their sexuality and their desire to have

[132] Gregory M. Saylin, 'The United Nations International Conference on Population and Development: Religion, Tradition, and Law in Latin America' (1995) 28 Vand J Transnat'l L 1245.
[133] Shepard B, [2000] (n.118).
[134] Id [133].
[135] Id [133].
[136] Sedacca N, [2017] (n.123).
[137] Id [136].
[138] Bogecho D, [2004] (n.127).
[139] Id [133].

children. At last, the conference culminated in the endorsement of the Beijing Declaration and Platform for Action. One of the components of this document was an appeal to governments to explore alternatives to punitive measures in cases related to illegal abortion[140]. Argentina not only participated in the conference but contributed to the discussions, negotiations, and agreements that led to the adoption of the Beijing Declaration and Platform for Action[141].

Abortion legal scholars Cook and Dickens wrote about how, following the 1995 Beijing conference, 187 members of the United Nations recognized that the health impact of unsafe abortion is a major public health concern[142]. Likewise, it is asserted that although many countries were adopting progressive views to tackle the abortion issue, others were enforcing moral prohibitions on abortion, going so far as to include criminal sanctions[143]. Despite the lack of well-defined positive outcomes in international instruments, recognizing reproductive rights as a human right has legitimized the human rights framework across cultures[144]. The proliferation of human rights discourses considered as a shared language across national borders and cultures indicates the need to investigate whether and how this framework resonates locally in national contexts.

To this end, we now turn to look at how the framework of reproductive rights as human rights impacted the evolution of these in Argentina, questioning its effectiveness. First, it is essential to note that reproductive rights and practices are fiercely debated in Latin America. The majority of citizens in Latin America identify themselves as Roman Catholics. Due to this, the Church holds significant power in the rejection of sexual and reproductive rights[145]. This is because the Church's hegemony considerably influences state policies by imposing its moral vision on legal codification[146]. As a result, the distinction between what is considered immoral and illegal becomes unclear. This causes a double negative effect; firstly, feminist networks that consider the highly hostile climate around abortion try to focus their campaigns on those issues that are less congested and less adverse from the Church. At the same time, legislators avoid exposing themselves to controversial issues as they risk political defeat if they do so[147].

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[140] María José Barajas & Sonia Corrêa, 'Legal and safe abortion: a global view seen from Latin America' (2018) SexPolitics: Trends & Tensions in the 21st Century.
[141] UN 'Report of the Fourth World Conference on Women Beijing' (4-15 September 1995) A/CONF.177/20/Rev.
[142] Bernard Dickens & Rebecca J. Cook, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 Human Rights Quarterly.
[143] Id [142].
[144] Sutton B & Borland E, [2019] (n.121).
[145] Shepard B, [2000] (n.118).
[146] Id [145].
[147] Id [145].

Although many Argentines are Catholic, contraceptive use is still common, reflecting a paradox in the interpretation of Latin American reproductive rights, known as "*doble discurso*". This expression, usually applied to individuals, corresponds to a practice for which people openly and publicly espouse repressive sociocultural norms while ignoring them in their private lives[148]. This paradox is confirmed by a study held in Colombia, which showed how Catholic priests give absolution to women who have had abortions even though the Church would require ex-communication for them[149].

Women's activism in the protection of human rights has historically been quite present in Argentina, even though it has not always been supported and sustained by its civil society. During the civil war of 1976-83, a military dictatorship perpetrated extensive human rights violations in the country, including torture, killings, disappearances, and mass imprisonment[150]. During and immediately after the fall of the dictatorship, a group of women extensively employed human rights discourse to denounce the dictatorship. 'The Mothers of Plaza de Mayo' and 'Grandmothers of Plaza de Mayo' were groups of women who were relatives of men who disappeared during the military dictatorship[151]. During these protests, the women exploited a traditionalist and conservative image to demonstrate against the regime. It is in doubt, then, whether the symbolic representation of the mothers obstructs activism in the matter of abortion since women's activism in Argentina was related to the role of women in their role of mothers who would do anything to defend their children, especially from death[152].

During the 1980s, several women's reproductive rights groups emerged in Argentina. The birth of these movements should be seen in the context of a broader struggle to promote social justice, democracy, and gender and sexual rights in the country[153]. For this reason, the democratic election of Raúl Alfonsín in 1983 was a significant victory, as it marked the first recognition of the human rights abuses committed during the years of dictatorship. With the subsequent elections of Néstor in 2003 and his wife Cristina Fernández in 2007, Argentina found itself in a new wave of post-neoliberal policies focused on expanding individual rights, specifically those concerning sexuality and gender[154]. The language of human rights became

[148] Shepard B, [2000] (n.118).
[149] Id [148].
[150] Sutton B & Borland E, [2019] (n.121).
[151] Id [150].
[152] Lynn M. Morgan, 'Reproductive Rights or Reproductive Justice? Lessons from Argentina' (2015) 17 Health and Human Rights 136.
[153] Sutton B & Borland E, [2019] (n.121).
[154] Daniel Jones, Lucía Ariza and Mario Pecheny, 'Sexual Rights, Religion and Post-Neoliberalism in Argentina (2003–2015)' (2018) 8 Religion and Gender 84.

well-known and intensely employed by political actors to express their goals and identities. As a result, these events had a profound impact on the way reproductive rights are discussed today.

To this day, abortion legalization movements extensively use human rights language to counter the claims of religious pro-life organizations. One of the most effective tools the National Campaign has employed is to remind the Argentine government of its obligation to adhere to the international treaties and agreements that ensure the protection of human rights, which the country has agreed to honor[155]. The activists can emphasize that the 1994 Constitution has given these treaties a constitutional hierarchy, making it crucial for Argentina to uphold its commitments. The Campaign statements include regular references to the UN Convention on the Elimination of all Forms of Discrimination against Women, which Argentina has ratified and is also part of its optional protocol[156].

Coming back to the human rights framework, the Campaign in the law brought before Congress in 2016 employed the *lingua franca* to expand its chances of success. The rationale behind the law was based on the assumption that sexual and reproductive rights are human rights and, as such, should be reckoned as basic rights of every person[157]. Even though the law failed, the relation between reproductive rights and human rights has been brought to the attention of the Congress. Meanwhile, national courts' decisions on the issue began to be increasingly informed by international normative arguments[158]. Hence, throughout Latin America, including Argentina, difficulties in obtaining legislative reforms due to anti-abortion forces gradually pushed pro-abortion rights movements to turn to the Courts to obtain the decriminalization of abortion[159].

Many motivations exist for employing the human rights framework to plead reproductive rights causes in Argentina. One of the most powerful motivations to support such a paradigm emerges from the strength of the human rights rhetoric within the country. From a feminist standpoint, the human rights framework's power comes from its capacity to legitimize political demands by virtue of its political acceptance[160]. In this regard, it should be noted that although civil society suffers from the "*doble discurso*" paradox, it has always expressed a high

[155] Sutton B & Borland E, [2019] (n.121).
[156] Id [155].
[157] Id [155].
[158] Barajas MJ & Corrêa S,[2018] (n.140).
[159] Id [158].
[160] Elisabeth Jay Friedman, 'Bringing Women to International Human Rights' (2006) Peace Review: A Journal of Social Justice.

level of acceptance and support for human rights in a wide variety of issues, as well as showing extensive support for the role of international bodies such as the United Nations[161].

Another benefit of using human rights in the reproductive rights context is creating alliances with other organizations already familiar with the discourse. This is due to the human rights context being seen as a cross-cutting tool for various movements and causes; for example, the Campaign highlights various activist movements with different focuses, but with which they have affinities, such as LGBTQ+ organizations[162]. Of all these organizations, it is important to note that in the last few years, the Campaign has garnered the support of the Mothers of Plaza de Mayo, women activists acclaimed by civil society[163]. Internationally, the human rights language unites Latin American countries that have experienced similar authoritarian governments[164]. Through shared regional experiences of state violence, the human rights framework can have regional resonance, facilitate alliance building, and pressure elected governments by arguing that, after the dictatorial past, decriminalization and legalization of abortion is a debt that democratic governments in South America owe to their citizens[165].

Another reason for the use of the human rights frame is the possibility of delegitimizing the discourses of anti-abortion groups. Pro-life groups have often used human rights language to argue in favor of protecting the fetus and opposing women's right to terminate their pregnancies. However, reproductive rights activists have labeled them as "anti-rights" by using the same language that pro-life groups employ and turning it against them[166].

In their demands, the Campaign calls for active intervention by the welfare state. By this, the groups require the state to not only decriminalize abortion but also to grant universal access to public services[167]. Reproductive rights are not just considered as negative rights, which entail the non-interference of the state, but also as positive rights, which require the state to take affirmative actions to make safe abortion services genuinely accessible[168]. Considering that Argentina already has a public health system, the Campaign calls for women's health

[161] Sutton B & Borland E, [2019] (n.121).
[162] Id [161].
[163] Id [161].
[164] Sutton B & Borland E, [2019] (n.121).
[165] Campaña, 'Aborto legal, una duda de la democracia en sudamérica' (*Aborto Legal*, 2011) <http:// www.abortolegal.com.ar /?p = 1739> accessed 11 May 2024
[166] Sutton B & Borland E, [2019] (n.121).
[167] Campaña, 'Fundamentos proyecto de ley y proyecto de ley' (*Aborto Legal*, 2011) < https://abortolegal.com.ar/wp-content/uploads/2011/08/Fundamentos-y-Proyecto-Ley-IVE.pdf> accessed 11 May 2024
[168] Sutton B & Borland E, [2019] (n.121).

services, including abortion, to be free of charge. In this way, the human rights paradigm enables a link with economic and social justice by expanding access to reproductive rights beyond those who can pay for the service[169]. The idea beyond this reasoning is that women's reproductive rights are essential to allow the exercise of other rights related to democratic and economic participation in society. In other words, reproductive rights are not the entirety of women's rights but rather a prerequisite for them[170].

To conclude, while some scholars consider the human rights paradigm to be the most fitting for legalizing reproductive rights in Latin America, others disagree. Lynn Morgan proposes that activism on abortion should move toward reproductive justice. This is because, due to the extreme use of human rights language on both sides of the reproductive rights conflict, such language seems to have lost its meaning[171]. In any case, Morgan's proposal to move to reproductive justice was not met with enthusiasm by Argentine anthropologists and feminists who remain firmly anchored in the human rights framework.

1.6 Reproductive Activism in the United States: From 'Pro-Life' to Reproductive Justice

Contrary to Argentina, which has historically embraced the international human rights framework, the United States government has shown ambivalence, if not hostility, towards it. As a result, the impact of international law on reproductive rights within the US system has been limited, with the focus of the U.S. being on civil rights instead[172]. This perspective underscores a limited understanding of human rights, overlooking the multifaceted dimensions of social and economic justice, particularly those affecting marginalized groups like women and minorities. It perpetuates the dangerous illusion that rights violations are exclusively an external issue, failing to acknowledge the pressing internal challenges and injustices that demand urgent attention and action[173].

An alternative strategy is necessary due to the potential strategic drawbacks that could emerge from applying the human rights framework in the United States. In fact, the United States has not ratified several international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women. Even considering the

[169] Sutton B & Borland E, [2019] (n.121).
[170] Sedacca N, [2017] (n.123).
[171] Morgan LM, [2015] (n.152).
[172] Zakiya Luna, 'From Rights to Justice: Women of Color Changing the Face of US Reproductive Rights Organizing' (2009) 4 Societies Without Borders 343.
[173] Id [172].

international instrument protecting human rights that the United States has signed, it has prevented its citizens from securing their human rights through legal claims[174].

The conflict between supporters and opponents of abortion, in the United States has pitted two groups against each other: pro-life and pro-choice groups. The pro-life movement is rooted in the belief that human life begins at conception and should be protected from that moment onward[175]. The pro-life group, therefore, believes that the fetus is a life and, as such, abortion should be criminalized. These groups support their position using claims rooted in the morality and sanctity of life.

The position of pro-choice groups asserts that the fetus is not life and therefore policies on such issues should be directed toward protecting a woman's ability to have control over her own body and life[176]. Pro-choice advocates further argue that imposing restrictions on abortion or reproductive health care infringes upon a woman's autonomy, dignity, and right to self-determination. Some pro-choice activists take a more controversial stance by arguing that the pro-life movement's mistake is not in acknowledging the fetus as a life but in using that assertion to justify criminalizing abortion[177].

The concrete actions of the pro-choice organizations involve financial support for women from poor social classes in their demands for sterilization or contraceptives[178]. The position that such groups take on contraceptives is sometimes controversial. In certain circumstances, pro-choice groups have continued to support the use of certain contraceptives even though they were considered dangerous or potentially dangerous to women's health, bringing forth the argument that women should be allowed to use contraceptives despite the consequences[179]. Planned Parenthood and NARAL[180] have opposed restrictions on the abuse of sterilization, despite thousands of Black women being sterilized without their consent[181]. According to these pro-choice groups, limiting such practices would interfere with women's right to choose.

Many scholars and activists have criticized the paradigm created by the opposition of pro-life and pro-choice groups. This is because the idea of "choice" refers to a strongly

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[174] Luna Z, [2009] (n.172).
[175] Andrea Smith, 'Beyond Pro-Choice versus Pro-Life: Women of Color and Reproductive Justice' (2005) 17 NWSA Journal 119.
[176] Id [175].
[177] Id [175].
[178] William Saletan, *Bearing Right* (*Univ of California Pr*, 2003).
[179] Smith A, [2005] (n.175).
[180] Planned Parenthood and NARAL Pro-Choice America are both prominent organizations advocating for reproductive rights and women's healthcare in the United States.
[181] Jennifer Nelson, *Women of Color and the Reproductive Rights Movement* (*NYU Press*, 2003).

individualistic concept that does not consider the social, economic, and political conditions that may influence the choices women are asked to make[182]. The major criticism of the two camps is that their positions are more similar than different. One aspect they share is that neither confers inherent rights on women. While the pro-life position is to put the rights of the fetus above those of women, the pro-choice position allows women to make choices freely if they have the financial means to do so, but without granting them rights over their bodies and lives regardless of class[183]. As capitalist systems give more choices to those with greater resources, governments can withdraw funds that grant poorer women the respect of their reproductive rights. This is what has happened in the United States with the Hyde Amendment, a federal law first passed in 1976, prohibiting the use of federal funds to finance abortions except in cases of sexual assault, incest, or threat to the life of the mother[184]. Despite opposition from pro-choice activists, the federal Government has not acted to eliminate this controversial law, highlighting a lack of meaningful political action by reproductive rights advocates.

The positions taken by both pro-life and pro-choice groups appear to reinforce gender and racial hierarchies that especially marginalize women of color in the United States. These women often spoke of the hostility they faced from mainstream pro-choice movements[185]. They frequently describe themselves as frustrated by the situation, stemming from the fact that the 'choice rhetoric' used by the mainstream movement applies only to a small number of women who are privileged enough to have multiple choices in the field of reproductive rights. Beyond that, Andrea Smith argues that the pro-choice/pro-life dichotomy disregards other groups of women beyond those of color, including poor women and individuals with disabilities, because it does not picture an accurate representation of their experiences[186].

Frustrated by the individualistic approach of the pro-choice framework, a growing number of organizations created and led by women of color have emerged to expand the goals and scope of reproductive rights in the United States. These groups advocate for a conception of reproductive rights that focuses on individuals but, at the same time, takes into account the collective rights of the communities to which women belong[187].

In the United States, there have been several attempts to create a national coalition for the reproductive rights of women of color; the latest attempt in this regard is the SisterSong

[182] Kimala Price, 'What Is Reproductive Justice? How Women of Color Activists Are Redefining the pro-Choice Paradigm' (2010) 10 Meridians 42.
[183] Smith A, [2005] (n.175).
[184] Id [183].
[185] Price K, [2010] (n.182).
[186] Smith A, [2005] (n.175).
[187] Luna Z, [2009] (n.172).

Women of Color Reproductive Health Collective, created in 1997. These groups, defining themselves as reproductive justice movements, overtake the singular focus on abortion of pro-choice movements to embrace a concept of choice that also considers social justice[188].

The term 'reproductive justice' was coined in 1994 by a Black woman immediately after the Cairo Conference on Population and Development[189]. The idea behind the creation of that term was to export and adapt the international norms that had been defined during the conference to the domestic context of the United States. The reproductive justice movement aims to ensure the well-being of women and girls in all aspects of their lives, including physical, mental, and spiritual health. This well-being can only be achieved when women and girls have access to economic, social, and political power and resources that enable them to make healthy choices regarding their bodies, sexuality, and reproduction for themselves, their families, and their communities[190].

Importantly, reproductive justice groups support legal abortion and the reproductive right of women not to have children if that is the decision they reach independently. Still, they support women's right to have and parent their children since women belonging to certain communities may be deprived of these rights in the United States[191]. Moreover, the activists specify that reproductive justice is not a doctrine that replaces other terms typical of the pro-choice/pro-life debate but adds to these by broadening the scope of the activism that preceded it[192].

The strategy of the new wave of activism began to show clear signs of success starting in 2010, when mainstream reproductive rights groups began to embrace the logic of reproductive justice within their programs[193]. For example, Planned Parenthood modified its message, recognizing that the idea of pro-choice failed to capture a range of issues that were critical for women belonging to vulnerable communities[194]. Therefore, the organization complemented messages based on reproductive choice with others in favor of a broader range of issues, including adequate access to health care and increased access to contraception. In

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[188] Price K, [2010] (n.182).
[189] Id [188].
[190] ACRJ, 'A New Vision for Advancing Our Movement for Reproductive Health, Reproductive Rights and Reproductive Justice' (*Forward Together*, 2017) < https://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-A-New-Vision.pdf> accessed 11 May 2024.
[191] Price K, [2010] (n.182).
[192] Id [191].
[193] Melissa Murray, 'Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade' (2021) 134 Harv L Rev 2025.
[194] Jackie Calmes, 'Advocates Shun "pro-Choice" to Expand Message' (*The New York Times*, 29 July 2014) <https://www.nytimes.com/2014/07/29/us/politics/advocates-shun-pro-choice-to-expand-message.html> accessed 11 May 2024.

addition, recent judicial battles, such as June Medical Services v. Russo[195], have seen reproductive justice issues explicitly invoked, highlighting the strength of the new doctrine[196].

This strategy has also led anti-abortion groups to leverage minority community rights and the Black Lives Matter movement to argue that *unborn* Black Lives Matter[197]. A group called Life Education and Resource Network, a well-known antiabortion organization, asserted that the Black Lives Movement could not effectively advocate for community rights to life as long as it continued to have relationships with groups supporting abortion rights[198]. Anti-abortion groups have thus used arguments echoing the themes of discrimination and inequality to advocate for legislation banning abortion on the grounds of "trait selection," such as sex, race, or disability. Such application of reproductive justice may create an absurd paradox whereby disability rights advocates find themselves aligned with pro-life groups[199].

1.7 Abortion laws: a Global Perspective Showing Progressive and Regressive Trends

As mentioned in the previous sections, the right to abortion is one of the most debated topics related to reproductive rights. The complexity of this issue is further compounded by the differing legal systems and regulations employed by different countries, and even within countries that are related to the legalization of abortion. To tackle this discrepancy, the United Nations treaty bodies have already repeatedly condemned absolute bans on abortion as incompatible with international norms on the protection of human rights[200]. These bodies have also urged countries to abolish punishments imposed on women or girls who undergo abortions or those imposed on healthcare providers who offer abortion services[201]. Unsurprisingly, despite this, legal reforms aimed at ensuring women's right to make autonomous decisions about abortion have been implemented slowly and subject to far more controversy than other legal changes aimed at ensuring women's political, civil, and economic rights[202].

An overview of abortion laws globally estimated by Berer in 2017 informed that abortion was legal in ninety-eight percent of the world's countries to save mothers' lives, an

[195] *June Medical Services v. Russo* [2020] US Supreme Court 591, [2020] 140 S Ct 2103.
[196] Murray M, [2021] (n.193).
[197] Pro-Life America, 'Preborn Black Lives Matter' (*Students for Life*, 22 July 2020) <https://prolifeamerica.org/preborn-black-lives-matter/> accessed 11 May 2024.
[198] Murray M, [2021] (n.193).
[199] Id [198].
[200] Sutton B & Borland E, [2019] (n.121).
[201] Id [200].
[202] Barajas MJ & Corrêa S, [2018] (n.140).

encouraging percentage. However, the data were less promising when other reasons for the decision to abort were considered. In the case of rape, sexual abuse, and incest, the percentage dropped to a forty-three percent, and then to the meager percentages of thirty-three percent and twenty-seven percent, for the respective cases of abortion for economic and social causes and abortion on demand[203]. Regarding the timing for the legalization of abortion, the first country to legalize abortion was the Soviet Union. However, abortion was made illegal during the Second World War. In the post-World War II era, Japan legalized abortion according to a strategy aimed at population control. The legalization of the Japanese empire was shortly followed by legal changes in Eastern Europe, Western and Central Asia, and China[204]. These changes were influenced by the reenactment of abortion by the Soviet Union, which reintroduced the practice in 1955. In the 1960s and 1970s, this wave of legal change reached Western Europe, the United States, Australia, and New Zealand[205]. This first wave of legalization was only the beginning of a broader transformation process.

Over the past two decades, especially in countries of the global South, there has been an intensification of liberalizing abortion reforms[206]. However, although more and more countries are embracing the legalization of abortion, the context around the topic remains complex. In the last thirty years, more than sixty countries and territories have made their abortion laws less strict, while only four states have made them more restrictive[207]. However, the example of the United States stands out, as it shows how easy it is to reverse the liberalization of abortion laws. Hence, it emerges that the trend toward liberalization is not linear: there could also be movements in a restrictive direction, with countries seeking to restrict women's reproductive rights. For example, if one goes back to analyze Eastern Europe, it can be observed how the laws that made abortion legal have either been removed or are under attack in many countries belonging to the group[208]. In the United States, threats to abortion rights have been present since the Supreme Court's 1973 decision legalizing abortion, and they have only intensified in recent years.

Abortion on demand to date is available in seventy-seven countries and maritime territories[209], a significant change when compared to the number in 2017, between the most

[203] Marge Berer, 'Abortion Law and Policy around the World: in Search of Decriminalisation' (2017) 19 Health and Human Rights Journal 13.
[204] Barajas MJ & Corrêa S, [2018] (n.140).
[205] Id [204].
[206] Id [204].
[207] Center For Reproductive Rights,'The World's Abortion Laws' (*Center for Reproductive Rights*, 11 April 2024) <https://reproductiverights.org/maps/worlds-abortion-laws/> accessed 11 May 2024.
[208] Barajas MJ & Corrêa S, [2018] (n.140).
[209] Center For Reproductive Rights, [2024] (n.207).

recent addition to this list is Catholic Argentina legalizing abortion in late 2020. In this way, Argentina became one of the few, if not very few, countries in Latin America to allow abortion up to the 14th week of pregnancy without apparent restrictions. Another extremely Catholic country that has only recently legalized abortion is Ireland. The country, in 2018, following a national abrogative referendum, introduced the Regulation of Termination of Pregnancy Act, with which the Parliament allowed the practice within the first twelve weeks of pregnancy without significant restrictions[210].

For what concerns those countries and island territories that prohibit abortion for any reason, the number of such countries dropped by only one compared to 2017, remaining at twenty-one[211]. It is important to note at this point, that the United States, along with Mexico, are placed in a category of their own, as in the two countries, the legal status of abortion varies widely at the subnational level[212]. When examining the local legislation of the states of the U.S., these ranges from states where abortion is legal upon request to states where abortion is only legal to save the pregnant person's life.

Regarding the legalization of abortion in Latin America, although it appears to be a slow process, so far, it seems to be pushing countries toward legalization. Although Latin America is thought to have come late in adopting laws on the legalization of pregnancy termination practices, in 1926, during the Calles administration, the state of Yucatán in Mexico passed a law that made abortion legal in various circumstances, including in the case of economic necessity[213]. This made Mexico, or at least part of it, the second country to liberalize abortion after the Soviet Union. Moving to more recent trends, in 2007, the federal district assembly in Mexico passed a new law allowing abortion up to the twelfth week of pregnancy[214]. The legalization of abortion was strengthened in 2021 when Mexico's Supreme Court unanimously recognized the constitutional right to legal, safe, and accessible abortion early in pregnancy. Since then, Mexico's states have liberalized their laws to reflect the Court's decision[215]. Looking at another Latin American federation, in 2006, in the Federal Republic of Colombia, the Constitutional Court issued a decision that voided the total abortion ban, recognizing the legal and safe right to abortion in certain circumstances. This decision was based on the principles of gender justice and women's rights to dignity and personal

[210] Center For Reproductive Rights, 'Ireland's Abortion Provisions' (Center for Reproductive Rights, 2024) < https://reproductiverights.org/maps/provision/irelands-abortion-provisions/> accessed 26 August 2024.
[211] Id [210].
[212] Id [210].
[213] Barajas MJ & Corrêa S, [2018] (n.140).
[214] Id [213].
[215] Center For Reproductive Rights, [2024] (n.207).

autonomy[216]. Using human rights to confirm this decision increased the relevance of the decision and resulted in implementing adequate means and structures to grant access to safe procedures for Colombian women.

Despite these positive results, it is important to note that Latin America is a region where the Catholic Church has significant influence and, in some countries, has successfully pushed for a complete abortion ban, including in cases where the woman's life is at risk[217]. This happened in Chile in 1988, Honduras in 1991, El Salvador in 1994, Nicaragua in 2006, and the Dominican Republic in 2010[218]. The case of Nicaragua is of particular relevance, as abortion was legal in the country for more than a century, when a series of restrictive changes enacted since 2006 culminated in the imposition of prison sentences for women who perform abortions[219].

To date, total bans on abortion are still active in some countries. According to the latest data provided by the Center for Reproductive Rights, the Dominican Republic, El Salvador, and Honduras continue to consider abortion illegal under any circumstances[220]. To the list of Latin American countries with a total abortion ban must be added the case of Haiti. However, the country's criminal code, which is expected to take effect in 2024, will allow abortion under any circumstance up to the twelfth week of pregnancy and without time limits in cases of rape, incest or when the woman's mental and physical health are in danger[221]. In other countries where abortion was not so restrictive, proposals to broaden the ground for abortion laws began around the same time. In Peru, since the late 1980s, several legal provisions aimed at expanding the circumstances under which a woman can request a safe and legal termination of pregnancies have all resulted in unsuccessful outcomes[222].

This regressive trend began to reverse starting in 2015. In the same year, the absolute prohibition of abortion in Chile was challenged when the executive branch proposed a law on the matter, out of which emerged a law in August 2017 that allows abortion in cases of risk to the mother's life, rape or fetal abnormality[223]. In the case of Argentina, the culmination of the legalization process in the country came in 2020, when the Argentine lawmakers voted in favor

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[216] Barajas MJ & Corrêa S, [2018] (n.140).
[217] Saylin GM, [1995] (n.127).
[218] Barajas MJ & Corrêa S, [2018] (n.140).
[219] Sedacca N, [2017] (n.123).
[220] Center For Reproductive Rights, [2024] (n.207).
[221] Human Rights Watch, 'World Report 2024: Rights Trends in Haiti' (*Human Rights Watch*, 11 January 2024) <https://www.hrw.org/world-report/2024/country-chapters/haiti#:~:text=in%20June%202023.-,Access%20to%20Abortion,pregnant%20person%20is%20in%20danger> accessed 11 May 2024.
[222] Barajas MJ & Corrêa S, [2018] (n.140).
[223] Id [222].

of legalizing abortion on demand[224]. The process of legalization of abortion in Argentina reflects not only the evolution of public opinion on the issue but also the influence and importance of feminist activism in shaping politics and society.

As for the United States, the Supreme Court in 1973 made abortion legal nationwide. With that decision, the Supreme Court invalidated or reduced most of the state anti-abortion laws that were in place at the time[225]. Although the federal barrier prevented from banning abortion in its entirety, states have tried to limit the federal intervention on the salient issue. From 1973 onward, an increasing number of states have enacted abortion laws that restrict and regulate when and under what circumstances a woman may or may not obtain an abortion[226]. Many states have also passed laws defined as "The Woman's Right to Know Acts," which aim to deter those who wish to seek an abortion from completing the procedure. Such laws include mandatory counseling that reinforces the negative view of abortion and sometimes misinforms the patient with respect to fetal pain or the link between having an abortion and the possibility of developing breast cancer[227]. In addition to targeting women willing to terminate a pregnancy, many states have enacted laws that also affect abortion providers, especially by requiring onerous licensing requirements on clinics[228]. Of course, if these were the law implemented in conservative states, the highly polarized political setting of the United States has led abortion-supportive states to pass laws that protect freedom of choice, having sex education mandatory or expanding the use of emergency contraceptives for sexual assault survivors[229].

In addition to obstacles at the state level, the legality of abortion in the federation was also limited by federal amendments. Among these are the Hyde Amendment and the Helms Amendment. The latter prohibited the use of international funds to promote programs that employed abortion as a method of family planning[230]. Going in the same direction, in 1984, the Reagan administration implemented the Mexico City Policy, which included the 'Gag Rule' prohibiting foreign NGOs from using US funds for any abortion-related work[231]. This policy,

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[224] Center For Reproductive Rights, [2024] (n.207).
[225] Christopher Z. Mooney, 'The Decline of Federalism and the Rise of Morality-Policy Conflict in the United States' (2000) 30 Publius: The Journal of Federalism 171.
[226] Guttmacher Institute 'State Bans on Abortion throughout Pregnancy' (*Guttmacher Institute*, 2 May 2024) <https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans> accessed 11 May 2024.
[227] Louise Mariw Roth & Jennifer Hyunkyung Lee, 'Undue Burdens: State Abortion Laws in the United States, 1994–2022' (2023) 48 Journal of Health Politics, Policy and Law 511.
[228] Id [227].
[229] Id [227].
[230] Barajas MJ & Corrêa S, [2018] (n.140).
[231] Françoise Girard, 'Global Implications of U.S. Domestic and International Policies on Sexuality'(2004) Sexuality Policy Watch, Working Papers.

suspended during the Clinton and Obama administrations, was reintroduced by Donald Trump in 2017[232].

All these limitations, both at the state and federal levels, never led to the actual nationwide adoption of abortion. In 2017, forty-three states prohibited abortion unless there was a risk of death to the mother[233]. To date, the legal landscape is much more varied, with fourteen states where abortion is illegal with little to no justification and an additional fourteen states and islands territories that are considered "hostile" to legal abortion practices[234]. The policies implemented for or against abortion in the United States play a crucial role in the legalization of abortion, as the controversies and obstacles to abortion rights in the country may have negative impacts at both domestic and global levels.

Conclusion

In conclusion, the objective of this first chapter was to compare the legal and political systems of Argentina and the United States and outline their similarities and differences, with a particular focus on their approaches to reproductive rights and abortion legalization. The first section highlighted the deep influence that the text, the principles, and the values of the U.S. Constitution had on the framing of the Argentine one, resulting in the wording of the two texts being similar, if not identical, in specific passages. However, several differences have emerged when the analysis has regarded the practical application of the two constitutional texts. In the last years, the differences between the application of the two texts have narrowed, with the United States being affected by the same defects as the Argentine one.

The following two sections have regarded the different legal systems of the two countries. The common law legal system based on precedents and adopted by the United States establishes a balance that not only serves to maintain long-term legal consistency but also allows for rapid adaptation to societal changes. However, it remains uncertain if the system is well equipped to handle the overruling of a precedent, especially when it comes to decisions rooted in a long historical process.

On the other hand, the civil law system in its application to the Argentine case, while maintaining a solid dependence on codes and written norms, has shown in the Argentine context the ability to integrate a form of *jurisprudencia* that, while not reaching the level of obligation that characterizes the common law precedents, contributes significantly to the

[232] Barajas MJ & Corrêa S, [2018] (n.140).
[233] Id [232].
[234] Center For Reproductive Rights, [2024] (n.207)

evolution of legal thought. The Argentine system combines a rules-based approach with a focus on Court decisions, creating a hybrid system that should be able to respond effectively to societal change.

Moving to the fourth section, the analysis of the federal systems of the two countries revealed several similarities but also substantial differences that may explain the distinct ways the two federations approach sociopolitical issues raised by the respective civil societies. Although both countries adopt a federal form of government, their implementations vary considerably. Contrary to the United States, in Argentina, the implementation of federalism shows a tendency toward greater centralization. Argentina's federal Congress has significant control over criminal and civil law matters, including legislation on reproductive rights, unlike the U.S., where these matters are mostly left to states.

All these preliminary concepts point to different reproductive rights protection systems in the two countries. Activist groups in both countries have recognized the complexity of the challenges associated with reproductive rights protection and are committed to overcoming traditional divisions. However, the policies and approaches to achieving this common goal have been different. The United States has been historically skeptical about human rights. The debate on women's sexual and reproductive rights that emerged after 1973 has opposed two factions, neither of which granted women inherent reproductive rights. However, in recent years, a broader vision of the topic emerged, namely the idea of reproductive justice. The new movement aims to include social justice considerations and collective rights of women in the debate, especially considering the difficulties faced by women of color and belonging to the most vulnerable communities. Instead, in Argentina, women activists have employed extensively and successfully the *lingua franca* of human rights, which has historically united Argentine civil society, to advance their causes. By appealing to the common language of human rights, Argentine activists have garnered national and international support for their advocacy efforts and have successfully brought the topic's relevance to the attention of the federal institutions.

Finally, the last section provides a global perspective on the implementation of abortion laws throughout history and examines the current state of progress made in this area. What was noted is that there has been significant progress toward legalization in many countries over the past few years. It is particularly encouraging to note the progress made in Latin American countries. Between the most recent legalization in the continent, there is the legalization of abortion on demand in Argentina, which will be discussed in more detail in chapter three. At the same time, it is equally salient to recognize the growing and constant challenges to abortion,

which have resulted in the rollback of abortion laws in the United States, a topic that will be addressed in the next chapter.

Chapter II

United States: The Path Towards the Decline of Abortion Laws

Introduction

In 1973, the landmark Roe v. Wade ruling on abortion represented a pivotal legal victory, not only for the American pro-choice movement but for the world as a whole, helping to catalyze the global debate over women's reproductive rights. Although the 1973 decision established the United States as a pioneer on this issue at the time, the intense debate that followed foreshadowed the difficulty in keeping the practice legal. In fact, on June 24, 2022, the Supreme Court of the United States declared that abortion was an issue whose legislature was left to the states[1]. Although there had long been grounds for a change in this direction, the decision caught the public and the international community off guard. To concern the global community was the fact that a country that had always been a leader in advocating for social freedoms had gone against the worldwide trend towards liberalization on the issue of abortion.

This chapter examines the elements that drove the shift in the United States and identifies the institutional mechanisms that have failed to safeguard reproductive rights within the country. To do so, the chapter will conceptualize and explore the legislative evolution and social debate that has characterized the issue from the nineteenth century to the present. Through the analysis, the essential factors that have contributed to the historic reversal will be observed. One of which will be found in the role of the Supreme Court and its connection to political parties, especially to the Presidents elected in those years. Additionally, the analysis will focus on the continued disapproval by conservative states of the decisions issued at the federal level, the failure of the principle of *stare decisis*, and the influence of the pro- and anti-abortion movements in the debate.

Especially with regard to the latter element, it will be shown that activism and lobbying by the pro-life movement were not mirrored by an equal commitment from the pro-right counterpart. The pro-right movement failed to garner the consensus necessary to unite society on the issue and did not develop policies that could effectively contain its counterpart's actions.

The first section of this chapter will cover an overview of the positions taken by the American states during the nineteenth century, examining how the evolution of opinions in the

[1] *Dobbs v Jackson Women's Health Organization* [2022] US Supreme Court No. 19-1392, [2022] 597 U.S.

medical profession and the general public led to the call for legal reform on the abortion issue, resulting in the famous Roe v. Wade ruling.

The second section will focus on the Supreme Court ruling of 1973. It will analyze the rationale behind Justice Blackmun's majority opinion that established the legality of abortion at the federal level. Additionally, it will discuss the legal instruments established to balance the right to privacy with the state's interests in preserving prenatal life. The third section will cover another fundamental Supreme Court ruling on the issue of abortion, Planned Parenthood v. Casey, decided in 1992. This section will highlight how, despite changes in the composition of the Court that seemed to point towards a new scenario for the abortion doctrine, the strength of the doctrine of *stare decisis* pushed the justices to uphold the precedent set in Roe, albeit in a softer form.

The fourth section will deal with the states' responses following both rulings. This section will illustrate how the federal system, particularly in its application to the United States, can lead to a highly polarized legislative system, with several states implementing restrictive bans in protest to the Supreme Court's decision. The proliferation of such legislation also led to intensified social and political debate on the issue. The fifth section will analyze the vigorous response of religious and political groups and anti-abortion activists in the wake of Roe. The section will also note how this activism was not mirrored by the pro-abortion counterpart which, in the meanwhile, relied on the 1973 ruling to focus on other issues. The pro-life lobbying, supported by the Republican Party, finally had the desired outcome in 2022.

The sixth section will first outline the Mississippi Gestational Age Act, which was the subject of the Supreme Court's 2022 ruling, then focus on the ruling itself, and finally, consider the dissenting opinions of the minority judges. Regarding the ruling, the decision to circumvent the doctrine of *stare decisis* and to overrule the previous precedents will be especially noted. Finally, the last section will be devoted to the response of the U.S. states, citizens, and the international community to the Supreme Court's change of doctrine on abortion. This section will assess the potential negative impact on the global trend toward abortion liberalization resulting from the Supreme Court decision being overturned.

2.1 The Pre-Roe v. Wade Era: From Illegality to Legality

Surprisingly, in the United States, abortion in the 1840s was a widespread practice, especially in large cities[2]. The situation began to change when the American Medical Association (AMA), one of the most prestigious professional associations for physicians and medical professionals in the United States, launched a campaign against abortion. The campaign's primary purpose was to relegate the abortion practice to the so-called 'regular physicians,' preventing homeopaths, pharmacists, and midwives from performing this function[3]. The legalization of abortion aimed to improve patients' health conditions since a considerable number of abortions were being performed by unqualified individuals, putting women's health at risk. In the meanwhile, a sudden change had also taken place in the same years with respect to the ethical vision with regard to abortion. The Catholic Church and many Protestant clergy members began to argue more and more vehemently that human life begins at conception[4]. This new doctrine contrasted with the widespread belief of the previous century that life began only during the stage of pregnancy during which the pregnant woman perceived the movements of the fetus, known as 'quickening'[5]. This led several doctors to consider the practice as a fundamentally immoral act that could be equated to infanticide[6].

Responding to the AMA's appeal, various states enacted laws limiting the practice of abortion. One of the most restrictive abortion laws in the United States enacted during those years was that of the state of Texas. This was adopted in 1854 and considered anyone who helped a woman have an abortion to be an accessory to murder and thus punishable by imprisonment for up to five years[7]. The only exception to the law existed in cases where medical personnel believed that termination of the pregnancy was necessary to save the mother's life, but also this exception was controversial[8].

All these factors prompted many state legislators during the second half of the nineteenth century to adopt provisions qualifying abortion as a crime at any stage of pregnancy. From 1900 until approximately 1970, the criminal codes of every state included a section

[2] Mary Ziegler, 'Roe v. Wade and the Rise of Rights Arguments' in *Abortion and the Law in America: Roe v. Wade to the Present* (Cambridge: Cambridge University Press, 2020).
[3] Ziegler M, [2020] (n.2).
[4] Leslie J. Reagan, 'Antiabortion Campaigns, Private and Public' in *When Abortion was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (University of California Press, 1997).
[5] Leslie J. Reagan, 'Introduction' in *When Abortion was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (University of California Press, 1997).
[6] Ziegler M, [2020] (n.2).
[7] Melissa Higgins, *Roe v. Wade: Abortion and a Woman's Right to Privacy (*ABDO Publishing 2013).
[8] Id [7].

banning abortion except in narrowly defined circumstances[9]. The implementation of new restrictive regulations had severe consequences, particularly for less affluent women who were forced to seek out unsafe and illegal procedures. These women had no choice but to turn to dangerous options such as self-induced abortions or procedures carried out by unqualified individuals in hazardous conditions, the so-called "back alley butchers."[10]

The situation began to change between the 1930s and 1940s when some physicians and health care providers began to voice dissent over the restrictions on abortion imposed by the states[11]. Physicians began to claim that such regulations prevented them from adequately caring for their patients and that more and more low-income and minority women arrived seriously injured in hospitals as a result of illegal abortions[12]. In any case, even if the medical profession's opinion on abortion was moving almost uniformly toward the call for reform, sentiments on this issue in the field were not uniform. As evidence of this, Dr. Robert D. Knapp Jr, a physicist who had a professional relationship with Blackmun, sent out articles in the years between 1970 and 1972 that described the liberalization of abortion as a threat to the integrity of the medical profession[13].

In addition, the social context was also transforming. The changing view of women concerning their societal role brought forth a desire to see laws deemed unfair and limiting overturned[14]. Furthermore, many Americans began to think of the legalization of abortion as a mechanism of population control,[15] such language echoed the then-new environmental movement that was deeply concerned about the conservation of the planet's scarce resources[16].

The first step toward legal reform on the topic of abortion was a small national conference organized by the organization Planned Parenthood in 1955. At the end of this, a joint statement was drafted calling for a change in abortion legislation[17]. The American

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[9] James George Jr. Beauford, 'Current Abortion Laws: Proposals and Movements for Reform' *in Abortion and the Law* (Press of Western Reverse University 1967).
[10] Leslie J. Reagan, 'Expansion and Specialization' in *When Abortion was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (University of California Press, 1997).
[11] Ziegler M, [2020] (n.2).
[12] Reagan LJ, [1997] (n.5).
[13] Robert D. Knapp Jr., 'Similarly I Will Not...Cause Abortion' in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling* (Yale Law School, 2012).
[14] Sarah Weddington, *A Question of Choice* (Putnam's 1992).
[15] The term "population explosion," dating back to 1954, considered population growth as a threat to world peace. This concept, applied at the household level, could often veer into class assumptions: namely, that too many poor people were having too many children they could not support.
[16] American Medical Association, 'American Medical Association Policy Statements, 1967 and 1970' in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling* (Yale Law School, 2012).
[17] Leslie J. Reagan, 'Radicalization of Reform' in *When Abortion was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (University of California Press, 1997).

Medical Association, which had played a key role in the criminalization of abortion only a few years earlier, began to reconsider its position in the mid-1960s. The association released two documents representing a profession and a society ready for change[18]. Justice Harry A. Blackmun considered these papers in his opinion in Roe v. Wade. In 1959, the American Law Institute, an organization composed of judges, lawyers, and law professors, proposed an abortion law model that expanded the circumstances under which doctors could perform abortions[19]. Specifically, this model allowed physicians to perform abortions even in cases where the pregnancy might have been detrimental to the physical and mental health of the mother, when fetal abnormalities were detected, or when the pregnancy was the result of rape or incest[20]. The proposed changes by the ALI required women who wanted to carry a pregnancy to find two doctors who would testify positively for their case within a short period[21]. This condition further widened the gap between wealthy and lower-class women in their ability to obtain a legal abortion, leading to these reforms being often referred to as "middle-class reform." [22]

The Institute's proposal proved to be very influential, and over the decade following its issue, this model was applied in the legislatures of several states. Colorado, North Carolina, and California passed ALI statutes in 1967[23]; many other states followed that pattern in the following years[24]. In 1970, four states, Alaska, Hawaii, New York, and Washington, took a more significant step and established statutes without early pregnancy restrictions[25]. In the same years, Courts in California, Vermont, New Jersey, Wisconsin, Kansas, and Washington DC declared the most significant abortion restrictions unconstitutional [26] [27].

[18] American Medical Association, [2012] (n.16).
[19] Reagan LJ, [1997] (n.17).
[20] Id [19].
[21] Mark A. Graber, 'The Ghost of Abortion Past: Pre-Roe Abortion Law in Action' (1994) 1 Va J Soc Pol'y & L 309.
[22] Herbert Packer, *The limits of the criminal sanction* (Stanford University Press 1968).
[23] Linda Greenhouse & Reva B. Siegel, 'Before (and after) Roe v. Wade: New Questions about Backlash' (2011) 120 Yale L J 2028.
[24] Maryland and Georgia followed in 1968; Arkansas, Delaware, New Mexico, Kansas, and Oregon joined in 1969; and South Carolina and Virginia followed in 1970.
[25]Gene Burns, *The moral veto: Framing contraception, abortion, and cultural pluralism in the United States* (Cambridge University Press 2005).
[26] Ruth Roemer, 'Abortion Law Reform and Repeal: Legislative and Judicial Developments (March, 1971)' in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling* (Yale Law School, 2012).
[27] It is necessary to note that although the Constitution does not explicitly protect the right to abortion, state Courts based their decision on the idea that such restrictions violated the constitutional right to privacy.
The right to privacy had been interpreted by the Courts as being protected by several amendments, including the Fourteenth Amendment, which in 1973, served as the basis to protect the right to abortion at the national level.

In this scenario of general liberalization, privileged women across the country acquired the right to abortion on demand in the early 1970s since, except for the state of Massachusetts, state laws did not interfere with organized travel to access abortion services in other states[28]. As evidence of this, nearly two-thirds of the women who obtained abortions in New York City in the two years following the repeal of the abortion law were nonresidents[29].

Despite this liberalizing trend, its impact was limited. Thirty-three states continued to have laws criminalizing abortion in place, except when necessary to save the woman's life or health[30]. It is also important to note that the emphasis of these amendments was aimed at protecting physicians from legal liability for performing abortions, rather than enabling women to decide what to do in the event of an unwanted pregnancy[31].

In addition to the partial changes in state statutes, a "looking the other way" policy defined the years leading up to Roe[32]. Women who had the means to pay for a doctor's approval, even when they sought illegal procedures at the state level, were not arrested. At the same time, the prosecution rates for abortionists were very low, and the conviction rates were even lower[33]. The paradigm that was established during the years in which the laws did not match the changed beliefs of the public and the medical profession was defined by Dr. Alan Guttmacher, the leader of the abortion movement between the 1950s and 1960s, as a source of great hypocrisy for the country and its citizens[34].

At a later stage in the country, there was a shift from advocating for ALI-style reform to demanding abortion repeal and far-reaching changes in the law. This change was supported by the favorable opinion of an increasing number of Americans, which, as shown by the 1972 Gallup polls, showed substantial majorities of every demographic category, including Catholics, in favor of leaving abortion decisions to the woman and her doctor[35]. In 1965, there was a further breakthrough in the legalization of the practice of abortion embodied by the Griswold v. Connecticut ruling[36]. In this decision, the Supreme Court created a landmark precedent, ruling that a Connecticut law prohibiting the use of contraceptives violated the right

[28] Graber MA, [1994] (n.21).
[29] Jean Pakter et al.,'Two Years Experience in New York City with the Liberalized Abortion Law-Progress and Problems' (1973) Am J Pub Health 524, 525.
[30] Roemer R, [2012] (n.26).
[31] American Law Institute Abortion Policy, 'American Law Institute Abortion Policy, 1962' in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling* (Yale Law School, 2012).
[32] Graber MA, [1994] (n.21).
[33] Id [32].
[34] Alan F. Guttmacher, 'The Law That Doctors Often Break' (1960) Reader's Digest 51.
[35] George Gallup, 'Abortion Seen Up to Woman, Doctor' in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling* (Yale Law School, 2012).
[36] *Griswold v. Connecticut* [1965] 381 U.S. 479 Supreme Court.

to privacy guaranteed by the U.S. Constitution in the Fourteenth Amendment[37]. Although the decision did not deal with abortion, an important legal precedent was established regarding a woman's right to privacy with respect to her sexual and reproductive life[38]. The right to privacy recognized in Griswold v. Connecticut was later expanded to include other values in the personal, association, family, and sexual spheres until it came to enshrine the right to abortion in Roe v.Wade.

2.2 Roe v. Wade: The Supreme Court's Landmark Decision

The Texas law at issue in the landmark opinion Roe v. Wade of 1973 was a highly punitive abortion law, restricting any abortion that was not viewed as necessary to save the life of the pregnant woman[39]. Two young lawyers who had recently graduated from the University of Texas filed the case. Sarah Weddington and Linda Coffee filed two separate cases for the two plaintiffs' different conditions. The first plaintiffs were a married couple, Marsha and David King. Mrs. King was not pregnant when the case was filed but was suffering from medical conditions whereby she had to avoid becoming pregnant and feared the consequences of failed birth control[40]. The second plaintiff was an unmarried and pregnant twenty-one-year-old woman, Norma McCorvey. Mrs. McCorvey had already carried two pregnancies to term, and both children had been placed in foster care; this time, the woman was requesting an abortion[41]. During the trials, Mr. and Mrs. Kings became Mary and John Doe, while Norma McCorvey became Jane Roe[42].

The lawyers' appeal addressed two requests to the Court. First, to declare the state abortion law unconstitutional insofar as it violated the right to privacy outlined in the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments[43] of the Constitution[44]. Secondly, it was requested that the Court consider the vagueness and uncertainty provided by the law, which resulted in a limitation of women's rights[45]. The lawsuits were filed against Henry Wade,

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[37] Giacomo Viaggianni, 'La questione giuridica dell'aborto negli Stati Uniti' (2014) 3(5) AG About Gender-International Journal of Gender Studies.
[38] Ziegler M, [2020] (n.2).
[39] Linda Greenhouse & Reva B. Siegel, 'Speaking to the Court' in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling* (Yale Law School, 2012).
[40] Id [39].
[41] Greenhouse L & Siegel RB, [2012] (n.39).
[42] Id [41].
[43] The relationship between the Ninth and Fourteenth Amendments is especially important for protecting the right to abortion. The Ninth Amendment suggests that rights not specifically mentioned in the Constitution are still protected by it, while the Fourteenth Amendment provides the legal basis for granting those rights.
[44] Justia Law, 'Roe v. Wade, 410 U.S. 113 (1973)' (*Justia Law*) <https://supreme.justia.com/cases/federal/us/410/113/> accessed 10 June 2024.
[45] *Roe v. Wade* [1973] 410 U.S. 113 Supreme Court.

Dallas district attorney and responsible for law enforcement in the county, in the Dallas federal Court on March 3, 1970[46]. The Court merged the Doe and Roe cases into the 'Roe' case, to which was added a third plaintiff, James Hallford, a Dallas physician accused of performing abortions on patients for reasons not covered by state law[47]. It was also decided to expand the case to include a class action to represent all Texas women who, when faced with an unwanted pregnancy, might have found themselves in need of obtaining a legal abortion[48].

The trial of Roe v. Wade began on May 22, 1970. The arguments of the lawyers already listed above were countered by that of attorney John Tolle, who argued that the state had the right to protect the lives of its citizens at any stage and that, essentially, an unborn child's right to life should trump that of the pregnant woman's right to privacy[49]. The Court announced its verdict on June 17: the Texas abortion law was declared unconstitutional because it violated the right to privacy protected by the Ninth Amendment of the Constitution and was further deemed to be unconstitutionally vague by failing to define exceptions where abortion was considered legally viable for doctors[50]. However, the Court failed to order local authorities to stop prosecuting doctors who performed abortions. As for the Mr. and Mrs. Kings case, the Court dismissed the case on the grounds that the plaintiff was not pregnant[51].

When, in 1970, the plaintiffs filed the case to the Supreme Court, another case of a similar nature was pending in the same Court. This was the Doe v. Bolton case[52] [53], which, as stated by the Court itself, should be read together with the decision reached in Roe v. Wade[54]. The plaintiff in Doe, whose real name was Sandra Bensing, was a 22-year-old woman who had been abandoned by her husband and was already the mother of three children whom she could not care for[55]. During her previous pregnancies, she had experienced mental health complications, because of which she requested termination of the pregnancy. However, she

[46] Sarah Weddington, 'Roe v. Wade: Memories of Its Beginning' in RM Mersky and GR Hartman (eds), *A Documentary History of the Legal Aspects of Abortion in the United States: Roe v. Wade* (1993).
[47] Legal Information Institute, 'Jane Roe, et al., Appellants, V. Henry Wade.' (*Legal Information Institute*) <https://www.law.cornell.edu/supremeCourt/text/410/113> accessed 10 June 2024.
[48] Id [47].
[49] Weddington S, [1993] (n.46).
[50] Greenhouse L & Siegel RB, [2012] (n.39).
[51] Id [50].
[52] *Doe v. Bolton* [1973] 410 U.S. 179 Supreme Court.
[53] In order to avoid misunderstandings it is essential to not that the case involving Marsha and David King is not Doe v. Bolton; they are distinct cases with different legal issues and contexts.
[54] Viaggianni G, [2014] (n.37).
[55] Greenhouse L & Siegel RB, [2012] (n.39).

was prevented from doing so by Georgia law[56]. The case was decided on the same day as Roe and helped establish abortion rights at the federal level[57].

In the Roe v. Wade case, one of the plaintiffs, Roy Lucas, argued before the Supreme Court that the existing Texas law violated the right to marital privacy[58]. Through his reasoning, Lucas made an important point, claiming that the right to abortion was an extension of the right to contraception already established in other rulings[59]. In opposition to this, the Texas district attorney's legal team asserted that the case was no longer valid because Jane Roe was no longer pregnant[60].

In reviewing the case, the Supreme Court ruled that Jane Roe's case had standing and presented a justiciable controversy even though her pregnancy had ended before the Court's review[61]. At the same time, the Court reversed the lower Court's decision to allow Dr. Hallford to continue the trial and upheld the dismissal of John and Mary Doe's case on the grounds that their standing was too speculative[62]. On January 22, 1973, the Supreme Court ruled on the case[63]. Justice Blackmun, on behalf of the majority, began his reasoning with a historical reconstruction of the right to abortion. What emerged from the review was that there were no explicit prohibitions relating to abortion in the United States prior to 1871, when Connecticut first passed a law to this effect[64]. The Texas abortion law was declared unconstitutional in a seven-judge to two-judge majority since it conflicted with the right to privacy protected against state action by the Due Process clause[65] in the Fourteenth Amendment of the Constitution[66].

The decision marked a turning point for the United States legal system, setting an important legal precedent that, under the doctrine of *stare decisis*, would oblige Courts to consider it in situations involving the same subject matter and similar conditions. Moreover, the Supreme Court's ruling affected not only Texas but also other states where anti-abortion

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[56] Greenhouse L & Siegel RB, [2012] (n.39).
[57] Id [56].
[58] Linda Greenhouse, 'Constitutional Question: Is There a Right to Abortion? New York Times (January 25, 1970)' in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling* (Yale Law School, 2012).
[59] Id [58].
[60] Legal Information Institute, 'Jane Roe, et al., Appellants, V. Henry Wade.' (*Legal Information Institute*) <https://www.law.cornell.edu/supremeCourt/text/410/113> accessed 10 June 2024.
[61] John D. Sargent, 'Analysis of the United States Supreme Court Decisions Regarding Abortions: Roe v. Wade' [1973] Congressional Research Service Reports 1.
[62] Id [61].
[63]The Supreme Court consisted of Justices Harry Blackmun, Byron White, William Brennan, William Douglas, Potter Stewart, and Thurgood Marshall, and was chaired by Judge Warren Burger.
[64] Viaggianni G, [2014] (n.37).
[65] The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall... deprive any person of life, liberty, or property, without due process of law."
[66] Sargent JD, [1973] (n.61).

regulations were in place were obliged to submit them to federal or state courts and convert them into seemingly more flexible provisions.

The majority appeared to be driven in taking this decision by a consensus developed among legal and medical experts that a change from the legalization of abortion was both appropriate and necessary[67]. Blackmun, like the other justices, was aware that the Roe decision would not end the controversies and debates surrounding the issue. However, the majority believed that the general public would accept and appreciate the decision[68]. It is interesting to note that the only Catholic judge sitting in the Supreme Court, Wiliam J. Brennan Jr., was a liberal whose support for expanding abortion rights signaled how divisive the issue of abortion was for the Catholic community and, even more importantly, diminished the weight of the Catholic opposition on the issue[69].

Regarding the right to privacy, Justice Blackmun, referring to a long list of previous cases, pointed out that the right to privacy found its basis in several amendments to the Constitution of the United States, notably the First, the Fourth, the Fifth, and the Ninth Amendment, as well as the concept of liberty guaranteed by the first section of the Fourteenth Amendment [70]. Instead, Justice Stewart, in his concurring opinion, was adamant that the Due Process provision of the Fourteenth Amendment was thereon the only rational basis for the right to privacy[71]. By using the Due Process Clause in its rationale, the Court placed itself in line with other cases where this principle was employed to safeguard individual rights in the Bill of Rights against statutory violations[72].

However, there was still uncertainty regarding the appropriate balance between the state's interest in protecting the unborn child and the privacy and reproductive freedom of the pregnant person. Although the Court rejected the state's argument that the fetus deserved the same protection as persons born, the Court emphasized that states still had an interest in protecting the potential of human life[73].

To find a balance between the two interests, the Court ruled that a woman's right to privacy should not be considered absolute and then proceeded to outline a framework of regulations that states could adopt, dividing the pregnancy into three trimesters. During the first

[67]Greenhouse L & Siegel RB, [2012] (n.39).
[68] Id [67].
[69] Id [67].
[70] Sargent JD, [1973] (n.61).
[71] Id [70].
[72] William N Jr. Eskridge, 'Destabilizing Due Process and Evolutive Equal Protection' (2000) 47 UCLA L Rev 1183.
[73] Greenhouse L & Siegel RB, [2012] (n.39).

trimester, the woman's right to privacy allows her to choose freely, along with the judgment and opinion of her treating physician, whether to terminate the pregnancy[74]. During the second trimester, state interest in protecting the fetus remains less than compelling; however, states could restrict abortion for reasons related to the protection of maternal health[75]. By extending the right to privacy to the abortion issue, the Court establishes that all regulations designed to limit a woman's decision-making autonomy in the first two semesters had to be subject to the strictest degree of judicial review, termed 'strict scrutiny' and would have to respond to a compelling government interest[76].

Finally, the Court established that during the third trimester, when the fetus was considered viable, namely capable of surviving outside the mother's womb, the state's interest in protecting it became compelling[77]. For the legislation ruling the practice in the third trimester, the Court remitted to the states the decision to prohibit abortion with the sole exception of allowing the practice in those situations where the woman's life was at risk[78].

Regarding the dissenting opinions to the decision, Justice Rehnquist argued that with this ruling, the Court had overstepped its authority and that the right to privacy on which the decision was based was not part of the freedoms protected by the Fourteenth Amendment[79]. At the same time, Justice White, in his dissenting opinion, expressed his concerns that the majority has overstepped the Court's role by employing an extravagant exercise of its power of judicial review in issuing the Roe decision[80]. The same judge also added a moral stance to his critique, arguing that the majority had extended constitutional protection to women seeking abortions on a whim[81].

After the decision was issued, the debate concerning abortion became even more heated. From the perspective of those advocating for reproductive rights, it was concerning that the woman and her rights were largely overlooked in the ruling. As for the pro-life movement, its members denounced Roe as promoting the "slaughter" of the unborn[82]. From a demographic standpoint, the decision in Roe v. Wade resulted in a significant change in the classification of abortions rather than the actual number of procedures. Women who had criminal abortions in

[74] John Hart Ely, 'The wages of crying wolf: A comment on Roe v. Wade' (2018) Conscience, Expression, and Privacy 104.
[75] Id [74].
[76] Viggiani G,[2014] (n.37).
[77] Ely JH, [2018] (n.74).
[78] Greenhouse L & Siegel RB, [2012] (n.39).
[79] Id [78].
[80] Richard S. Myers, 'Re-reading Roe v. Wade' (2014) 71 Wash & Lee L Rev 1025.
[81] Greenhouse L & Siegel RB, [2012] (n.39).
[82] Graber MA, [1994] (n.21).

1965 could have therapeutic and legal abortions in 1975[83]. For the first time since the beginning of the debate around the topic, it was low-income women, particularly women of color, who benefited from the changes introduced by Roe v. Wade[84]. This allowed less privileged women access to legal and, most importantly, safe services.

In the last years of the twentieth century, the landmark decision of the United States, although not serving as a precedent or persuasive authority for other jurisdictions, has kept the worldwide debate on abortion active[85]. A partial and indirect impact was what Roe v. Wade had on the decision of Canada's Supreme Court in 1988 in R v. Morgentaler[86]. This decision, which declared abortion laws unconstitutional, was influenced by broadly similar reasoning to that in Roe v. Wade, although it did not adopt the trimester framework.

Additionally, the framing of the U.S. Supreme Court's decision was perceived by pro-abortion advocates around the world as a form of liberalization of women's rights that did not exist before the ruling[87]. Particularly notable is the case of the Caribbean region, where abortion rights advocates have often employed reference to the Roe v. Wade decision to demand the recognition of this right[88].

2.3 Planned Parenthood v. Casey: on the Cusp of Overturning the Roe Precedent

Just over a decade after the Roe v. Wade decision, the precedent set by the Supreme Court already seemed to be in danger. During President Reagan's election campaign, the future Republican president clearly stated that he would support a constitutional amendment to restore the right to life of unborn children[89]. The President stayed true to his promise and proposed the name of Bork, a strong opposer of Roe, to replace Justice Lewis Powell. Although the Senate rejected the presidential nomination because of Bork's rejection of privacy rights[90], the judges that were appointed during those years began to deem the framework elaborated in Roe as unworkable. In the meanwhile, states continued to enact antiabortion restrictions[91].

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[83] Willard Jr. Cates & Roger W. Rochat, 'Illegal Abortions in the United States: 1972- 1974' (1976) 8 Fain. Plan. Persp. 86.
[84] Graber MA, [1994] (n.21).
[85] Roma M. Paul, 'The Impact of Roe v. Wade from an International Perspective' (2013) 9 31.
[86] *R v. Morgentaler* [1988] 1 SCR 30 Supreme Court of Canada.
[87] Paul RM, [2013] (n.85).
[88] Ibid [87] 32.
[89] Neal Devins, 'How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars' (2009) 118 Yale L J 1318.
[90] Id [89].
[91] Id [89].

These factors converged in 1989 in the Webster v. Reproductive Health Services decision[92]. With that decision, the Supreme Court seemed to signal its willingness to rethink abortion rights. The case concerned an abortion law adopted in Missouri that stipulated that human life began at the moment of conception and required that all state laws be interpreted by giving the fetus the same rights as a person[93]. In addition, the law required the physician who was about to perform an abortion to make sure that the fetus was not capable of surviving outside the mother's womb, requiring the practice to be suspended if that was the case, even if the woman had not yet entered the third trimester[94]. The strict provisions provided by the Missouri law were considered constitutional, and several justices called for a reconsideration of the trimester system established by Roe[95]. In his dissenting opinion, Justice Blackmun lamented that this ruling would encourage states to enact increasingly restrictive abortion laws that would restrict the freedom to the point of re-enacting the limits that ruled the subject before 1973.

On June 29, 1992, the justices were called upon to decide a new case on the abortion issue; the Supreme Court was made up of judges who had either written decisions challenging the precedent set by Roe v. Wade or had been appointed by a President intent on overturning that ruling[96]. Although there were conditions for overturning Roe v. Wade, the precedent was upheld by Planned Parenthood of Southern Pennsylvania v. Casey[97]. With the 1992 ruling, the constitutional protection of the right to abortion was confirmed, albeit in a weaker form than that guaranteed by Roe[98].

The lawsuit was filed by the Planned Parenthood Pennsylvania organization against state Governor Robert Casey and concerned new provisions that had been added to Pennsylvania's Abortion Control Act between 1988 and 1989[99]. These provisions listed several requirements for being able to obtain an abortion, including informed consent of the patient, consent of a parent or guardian or that of the judge for minors, notification of the spouse for married women, and a twenty-four-hour cooling-off period between the first session, during which the patient would be dissuaded from the procedure and the performance of the procedure

[92] *Webster v. Reproductive Health Services* [1989] 492 U.S. 490 Supreme Court.
[93] Viaggianni G, [2014] (n.37).
[94] Id [93].
[95] Linda J. Wharton et al., 'Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey' (2006) 18 Yale JL & Feminism 317.
[96] Chris Whitman, 'Looking Back on Planned Parenthood v. Casey' (2002) 100 Mich L Rev 1980.
[97] *Planned Parenthood of Southeastern Pennsylvania v. Casey* [1992] 505 U.S. 833 Supreme Court.
[98] Whitman C, [2002] (n.96).
[99] *Planned Parenthood of Southeastern Pennsylvania v. Casey* [1992] 505 U.S. 833 Supreme Court.

itself[100]. According to the Roe precedent, the Court should have declared unconstitutional all the new provisions of the Pennsylvania Abortion Control Act. However, the new majority deemed all provisions valid except those requiring the husband to be informed of his wife's intention to have an abortion[101].

The Supreme Court then moved on to a review of the principles contained in Roe v. Wade. With a five-justice majority, the basic principles of Roe were confirmed, including the right for women to have an abortion before fetal viability without interference from the state. The Planned Parenthood v. Casey decision upheld the right to abortion by citing the Due Process clause. It was determined that a right can be found within that clause even without an explicit reference, as long as it can be inferred from the nation's history and tradition and is essential to the freedoms guaranteed by the nation[102].

Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter, appointed by Republican presidents for their skeptical views towards Roe, surprisingly announced that the principle of *stare decisis* had led them to conclude that the central holding established in Roe v.Wade should be preserved[103]. Particularly interesting is the position of Justice Kennedy, who apparently had initially supported the idea of overturning Roe but had later changed his mind[104]. In this ruling, the justices elaborated on some principles regarding the precedent that had guided them in determining that the 'viability rule' should continue to apply. These included the workability of the rule, the fact that people had begun to rely on the rule, and finally, the absence of changes in the law or facts that could erode the doctrine or demonstrate that a shift in societal understanding on the subject had prompted to a reexamination of the precedent[105].

In its reasoning, the Supreme Court annulled the criterion of the division into three trimesters, adopting a standard based on a distinction between the pre-viability and post-viability of the fetus[106]. As a result of this change, state laws would no longer be subject to the 'strict scrutiny' established by Roe but to a 'rational basis review', which in this case was called

[100] *Planned Parenthood of Southeastern Pennsylvania v. Casey [1992] 505 U.S. 833 Supreme Court.*
[101] Whitman C, [2002] (n.96).
[102] Anna Grace Cole, 'Dobbs v. Jackson Women's Health Organization' (2023) 90 Tenn L Rev 361.
[103] Graber MA, [1994] (n.21)
[104] Lawrence Hurley, 'Trump's Justices Decisive in Long Campaign to Overturn Roe v. Wade' (*Reuters*, 24 June 2022) <https://www.reuters.com/legal/government/trumps-justices-decisive-long-campaign-overturn-roe-v-wade-2022-06-24/> accessed 12 June 2024.
[105] Paul Benjamin Linton & Maura K. Quinlan, 'Does Stare Decisis Preclude Reconsideration of Roe v. Wade? A Critique of Planned Parenthood v. Casey' (2019) 70 Case W Res L Rev 283.
[106] Viaggianni G, [2014] (n.37).

the 'undue burden test.'[107] Under this new and less restrictive test, the state may implement restrictions on the right to abortion before fetal viability as long as these do not create an 'undue burden' on women's access to abortion and such provisions are rationally justifiable[108]. Moreover, in defining what was meant by undue burden, the justices in Casey established that this existed when a substantial obstacle was found in the pathway faced by a woman to have an abortion of a nonviable fetus[109].

The Court's decision sparked dissenting reactions of a dual nature. On the one hand, Justice Samuel Alito, who was a member of the U.S. Court of Appeals for the Third Circuit at the time, argued that the majority had erred in making husband notification unconstitutional because, in his judgment, it did not constitute an unduly burden on women's access to abortion[110]. Within the Court, Justices Rehnquist and Scalia, along with Justices White and Thomas, wrote concurring and dissenting opinions explicitly calling for the overruling of Roe v.Wade[111]. At the same time, Justices Stevens and Blackmun wrote dissenting opinions expressing their disagreement with the Court's dismantling the semester-based system and abandoning strict scrutiny. In any case, in their opinions, both justices voiced hope that the new standard would guarantee the protection of women's rights[112]. In particular, looking at Justice Blackmun's papers on the Casey case, he seems optimistic that the new standard would adequately protect the fundamental principles enshrined within Roe [113].

The reactions to the decision were varied, while many moderates were releaved and enthusiastic about the fact that the new decision reaffirmed the core of Roe v. Wade; those who had hoped for a reversal of Roe were baffled by the judgment. The same reaction emerged among the ranks of abortion-rights advocates who viewed the Court's new opinion as a disaster[114].

In any case, a particularly stable model emerged as a result of the 1992 decision. This was due to the fact that the Casey decision reflected American's preferences. While eighty percent of Americans approved the legalization of abortion, seventy percent of them at the same time supported some restriction on abortion rights[115]. This created a highly immobile situation, as returning to Roe was problematic, but at the same time, pro-life absolutism was

[107] Viaggianni G, [2014] (n.37).
[108] Id [107].
[109] Wharton LJ et al.,[2006] (n.95).
[110] Id [109].
[111] Ibid [109] 340.
[112] Ibid [109] 341.
[113] Id [112].
[114] Whitman C, [2002] (n.96).
[115] Devins N, [2009] (n.89).

impractical due to the fierce backlash that could arise from the banning of abortion, or so it was believed.

2.4 States's Legislative Response to the Supreme Court's Decisions

Although with Roe on the books, abortion at the federal level was declared legal, many women continued to have limited access to the service. An analysis of the state laws adopted following Roe and Casey demonstrates how many of these were at odds with the holding of the two precedents. From 1973 to 1989, forty-eight states passed over three hundred antiabortion measures[116]. The Supreme Court has attempted to maintain a uniform standard nationwide by rejecting many of these initiatives[117].

Regarding the interpretation of the Supreme Court's ruling, in the post-Roe scenario, states took three different approaches to the issue of abortion. Some states adopted a language quite similar to that of the Court, prohibiting abortion following viability and defining that term, as the Court had done, as the moment when the fetus was capable of surviving outside the mother's womb[118]. A second group of states prohibited abortion in cases where there was a 'reasonable possibility' of viability[119]. The framing of these laws is doubtful since they will ban abortion in several instances in which fetuses are, in fact, nonviable. Finally, a third category of states, the majority of them, defined viability as a phenomenon that occurs at some point during pregnancy that can range from the 20th to the 24th week of gestation[120]. However, some states have imposed stricter viability limits than those proposed by the Court, leading to prompt challenges. Such is the case of Hodgson v. Anderson, in which a three-judge federal Court declared unconstitutional the 1974 Minnesota statute that provided that abortion beyond the 20th week could be performed only in cases where it was strictly necessary to safeguard the life and health of the mother[121].

In addition to disputes around the definition of viability, several states were not ready to accept the decision of the Supreme Court for which the fetus did not have direct rights. As a reaction, Rhode Island enacted legislation that expressly recognized that human life and

[116] Devins N, [2009] (n.89).
[117] Id [116].
[118] David M. Jr. Bryant, 'State Legislation on Abortion after Roe v. Wade: Selected Constitutional Issues' (1976) 2 Am JL & Med 101.
[119] Id [118].
[120] Bryant M Jr, [1976] (n.118).
[121] Id [120].

personhood began at conception[122]. The First Circuit Court of Appeals ruled that the state's implemented legislation was not permissible[123].

In any case, by the time Roe was decided, several states had already established other mechanisms to restrict abortion without apparently challenging the limits set by the Supreme Court. Many began to establish parental or paternal consent requirements that have multiplied over the years[124]. Paternal consent requirements, like parental consent requirements, have been struck down in many Courts. However, the discussion regarding such requirements remains ongoing and has captured the attention of numerous scholars. The interests of fathers are the subject of much debate. These deal with the fact that the father may have a more substantial interest in the welfare of the woman with whom he has a relationship because of the couple dynamics[125]. Even more importantly, the father, regardless of any possible relationship with the pregnant woman, has an interest in the unborn child being brought into the world and in assuming the rights and responsibilities that will emerge with parenthood[126]. The use of these restrictions can limit a woman's rights and, in the worst case, lead to physical and psychological consequences for the woman while the father remains disconnected from these issues[127].

Another widespread reaction to Roe v. Wade has been to enact state laws to protect institutions and physicians who do not wish to take part in abortion practices. Many of these laws are called 'conscience laws' and prevent discrimination or civil liability against professionals or institutions that refuse to participate in or permit such procedures[128].

A final group of state legislations, adopted in those years, that do not appear to be fully constitutional are those that require keeping records of information on abortion. Unless a state establishes a health rationale or other legitimate reason for requiring such detailed information, these statutes are questionably constitutional because the regulation of abortion is allowed only where it serves legitimate state interests[129].

Beginning in the 1980s, the Supreme Court gradually seemed to give states more room to restrict access to abortion further[130]. One of the forms states expressed their dissent to the

[122] Marlan C. Walker & Andrew F. Puzder, 'State Protection of the Unborn after Roe v. Wade: A Legislative Proposal' (1984) 13 Stetson L Rev 237.
[123] Id [122].
[124] Barbara Norrander & Clyde Wilcox, 'Public Opinion and Policymaking in the States: The Case of Post-Roe Abortion Policy' (1999) 27(4) Policy Studies Journal 707.
[125] Bryant M Jr, [1976] (n.118).
[126] Id [125].
[127] Id [125].
[128] Bryant M Jr, [1976] (n.118).
[129] Id [128].
[130] Matthew Berns, 'Trigger Laws' (2009) 97 Geo LJ 1639.

Supreme Court's interpretation of the Constitution were through the use of 'trigger laws'. Through these regulations, states would criminalize abortion upon overruling Roe v. Wade[131]. Between 2005 and 2007, South Dakota, Louisiana, Mississippi, and North Dakota all adopted trigger laws. In all of these laws, the practice of abortion was considered a felony[132]. Additionally, only a few of those laws provided exceptions in cases where the mother's life or health was in danger or in cases of sexual assault or incest[133].

After Casey, the restrictions of state abortion laws varied substantially. On the one hand, following the decision, states did not attempt to reintroduce restrictions that the Supreme Court had already prohibited in earlier decisions, such as spousal notification or parental notification[134]. On the other hand, many states saw the Webster decision as an invitation to enact new restrictions on abortion. After Casey, Some states have passed laws that either prohibit all abortion or prohibit it from limiting gestational ages, defining viability much earlier than medical research does[135].

The wave of restrictions that followed the Planned Parenthood v. Casey decision has seen anti-abortion activists shifting their focus from attempting to ban abortion to the implementation of targeted regulations on abortion providers, known as 'TRAP laws'. The reason behind this decision lies in the fact that such laws receive little media and public attention[136]. Such laws impose demands on abortion providers that are much more stringent than the regulations that are usually applied to comparable medical practices. The vast majority of states, more than eighty-two percent, prohibit anyone who is not a licensed physician from performing an abortion, even if physician assistants and advanced practice nurses have the necessary skills to perform certain types of abortions[137].

TRAP laws, began to increase in 2005, soaring in 2010[138]. Such laws require clinics to meet exaggerated requirements for medical staff and facilities, resulting in the shutdown of numerous abortion clinics unable to make such investments. In addition to that, following Casey's 'undue burden' standard, challenging these restrictions has become increasingly more difficult. As a consequence, litigations involving TRAP laws in the post-Casey landscape have

[131] Matthew Berns, 'Trigger Laws' (2009) 97 Geo LJ 1639.
[132] Id [130].
[133] Id [130].
[134] Devins N, [2009] (n.89).
[135] Louise Marie Roth & Jennifer Hyunkyung Lee, 'Undue Burdens: State Abortion Laws in the United States, 1994–2022' (2023) 48(4) Journal of Health Politics, Policy and Law 511.
[136] Marshall H. Medoff, 'State Abortion Politics and TRAP Abortion Laws' (2012) 33(3) Journal of Women, Politics & Policy 239.
[137] Roth LM & Hyunkyung Lee J, [2023] (n.135).
[138] Id [137].

often proven unsuccessful since they do not appear to create a direct impediment to a woman's ability to decide on abortion[139].

Alongside these, there is the implementation of several informed consent laws. These laws include fetal ultrasound laws, fetal pain laws, and laws requiring physicians to explain to women the possible connection between abortion and breast cancer[140]. Many states along these lines have passed laws that have come to be known as "The Woman's Right to Know Acts" that aim to dissuade abortion seekers from obtaining such a procedure. These laws mandate counseling that reinforces negative views on abortion and sometimes misinforms patients regarding fetal pain[141]. For example, the information consent law of South Dakota requires physicians to inform women that having an abortion increases the risk of having post-traumatic stress disorder or, in severe cases, may lead to suicidal thoughts[142].

Finally, it should be noted that although several states have tried to circumvent the limits of legality set by Supreme Court rulings, a growing number of states have begun to pass laws to protect abortion rights. These include laws incentivizing the use of public funds for abortion beyond federal regulations, legal protection against violence for reproductive health clinics, and the administration of emergency contraception for survivors of sexual assault[143].

2.5 The Escalation of the Social Debate on the Abortion Issue

Following the decision in Roe v.Wade, as Justice Blackmun had predicted, the abortion debate became even more heated. This section is crucial as it examines the actions and motivations of the two opposing sides in the abortion debate. It highlights that a weakened pro-abortion movement, both in its actions and motivations, can be a factor leading to the erosion of the systems of abortion protections and potentially result in their overruling, as happened in the case of the United States.

The Church was one of the actors who had always been very active on the issue. Following the ruling in Roe, a crusade against the procedure and its supporters began. The Catholic Church, in particular, threatened those who supported such practices with

[139] Medoff MH, [2012] (n.129).
[140] Devins N, [2009] (n.89).
[141] Roth LM & Hyunkyung Lee J, [2023] (n.135).
[142] Devins N, [2009] (n.89).
[143] Roth LM & Hyunkyung Lee J, [2023] (n.135).

excommunication, impediment to participation in the Eucharist ceremony[144], and even refusal to baptize the children of pro-choice members[145].

In the wake of Roe v. Wade, the abortion debate had taken the dimension of a partisan conflict between national political parties, and in the aftermath of Roe, the political orientation of the elected President seemed to indicate the potential direction of abortion policies[146]. The Democratic Party's position on the issue became increasingly supportive of abortion rights, while the Republican Party became increasingly anti-abortionist[147]. During the 1972 presidential election, the Republican Party shifted its electoral strategy to portray their candidate, Richard Nixon, as a conservative supporter of traditional values and roles[148]. Nixon went so far as to claim that unrestricted abortion policies or abortion on demand were incompatible with his personal values with respect to the sanctity of life[149]. Another Republican president, Ronald Reagan, reaffirmed the party's anti-abortion stance. During Reagan's first term, his position in support of anti-abortion policies and a Congress aligned with these ideas led to the adoption of several reforms restricting abortion[150] [151]. Opposed to Reagan's position was that taken by the democrat Bill Clinton. When the latter was elected in 1992, he showed his strong support for the idea of abortion on demand[152].

As for the debate between pro-life and pro-choice advocates, soon after Roe, the antiabortion movement gained momentum. While abortion rights advocates were on the decline, as they believed that the abortion issue was settled and fixed in the Constitution, leading activists to shift their focus to other issues concerning women's rights[153], abortion opponents and pro-life activists reacted to the Supreme Court decision by highlighting the rights of fetuses and the potential negative impact of the sentence on the African American

[144] United States Conference of Catholic Bishops, 'Respect for Unborn Human Life: The Church's Constant Teaching' (*USCCB*, 2005) <www.usccb.org/issues-and-action/human-life-and-dignity/abortion/respect-for-unborn-human-life> accessed 23 August 2024.
[145] James Andrew Moretto, 'The Walk of Life: The History of the Anti-Abortion Movement and the Quest to Overturn Roe v. Wade' (2014) Law School Student Scholarship.
[146] Devins N, [2009] (n.89).
[147] Medoff MH, [2012] (n.129).
[148] Greenhouse L & Siegel RB, [2011] (n.23).
[149] Id [148].
[150] Moretto JA, [2014] (n.145).
[151] When it comes to regulating abortion, the federal executive can heavily influence the politics on the topic by managing federal funds. This was one of the most effective techniques employed during the Reagan presidency through the Global Gag Rule and the Hyde Amendment.
[152] Graber MA, [1994] (n.21).
[153] Marlene Gerber Fried, 'Reproductive rights activism in the post-Roe era' (2013) 103(1) American Journal of Public Health 10.

community and disabled individuals due to the eugenic connotation of the 1973 decision[154]. Indeed, following that decision, many members of the African American community identified population control techniques as racist attitudes[155]. The so-called "black genocide" was described by such groups as endangering not only the lives of innocent fetuses but also the rights of racial minorities[156].

Following Roe and noting the negative opinion of minority groups concerning population control, as well as how the pro-lifers had exploited minority fears to their advantage, the right-based movement removed population control issues from the abortion debate. The supporters of abortion rights decided instead that the best way to defend the legalization of abortion was by emphasizing rights-based arguments in favor of Roe[157].

During the 1970s, both sides of the debate began to place increasing emphasis on the Constitution and the rights guaranteed by it[158]. While abortion rights supporters continued to campaign for the protection of women's right to terminate pregnancies, pro-life groups attempted to use the Due Process Clause contained in the Fourteenth Amendment to prove that the Constitution protected the right to life of unborn children[159].

During the 1980s, pro-lifers abandoned the idea of pushing for the adoption of a constitutional abortion ban and began campaigning to overturn Roe v. Wade[160]. By the late 1980s, supporters of abortion legalization were also presenting themselves as champions for various minority rights, thus reshaping abortion policies[161]. Despite this shift in rhetoric, the choice movement kept conveying the message that the decisions of women of color and low-income women were not at the forefront of its priorities[162]. Because of this, new groups began to emerge whose values centered on each woman's effective access to abortion services.

At this point, the pro-life movement shifted the way its position was presented to gain more support. To do this, anti-abortion groups adopted a paradigm termed 'pro-women.' In this way, pro-life groups argued that they not only supported the rights of fatus but also those

[154] Mary Ziegler, 'The framing of a right to choose: Roe v. Wade and the changing debate on abortion law' (2009) 27(2) Law and History Review 281.
[155] Ibid [154] 295.
[156] Id [155].
[157] Ziegler M, [2009] (n.154).
[158] Ziegler M, [2020] (n.2).
[159] Id [158].
[160] Mary Ziegler, 'Planned Parenthood v. Casey, the Family, and Equal Citizenship' in *Abortion and the Law in America: Roe v. Wade to the Present* (Cambridge University Press 2020).
[161] Ziegler M, [2009] (n.154).
[162] Gerber Fried M, [2013] (n.153).

of of women, claiming that they loved them both equally[163]. Through this rhetoric, the groups could advocate that regulating abortion was done in the interest of women, to educate them on the negative effects of abortion, and to protect them from possible harmful effects, both psychological and physical of the practice[164]. The anti-abortion groups' change in rhetoric also aimed at distancing the moderate group from the radical fringes of the movement, which had shown hostility toward women's rights and had begun to employ violent tactics.

In the late 1970s and early 1980s, several radical anti-abortion groups emerged[165]. Groups that had previously used passive, nonviolent demonstration techniques shifted to more aggressive tactics to "rescue the unborn children."[166] Some of these groups began to camp outside abortion clinics to ask women not to kill their babies. When these attempts were unsuccessful, more extreme measures were employed, such as using concrete to block the locks and prevent access to the clinics or using bombs containing chemicals to deter women from carrying out the practice[167]. Even more disturbing were the threats to many clinic staff members and even some judges[168]. Around 1984, the violence took an even more lethal path by adding assaults, hostage-taking, and burglary to the techniques used[169].

As for the practices implemented by pro-choice groups in the same years, their focus was on establishing new local organizations to advocate for reproductive rights. These organizations had several objectives, ranging from militating in preventing the passing of laws against abortion to raising money for less wealthy women to guarantee them access to abortion services[170]. It is worth noting that a local group was formed in Rhode Island in the late 1980s, known as '2 to 1,' to counter the sabotage actions of Operation Rescue[171]. The two groups clashed repeatedly during those years. In addition to that, 2 to 1 opened the Women's Health Fund to raise money for women who, in that climate of violence, were unable to access abortion services[172]. Even though pro-abortion groups have managed to maintain the right to abortion

[163] Amanda Roberti, '"Women Deserve Better:" The Use of the Pro-Woman Frame in Anti-abortion Policies in US States' (2021) 42(3) Journal of Women, Politics & Policy 207.
[164] Roberti A, [2021] (n.163).
[165] Moretto JA, [2014] (n.145).
[166] Leslie King & Ginna Husting, 'Anti-abortion activism in the US and France: Comparing opportunity environments of rescue tactics' (2003) 8(3) Mobilization: An International Quarterly 297.
[167] Moretto JA, [2014] (n.145).
[168] Dallas A. Blanchard, *The Anti-Abortion Movement and the Rise of the Religious Right: From Polite to Fiery Protest* (Twayne Publishers 1994).
[169] Id [168].
[170] Marlene Gerber Fried, 'Abortion Politics: building pro-choice advocacy organization' in *From Abortion to Reproductive Freedom: Transforming a Movement* (South End Press 1990).
[171] Id [170].
[172] Gerber Fried M, [1990] (n.170).

legal, they were ineffective in stopping the continued attacks on practical access to such services[173]. In fact, pools showed a decline in support for these groups.

2.6 Dobbs v. Jackson Women's Health Organization: The Turning Point

2.6.1 Mississippi Gestational Age Act

The Mississippi Gestational Age Act, passed in 2018, was at the heart of the 2022 Dobbs case. The Mississippi Act banned abortion from the fifteenth week of gestation except in cases of medical emergencies or severe fetal anomaly[174]. The reason the law prohibits abortion after that date is that following the fifteenth week, abortions are operated by a procedure called 'dilation and evacuation,' the use of which had already been restricted in 2016 since it was considered barbaric[175].

For cases of fetal abnormalities, the law prescribes that the condition must be reported no later than fifteen days after the procedure. This notification must contain a variety of information, including the date of the abortion, the probable gestational age, the diagnosis, and a statement in which the physician declares that the abortion was deemed necessary[176]. The Mississippi law, therefore, presented a direct challenge to both the precedent set by Roe v. Wade and Planned Parenthood v. Casey since both ruled that abortion could not be banned entirely before fetal viability, which physicians determined to be around the twenty-third, twenty-fourth week of gestation[177].

Following the law's passage in the Mississippi Congress, the Jackson Clinic almost immediately challenged the act. In June 2020, the state of Mississippi filed a petition to the Supreme Court with three questions. The first asked whether pre-viability prohibitions on elective abortion were unconstitutional, and the Supreme Court admitted the case to deal with this provision[178]. The state's stand on the issue was that if a state interest can be considered sufficiently compelling after viability to support the prohibition of abortion, then it should be regarded as equally compelling before viability[179]. The position of the attorneys representing Jackson Woman's Health Organization was that the Court had already decided the question

[173] Gerber Fried M, [2013] (n.153).
[174] Mississippi Gestational Age Act (2018) (Mississippi).
[175] Elizabeth Ann M. Jhonson, 'The Reality of Late-Term Abortion Procedures' (*Lozier Institute*, 20 January 2015) <https://lozierinstitute.org/the-reality-of-late-term-abortion-procedures/> accessed 12 June 2024.
[176] Mississippi Code § 41-41-191 (2020) (Mississippi).
[177] Yvonne Lindgren, 'Dobbs v. Jackson Women's Health and the Post-Roe Landscape' (2022) 35 J Am Acad Matrimonial Law 235.
[178] Dobbs v Jackson Women's Health Organization, Petition for a Writ of Certiorari (2020) (US).
[179] Dobbs v Jackson Women's Health Organization, Brief for Petitioners, 41 (2020) (US).

regarding the constitutionality of abortion in previous sentences, and there was no reason to re-discuss the legality of abortion[180]. Furthermore, the attorneys addressed the fetal pain argument, asserting that according to the medical community, there is no possibility of fetal pain until viability, and they even ruled out the possibility of conscious awareness before that term[181].

Failing this case to the Court, the goal of the state of Mississippi was to trigger the overruling of Roe and Casey and return the power to legislate abortion to the states. The main argument for returning the issue of abortion to the states was that, as a controversial topic, American citizens should be granted the possibility to decide it through democratic processes[182].

2.6.2 The Overruling: The Reasoning of Justice Alito's majority

The *coup de grâce* to Roe v. Wade came one step short of its 50th anniversary. The events that preceded the new decision of the Supreme Court confirmed that the elected President can shift the government's stance on abortion towards either an anti or pro-abortion position[183]. Indeed, it is not surprising that during his campaign to be elected President of the United States, Donald Trump self-described himself as pro-life and promised that if elected, he would proceed to appoint justices to the Supreme Court who would work to overturn Roe v. Wade[184]. Once elected, the President lived up to his word.

The general public started to take a negative stand against the Supreme Court[185]. The Court's reputation was tarnished by political maneuvering by Republicans to permit President Donald Trump to elect three conservative justices during his four-year term[186]. These were Neil Gorsuch in 2017, Brett Kavanaugh in 2018, and Amy Coney Barrett in 2020. After the appointment of the three new judges, the Court, which was previously evenly split between four conservative and four liberal justices, shifted to having a solid conservative majority of

[180] Dobbs v Jackson Women's Health Organization, Brief for Respondents (2020) (US).
[181] Dobbs v Jackson Women's Health Organization, Brief for Respondents, 31-34 (2020) (US).
[182] Dobbs v Jackson Women's Health Organization, Brief for Petitioners (2020) (US).
[183] Devins N, [2009] (n.89).
[184] Melissa Murray, 'The Symbiosis of Abortion and Precedent' (2020) 134 Harv L Rev 308.
[185] Pew Research Center, 'Positive Views of Supreme Court Decline Sharply Following Abortion Ruling' (*Pew Research Center*, 1 September 2022) <www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/> accessed 23 August 2024.
[186] Jeffrey M. Jones, 'Approval of U.S. Supreme Court down to 40%, a New Low' (*Gallup.com*, 23 September 2021) <https://news.gallup.com/poll/354908/ap-proval-supreme-Court-down-new-low.aspx> accessed 12 June 2024.

six justices at the end of Donald Trump's term[187]. The Supreme Court had controlled a majority for decades, yet up to that point, it had missed the five votes needed to overturn Roe.

The first of President Trump's elected justices was appointed following a refusal by the Republican-majority Senate to consider Obama's nominee for the Supreme Court. President Obama nominated Merrick Gerland in March 2016 to fill the vacancy left by Justice Scalia[188]. However, the Republican Senate leader declared that any nominee proposed by the then-Democratic President would be considered null and void, as the new judge would have to be nominated following the election of a new president, which was to occur eight months later[189]. The same Senate later changed its position and confirmed Amy Coney Barrett only a week before the 2020 elections[190]. Considering the growing concern over the politicization of the Supreme Court judges, during the term of Democratic President Joe Biden, an initiative to review the system of appointment and composition of the Supreme Court was issued. A presidential commission of legal and constitutional experts to discuss and examine possible reforms of the Court was established[191]. The potential changes under review included the expansion of the number of judges, the duration of judges' terms, and transparency in appointment processes[192]. However, the Commission ended its work without endorsing any structural reform[193].

The low confidence rate in the Supreme Court was also due to the speed and levity with which the Court made high-profile decisions. On June 24, 2022, the Supreme Court handed down its decision concerning the constitutionality of Mississippi's Gestational Age Act with the decision of Dobbs v. Jackson Women's Health Organization[194]. A six-judge majority upheld the Mississippi law, while a five-judge majority determined that the Constitution did not confer any right to abortion and that adherence to the 1973 and 1992 rulings under the doctrine of *stare decisis* was inappropriate, proceeding with the reversal of the two rulings[195].

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[187] Hurley L, [2022] (n.104).
[188] Lindgren Y, [2022] (n.177).
[189] Id [188].
[190] Ibid [188] 248.
[191] The White House, 'Presidential Commission on SCOTUS | The White House' (*The White House*, 7 December 2021) <www.whitehouse.gov/pcscotus/> accessed 23 August 2024.
[192] Id [191].
[193] Commission on the Supreme Court of the United States, Final Report (*Presidential Commission on the Supreme Court of the United States*, 2021) <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf> accessed 23 August 2024.
[194] *Dobbs v Jackson Women's Health Organization* [2022] US Supreme Court No. 19-1392, [2022] 597 U.S.
[195] Id [194].

In the decision, it is determined that Roe had set an incorrect precedent from the beginning and confirmed Mississippi's desire to return the abortion issue to the people's elected representatives[196]. The decision was made possible by the judges that Donald Trump had appointed during his presidential term. Indeed, all three judges voted in favor of overruling the precedent set by Roe[197].

In its decision, the Supreme Court establishes that there is no constitutional right to abortion, justifying that stand on the basis that abortion is not explicitly mentioned in the United States Constitution and that there is no other rationale for inferring that such a right should somehow be implied from the language of the Constitution. This is because, according to the majority, abortion is not rooted in the country's national history or its traditions[198]. To justify this position, the majority noted that abortion was considered a crime in three-quarters of the states at the time the Fourteenth Amendment was adopted and that thirty states banned all types of abortion when Roe was decided[199]. Continuing in its reasoning, the Supreme Court determined that the abortion framework failed the workability test because the undue burden test established by Casey had proven to be unworkable[200]. Another reason for the overruling of Roe v. Wade was the disruptive effect that the decision had in other areas of law, and finally, the last reason lay in the absence of interests generating "concrete reliance"[201].

Considering the principles for the accuracy of the precedent established in 1994, Justice Alito's reasoning ignores the framework and addresses new elements[202]. In doing so, the Court asserts that it can disregard the strong tradition established by *stare decisis*. The Court's stance in this matter will significantly undermine precedents safeguarding individual rights, creating a problem of legal certainty and legitimate expectations and potentially leading to their reversal in the future[203].

In addition to that, in the Court's decision, the principle of substantive due process[204] was deemed "controversial" and, when applied to the right of abortion, it could not provide a

[196] Lindgren Y, [2022] (n.177).
[197] Ibid [196] 235.
[198] Ibid [196] 238.
[199] Ibid [196] 239.
[200] *Dobbs v Jackson Women's Health Organization* [2022] US Supreme Court No. 19-1392, [2022] 597 U.S.
[201] Id [200].
[202] Michael Gentithes, 'Concrete Reliance on Stare Decisis in a Post-Dobbs World' (2022) 14 ConLawNOW 1.
[203] Id [202].
[204] The doctrine of substantive due process is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. This doctrine interprets certain fundamental liberties as falling outside the scope of either federal or state governments' authority and affords them constitutional protection without a clear textual warrant.

constitutional basis for protection[205]. The right to abortion, along with other intimate behaviors such as contraception, consensual sexual intimacy, marriage, and reproduction, are all protected under the doctrine of substantive due process. The substantive Due Process is thus seen as an uncertain basis for guaranteeing such a right. Still, it plays a crucial role in ensuring a national standard for these rights[206]. In the absence of substantive Due Process, legislation on intimate behaviors would be left to the governments of the fifty states, resulting in a fragmented set of rights.

Even if, in its opinion, the Court asserted that the Dobbs decision would not affect other rights based on substantive Due Process, such as same-sex marriage or contraception, this is very unlikely[207]. The Court believed that Dobbs would not affect other rights because Roe was a *sui generis* case involving the interest of "potential life."[208] This made abortion different from other rights that fall under the same doctrine since, in other cases, this balancing is not requested. Contrary to the majority opinion, Justice Thomas' concurring opinion asserts that substantive Due Process does not exist in the Constitution. Thus, all the decisions involving the contested principle should be reversed[209]. Moreover, according to the doctrine of *stare decisis*, other intimate behavior freedoms cannot have standing in the absence of Roe v. Wade because the Court connected that decision to other freedoms concerning bodily integrity, family relations, and contraception[210].

Finally, following the overrule by the Supreme Court, the ground seemed fertile for implementing new legislation to protect fetal personhood, which had always been a significant goal of the pro-life movement. Soon after the issue of the decision, a federal fetal personhood bill, named the 'Life at Conception Act,' was introduced in both chambers[211]. The proposal aimed to extend the constitutionality guaranteed right to life from the moment of conception. It would recognize the fetus as a person under the law, granting it constitutional rights. As a result, abortion would be considered murder[212].

[205] Lindgren Y, [2022] (n.177).
[206] Richard Johnson, 'Dobbs v. Jackson and the Revival of the States' Rights Constitution' (2022) 93(4) The Political Quarterly 612.
[207] Lindgren Y, [2022] (n.177).
[208] Id [207].
[209] Arushi Bhagotra & Tejas Sateesha Hinder, 'Dobbs v. Jackson: A Constitutional Breakdown' (2022) 2022 Rev Dr Const 58.
[210] Lindgren Y, [2022] (n.177).
[211] The Life at Conception Act is still pending as of August 2024.
[212] Lindgren Y, [2022] (n.177).

2.6.3 The Jointly Drafted Dissenting Opinion: Justices Breyer, Sotomayor, and Kagan

While Justice Thomas, Kavanaugh, and Chief Justice Roberts filed concurring opinions, Justices Breyer, Sotomayor, and Kagan filed a jointly drafted dissent opinion, a very rare occasion for cases involving the Constitution[213]. The Justices initially addressed the majority's view that the right to abortion is not found in American history and traditions. The dissenters argue that interpreting the Constitution as it was written at the time of ratification relegates women to occupy a secondary role in American society[214]. Justice Breyer objected that the 2022 decision would enshrine the substantial loss of women's control over their lives, reducing their rights and status as free and equal citizens[215]. Further observing the argument about the lack of connection between American history and abortion rights, the dissenting opinion points out that historically, in the common law system, abortion was considered a crime from the moment of quickening; thus, early abortions were not criminalized[216].

Furthermore, the dissenting opinion addresses the majority's stance on *stare decisis* and substantive Due Process. Justice Breyer upholds *stare decisis* as the cornerstone of the American rule of law, and because of this, he asserts that the principle of precedent can only be altered with valid reason. From the standpoint of the dissidents, in the Dobbs case, the majority opinion failed to adhere to the principles outlined by Casey and Roe without any justification. Since there had been neither legal nor factual changes within the subject matter, the precedent should have continued to stand[217]. Regarding the choice not to follow the precedents, the dissenters added that the American public should never fear that a change in the composition or doctrine guiding the Supreme Court could jeopardize their rights[218].

Moving on, the dissenters argued that the majority's belief that the decision would not affect other similar rights was flawed. The opposing judges asserted that the Dobbs decision was comparable to a "Jenga game" and that having removed one of the blocks holding up the foundations of substantive due process, the architecture of the legal mechanism had been greatly destabilized and was in serious danger of collapsing[219].

Additionally, the dissenters accused the majority of judicial activism. The dissenting justices claimed that the majority had made radical changes too quickly and easily, relying on

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[213] Lindgren Y, [2022] (n.177).
[214] Elena Falletti, 'Una marcia indietro lunga cinquant'anni: la sentenza della Corte Suprema americana Dobbs v. Jackson in tema di aborto' (2023) 1 GenIUS 1.
[215] Id [214].
[216] Id [214].
[217] Ibid [214] 16.
[218] Ibid [214] 15.
[219] *Dobbs v Jackson Women's Health Organization* [2022] US Supreme Court No. 19-1392, [2022] 597 U.S.

their personal opinions. Therefore, they claimed that with the decision made in Dobbs, the judges had replaced the "rule of law" with the "rule by judges."[220]

Another point the dissenters comment on concerns the possibility of a fetal personhood law. The minority justices say that the language employed by the Supreme Court in the 2022 decision does not prohibit the federal government from passing a law banning abortion nationwide from the very moment of conception and without exception for cases of incest and rape[221].

The dissenting opinion is concluded with a powerful sentence in which the justices express their sorrow for the Supreme Court's attitude and especially for the American women who were losing what was until that day considered a fundamental right[222].

2.7 Post-Dobbs: Reactions from the States and the Global Community

2.7.1 State Reactions and Public Response Following Dobbs v. Jackson

As was to be expected following the decision in Dobbs v. Jackson, the reactions of the states resulted in a plurality of legislation affecting the right to abortion. With legal changes occurring rapidly across the country, the result has been widespread confusion and limited or no access to affordable abortion in many states[223].

First, many states had implemented 'trigger laws' before the ruling, which went into effect immediately or nearly immediately after the Supreme Court overruling. The trigger bans in Kentucky, Louisiana, and South Dakota specify that when Roe v. Wade is overturned, the new state law on abortion would immediately go into effect[224]. However, these laws do not include a process for disposing of the enactment, causing significant confusion. After the sentence, some states proceeded to re-promote laws that had been previously struck down. Most notably, Arizona's attorney general announced within days of Dobbs that the 1901 state law banning all types of abortion would be enforced once again, despite the governor having signed a new law on the issue just a few months earlier[225].

[220] Lindgren Y, [2022] (n.177).
[221] Id [220].
[222] *Dobbs v Jackson Women's Health Organization* [2022] US Supreme Court No. 19-1392, [2022] 597 U.S.
[223] Adrienne R. Ghorashi & DeAnna Baumle, 'Legal and Health Risk of Abortion Criminalization: State Policy Responses in the Immediate Aftermath of Dobbs' (2023) 37 JL & Health 1.
[224] Elizabeth Nash & Isabel Guarnieri, '13 States Have Abortion Trigger Bans-Here's What Happens When Roe Is Overturned' (*Guttmacher Institute*, 13 June 2022) <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> accessed 12 June 2024.
[225] Ghorashi AR, & DeAnna Baumle, [2023] (n.223).

The state of Texas made abortion illegal and punishable both civilly and criminally, as well as framing the law in a specific way to hinder judicial review[226]. Even before Dobbs v. Jackson was decided, the state passed a law called Senate Bill 8. This law, also known as the 'Texas Heartbeat Act,' is a controversial piece of legislation that became effective on September 1, 2021. The law provides that abortion is prohibited from the time that fetal heart activity is detected, which can occur as early as the sixth week of gestation, often before many people realize they are pregnant[227]. In addition, under that law, any person can sue another individual who induces, aids, or abets the termination of a pregnancy occurring after the sixth week of gestation[228]. In this way, Texas has established a regime where citizens themselves are obliged to enforce state-mandated abortion laws.

In Missouri, legislators introduced a bill that would have made it a crime for a doctor to perform an abortion on a woman suffering from ectopic pregnancy[229]. A similar law was passed in Ohio where, in case of ectopic pregnancy, the doctors are asked to replant the egg in the woman's uterus, a procedure that does not exist in medical science[230].

Anti-abortion activists and politicians have also started pushing for restrictions beyond national borders with the ultimate goal of eliminating access to abortion services nationwide[231]. In response, several states have taken a proactive approach to safeguarding access to abortion. Soon after the Dobbs decision, Michigan and Vermont began working to implement constitutional protections for reproductive freedoms[232]. Their goal was to prevent the enactment of laws that do not represent the citizen's interests and the majority opinion of the citizens of these states. In November 2022, the citizens of Vermont passed a constitutional amendment placing reproductive freedoms within the state Constitution[233]. In Michigan, citizens also approved, concurrently with the vote in Vermont, a constitutional amendment allowing reproductive freedoms to benefit from constitutional protection[234]. In addition, in

[226] Ghorashi AR, & DeAnna Baumle, [2023] (n.223).
[227] Id [226].
[228] Lindgren Y, [2022] (n.177).
[229] Ectopic pregnancies are a risky type of pregnancy that remains the leading cause of death for pregnant women during the first trimester of pregnancy.
[230] Lindgren Y, [2022] (n.177).
[231] Carleen M. Zubrzycki, 'The Abortion Interoperability Trap' (2022-2023) 132 Yale LJ F 197.
[232] Tessa Weinberg, 'GOP Eyes Amending Missouri Constitution to Ensure No Right to Abortion Exists Post-Roe' (*Missouri Independent*, 3 May 2022) <https://missouriindependent.com/2022/05/03/gop-eyes-amending-missouri-constitution-to-ensure-no-right-to-abortion-exists-post-roe/> accessed 12 June 2024.
[233] Center for Reproductive Rights, 'Vermont' (*Center for Reproductive Rights*, 12 May 2023) <https://reproductiverights.org/maps/state/vermont/> accessed 12 June 2024 .
[234] Center for Reproductive Rights, 'Michigan' (*Center for Reproductive Rights*, 7 February 2024) <https://reproductiverights.org/maps/state/michigan/> accessed 12 June 2024.

February 2023, twenty-one state governors launched the 'Reproductive Freedom Alliance initiative,' a coalition aimed at protecting reproductive rights and sharing a model to promote the protection of patients and providers from interstate persecution[235].

Some states are going beyond protecting their citizens and enacting legislation to expand rights to citizens in those states where abortion services are no longer guaranteed. In this regard, many states are expanding access to telehealth services for abortion[236]. Through this service, patients can receive necessary abortion care by consulting a doctor through digital communication platforms instead of visiting in person. Massachusetts recently passed legislation allowing local telehealth providers to offer their services to patients living in other states, including those states where abortion is not permitted[237]. Thus, in the United States, a noticeable trend of "underground abortion practices" is rising, which allows individuals living in abortion-restrictive states to obtain medication abortion pills despite the abortion bans employed by their state of residence[238].

Some states are also passing laws to expand the types of providers who can provide abortion services. Advanced practice registered nurses already provide abortion care services in states such as California, Illinois, Montana, and New Hampshire[239]. Seeking services from such qualified nurses is less expensive than going to a physician, thus allowing women from lower classes to enjoy the same safe abortion services at lower costs.

Turning to the reaction of the American citizens to the Supreme Court's ruling, the majority of them appeared opposed to the decision of the Supreme Court on abortion. Most American citizens did not have an absolutist opinion concerning the issue of abortion as most of them, sixty-one percent of Americans, believe that abortion should be legalized under certain conditions[240]. A Pew Research Center poll showed that fifty-seven percent of Americans disagreed with the decision made by the Supreme Court in 2022, with a relevant forty-three percent saying they strongly disagreed[241].

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[235] Ghorashi AR & Baumle, [2023] (n.223).
[236] Lindgren Y, [2022] (n.177).
[237] Id [236].
[238] Jessica Bruder, 'The Abortion Underground Is Preparing for the End of Roe v. Wade'(*Atlantic*, 4 April 2022) <https://www.theatlantic.com/politics/archive/2022/04/abortion-underground-roe-v-wade/629448/> accessed 12 June 2024.
[239] Tracy A. Weitz et al., 'Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants under a California Legal Waiver' (2013) 103(3) Am J Public Health 454.
[240] Jeff Diamant et al., 'What the Data Says about Abortion in the U.S.' (*Pew Research Center*, 25 March 2024) <https://www.pewresearch.org/short-reads/2024/03/25/what-the-data-says-about-abortion-in-the-us/> accessed 12 June 2024.
[241] Carrie Blazina, 'Key Facts about the Abortion Debate in America' (*Pew Research Center*, 15 July 2022) <https://www.pewresearch.org/short-reads/2022/07/15/key-facts-about-the-abortion-debate-in-america/> accessed 12 June 2024.

To show their dissent against the position of the Supreme Court, the United States citizens organized several protests. Within days of the ruling, thousands of abortion rights demonstrators clashed with small groups of anti-abortion activists[242]. A year after the overruling of Roe v. Wade, protests were planned in several cities across the US, including Washington, New York, and Atlanta. In states where abortion had been banned, similar events were held virtually[243].

2.7.2 The Global Ripple Effect of the Dobbs Ruling: International Responses

When it comes to considering the impact of the ruling on the international community, several world leaders immediately demonstrated their disagreement with the decision. The spokesperson of the UN Secretary-General and the UN High Commissioner both criticized Dobbs for ruling strongly against international human rights ideals[244].

At the same time, the prime minister of Belgium, acknowledging the United States' global influence, expressed his concern over the signal that Dobbs could send to the rest of the world[245]. French President Macron expressed support for women whose freedoms were drastically curtailed by the ruling, while French women protested in solidarity with American women[246]. In the meantime, French activists were engaged in a revolutionary social and political commitment to obtain the inclusion of abortion rights in the country's Constitution. The efforts of the activists, supported by a collaboration with French politicians and government organizations, led to the inclusion of the right to abort in Article 34 of the French Constitution through the constitutional law of 8 March 2024[247].

In general, following the overturning of Roe v. Wade, the international community wondered if, just as the United States had been a trendsetter in 1973 for the legalization of

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[242] Shawn Hubler, 'Supreme Court Rules on Abortion: Thousands Protest End of Constitutional Right to Abortion (Published 2022)' (*The New York Times*, 24 June 2022) <https://www.nytimes.com/live/2022/06/24/us/roe-wade-abortion-supreme-Court#:~:text=Thousands%20gather%20in%20New%20York%20to%20protest%20the%20ruling.&text=Hours%20after%20the%20U.S.%20Supreme,constitutional%20right%20to%20an%20abortion.> accessed 12 June 2024.

[243] The Guardian, 'Protests Planned across Us to Mark One Year since Loss of Abortion Rights' (*The Guardian*, 24 June 2023) <https://www.theguardian.com/us-news/2023/jun/24/roe-v-wade-overturned-anniversary-protests-abortion-ban> accessed 12 June 2024.

[244] Laurie Coles & Danielle Essma, 'Dobbs v. Jackson: Changes in U.S., Global, and Domestic Leadership for Women's Rights' (New York State Bar Association, 8 March 2023) <https://nysba.org/dobbs-v-jackson-changes-in-u-s-global-and-domestic-leadership-for-womens-rights/> accessed 12 June 2024.

[245] Kaly Soto, 'World Leaders React to the US Supreme Court's Decision to Overturn Roe v. Wade' (CBS News, 24 June 2022) <https://www.cbsnews.com/news/roe-v-wade-supreme-Court-overturn-world-leaders-react/> accessed 12 June 2024.

[246] Id [245].

[247] Légifrance, 'Article 34 - Constitution du 4 octobre 1958 - Légifrance' (*Légifrance*, 10 March 2024) <www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000019241018> accessed 23 August 2024.

abortion, the 2022 ruling would also set a worldwide precedent to restrict access to abortion[248]. Although the overturning of Roe v. Wade had an immediate impact on access to abortion rights within the country, it is believed that this ruling will not reverse the global trend regarding this issue.

The United States also allegedly violated several instruments of international law that recognize that restrictive abortion laws violate human rights. Several UN human rights experts tackled the Supreme Court 2022 violation, assessing that it stands in stark contrast to a global trend of expanding access to abortion[249]. Following the Dobbs ruling, CEDAW issued a statement calling on the U.S. institutions to ensure women's access to safe and legal abortion services[250]. However, it is necessary to consider that the United States has not ratified this instrument and is, therefore, not bound to it. At the same time, the UN Committee on the Elimination of Racial Discrimination, which monitors a treaty that the United States has ratified, has called for the country to ensure access to abortion in addition to providing adequate mental health care to its citizens[251].

From the perspective of anti-abortion movements worldwide, the Dobbs decision marked a significant triumph and the beginning of a larger reversal. The global anti-abortion coalition has considered the United States' setback as a step towards establishing a world where life is supposed to begin at the moment of conception[252]. Furthermore, the Supreme Court decision is considered to provide the grounds for encouraging opposition efforts to abortion in several countries. Human Life International takes this position, stating that if the world's largest and most powerful democracy can reconsider its stance on the legality of abortion, then pro-lifers in all the nations of the world could come to similar conclusions[253].

Despite the stance of pro-lifers and anti-abortionists worldwide, the Supreme Court's decision has only proven to marginalize the United States' position on the issue. United States Ambassador Linda Thomas Greenfield confirms that with the Dobbs decision, the country has become an outlier in the protection of sexual and reproductive rights[254]. Confirming the quasi-isolated position of the United States towards abortion, as states in America increasingly promote restrictive laws, the rest of the world continues on the path towards the liberalization

[248] Lynn M. Morgan, 'Global Reproductive Governance after Dobbs' (2023) 122(840) Current History 22.
[249] Risa Kaufman et al., 'Global Impacts of Dobbs v. Jackson Women's Health Organization and Abortion Regression in the United States' (2022) 30(1) Sexual and Reproductive Health Matters.
[250] Morgan LM, [2023] (n.248).
[251] Ibid [250] 27.
[252] Id [250] 23.
[253] Id [252].
[254] Kaufman R et al., [2022] (n.249).

of abortion. Several European countries have introduced new progressive legislation on the topics. Finland and San Marino enacted laws to allow abortion on demand, while England and Wales allowed people to have medication abortions at home[255].

Observing the impact of Dobbs in Latin America, the decision has been closely read in countries that have only recently legalized abortion. Allegedly, then Mexican president Andres Manuel Lopez Obrador asked his adviser whether they could use the Dobbs case to dismantle abortion rights at the local level[256]. At the same time, antiabortion academics from Argentina's Catholic university have been examining the potential impact of Dobbs on the country's abortion laws[257].

Although many antiabortion activists in Latin America hope to use the language and example of Dobbs to restrict reproductive rights in their countries, it is improbable that this decision will affect their legal systems. An essential element that makes the reversal of abortion rights less likely in the case of Latin American countries is the influence of social activists. These groups have united the entire nation to urge governments to provide rights to their citizens.

In Argentina, the struggle for reproductive rights is referred to as "*plebeya y plural*" (popular and plural) and has brought together activists from different generations[258]. La "*Campaña por el aborto legal y gratuito*", the social movement that has fought for years to achieve the legalization of abortion in Argentina, combines street actions, social activism, parliamentary lobbying, and the recovery of feminist solidarity, as well as international efforts and grassroots organizing[259]. La "*marea verde*," or green tide, as referred to by various scholars, was able to bring together popular movements for a variety of causes under one umbrella, an element that was certainly lacking in the pro-abortion campaign in the United States.

The next chapter will explore Argentina's journey towards legalizing abortion. It will, in particular, discuss how social activism played a crucial role in uniting people in support of human rights and was instrumental in the legalization of abortion in the country.

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[255] Risa E. Kaufman & Katy Mayall, 'One Year Later: Dobbs in Global Context' (*American Bar Association*, 26 July 2023) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-end-of-the-rule-of-law/one-year-later-dobbs-in-global-context/> accessed 12 June 2024.
[256] Morgan LM, [2023] (n.248).
[257] Id [256].
[258] Gabriela Arguedas-Ramírez & Danielle M. Wenner, 'Reproductive Justice Beyond Borders: Global Feminist Solidarity in the Post-Roe Era' (2023) 51(3) Journal of Law, Medicine & Ethics 606.
[259] Id [258].

Conclusion

This chapter has reconstructed the history of the legalization and subsequent limitation of the right of abortion at federal and state levels in the United States. The analysis aimed to examine the legal history of the issue in the country to identify the significant elements that made the United States an outlier vis-à-vis the general movement toward liberalization of abortion rights.

The first section analyzed the positions the individual states took during the nineteenth century and up to the decision in Roe. Initially regarded as a common but unregulated practice, abortion gradually became criminalized because of both medical and religious pressures on the issue. Such demands were followed by a wave of restrictive bans by the states. However, in the 20th century, a growing dissent in the medical community and changing societal perceptions on the topic led to a legal reform movement. These developments culminated in the landmark 1973 Supreme Court decision Roe v. Wade.

The second section discussed the Roe v. Wade decision of 1973. The Supreme Court declared the Texas law unconstitutional by a majority of seven to two, basing its decision on the right to privacy protected by the Fourteenth Amendment. Essential for the outcome of the process was the consideration of precedents that established the same rights in similar matters. In addition to setting a precedent that would bind future Courts when considering similar subjects, the decision profoundly influenced state abortion laws in the United States.

The precedent set by Roe v. Wade has endured numerous challenges since its enactment. The third section opened with an analysis of the uncertainty era in the years following the Roe ruling. In 1989, a pivotal moment in the potential overturning of the right to abortion occurred in Webster v. Reproductive Health Service. The Supreme Court seemed ready to reconsider the right to abortion. However, the Planned Parenthood v. Casey decision of 1992 did not lead to a reversal of the ruling but consolidated the precedent set in Roe, albeit in a weaker form. Although the Court at the time was composed of justices appointed for their skeptical positions on Roe, the principle of adherence to precedent led them to preserve the essence of the 1973 decision.

Following Roe v. Wade, states displayed a wide range of views on the issue of abortion, signaling the polarization of opinions on the topic. The fourth section dealt with this topic. The 1980s especially saw an increase in abortion restrictions, including laws requiring mandatory waiting periods and imposing strict standards on abortion providers. At the same time, other

states adopted laws to facilitate access to abortion. This showcases how the federal system can lead to a patchwork of regulations, potentially denying rights to residents of conservative states.

In the wake of Roe, the social debate has also intensified. This topic is dealt with in the fifth section. As for the clash between pro-life and pro-choice, the former had seen the emergence of radical groups using violent tactics to prevent access to abortion clinics. Meanwhile, the pro-choice movement has largely failed to protect citizens from having their reproductive rights violated. This was due to the fact that pro-choice advocates had settled on the belief that the right to abortion was constitutionally guaranteed and would not be changed.

The beliefs of the pro-choice party were proven wrong by the Dobbs v. Jackson Women's Health Organization decision, dealt with in the last section. Once again, the presidential figure's involvement is evident in the appointments made during Donald Trump's administration. These justices played a crucial role in the overruling of Roe. In the decision, the precedent set by Roe v.Wade and upheld in Planned Parenthood v. Casey, which had ruled on the issue of abortion for fifthy years, was repealed. In addition to this, the Supreme Court disregarded the doctrine of *stare decisis* and ruled that the precedent did not deserve to be followed as erroneous from the outset and insufficiently rooted in the history and traditions of the country.

The Supreme Court was called upon to adjudicate the constitutionality of the Mississippi Gestational Age Act, an act at odds with the precedents on the subject. The Court concluded that the Constitution conferred no right to abortion and left the issue to the discretion of the states. The dissenting justices harshly criticized the majority's decision to move away from the precedent, accusing them of judicial activism, as the majority had preferred the rule of judges to the rule of law.

Finally, the last section has analyzed the post-Dobbs scenario. States' responses were immediate and polarized, with some imposing numerous restrictions and others seeking to strengthen and protect citizens' reproductive rights. American citizens' reactions were primarily adverse, with protests demonstrating the disconnection between legal decisions and prevailing public opinion. Finally, responses from the international community showed concern about the regression of reproductive rights in the United States. However, Dobbs' ability to influence the global context is believed to be limited.

Chapter III
Argentina: The Struggle for Abortion Rights and What Lies Ahead

Introduction

This chapter will explore the long road to the legalization of abortion in Argentina that culminated with the passage of Law 27,610 in 2020. This made abortion legal up to the fourteenth week of gestation for all pregnant persons. The aim of the chapter will be to examine the factors within the Argentine system that facilitated the legalization process while also investigating the sources of uncertainty in the system. A significant role was played by the feminist movements that trailed the country to the landmark law on abortion and that continued their mobilization activities even after the legalization.

The importance of this analysis stems from the fact that even in countries where abortion has been long legalized, such as the United States, there have been registered recent successes by conservative movements in reducing or revoking abortion rights. Therefore, it is crucial to examine how feminist movements in Argentina have effectively presented their arguments in the debate. This will help in the understanding of the potential political future of abortion rights in the country and could permit the shaping of a model to follow for nations currently working to secure or restore reproductive and sexual rights[1].

The first section will examine Catholicism's enormous impact on the country during and following colonization. This section will also look at the role played by two actors in preventing the liberalization of abortion. First, it will examine how Argentine Presidents effectively obstructed the possibility of adopting more progressive policies regarding abortion. Second, the analysis will turn to the activities of conservative movements that engaged in the creation of informal norms and tactics that effectively made abortion illegal in most cases.

The second section will focus entirely on the actor who has been the most vocal advocate for the legalization of abortion in the country: the pro-abortion movement. First, the different organizations involved in Argentina's pro-abortion movement will be considered, looking in particular at the work of the National Campaign for Abortion and *Ni Una Menos*. Second, the holistic tactics employed by the pro-abortion activists during their decades of militating will be outlined.

[1] Mariela Daby & Mason W. Moseley, 'Feminist mobilization and the abortion debate in Latin America: Lessons from Argentina.' (2022) 18(2) Politics & Gender 359.

The third paragraph will analyze one of the most widely used tools during the abortion debate in Argentina, which came to be known as '*política por otros medios*'[2] and refers to the legal cases brought before Argentine Courts by both sides of the debate. This paragraph will analyze the most emblematic cases on the abortion issue, the most significant of which is the F.A.L. case discussed before the Argentine Supreme Court in 2012[3]. The paragraph will highlight the impact and limitations that emerged from the decision of the Court. The paragraph will conclude with an analysis of the Belén and Lucía cases, which can be seen as emblematic of the judiciary's struggle to assert its influence over health care and institutional personnel in the Argentine provinces.

The fourth section of the chapter will be divided into two parts. The first section will analyze the abortion reform attempt brought before the Chambers in 2018 by the National Campaign. Although the 2018 attempt was unsuccessful, it still registered minor successes that led to a new vote on a legalization bill in 2020, which was successfully passed[4]. The second part of the section will consider law 27,610 and the 1,000-day plan law that defined the legalization of abortion up to the 14th week and outlined the post-abortion care system in the federal country[5]. The steps that led to adopting both laws and the characteristics of the two legal instruments will be analyzed. In the second section, the Argentine President's figure will once again be under the spotlight, as it was one of the elements that made the opening of a new legal debate possible in 2020.

The final section of the chapter will deal with the national and subnational scenarios developed after the law's implementation in the country. Firstly the section will look at the changes from a health and legal perspective at the national level. At the same time, it will consider the response of conservative forces to the new legal instrument, especially following the election of a new President with an extremely conservative orientation on the topic. This section will also examine the impact of the new Argentine legislation in Latin America and worldwide. Then, the last section will be devoted to the response of Argentine provinces to the new laws. In a federal system like that of Argentina, which is characterized by fragmentation among the different health sectors of the provinces, it is anticipated that there will be a lack of harmony in abortion policies between the provinces.

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[2] Sandra Salomé Fernández Vázquez, 'Los antecedentes de una conquista: transformaciones políticas y normativas en el proceso de legalización del aborto en Argentina.'(2022) Derecho y Ciencias Sociales.
[3] *F.A.L.* [2012] Supreme Court of Argentina 335:197 (2012) 335 Fallos 197.
[4] Alicia Ely Yamin & Agustina Ramon Michel, 'Using Rights to Deepen Democracy: Making Sense of the Road to Legal Abortion in Argentina' (2023) 46 Fordham Int'l LJ 377.
[5] Morgan Peck, 'A New Green Wave: Lessons from Argentina's *Marea Verde* for Legalizing Abortion over Religious Opposition in the United States' (2023) 56 Vand J Transnat'l L 1385.

3.1 Barriers to Initiate Change: The Pre-Reform Period in a Restrictive Scenario and Legal Constraints

During colonial times, in all Latin American countries, abortion was considered a crime; this stemmed from the influence of Catholicism in those countries[6]. Once independence was achieved during the 1820s, abortion bans were confirmed and, in some cases, even strengthened in Latin American countries[7]. Supporting this, the Argentine Criminal Code of 1886 punished women and medical personnel who performed an abortion with prison. The sanctions ranged from one to four years in jail, with the penalty going up to six years in cases where the abortion resulted in the death of the pregnant woman. The code further stipulated that in case the procedure was carried out without the woman's consent, the penalty ranged from three to ten years in prison and went up to fifteen years if the woman died as a result of the practice[8].

Surprisingly, under a period of military dictatorship, in 1922, Argentina passed a groundbreaking law permitting abortion in cases of rape or when the pregnant woman's life was at risk, which remained unchanged for over a century[9]. This law was implemented several decades before the reform on the issue took place in predominantly Catholic countries of Europe, such as Italy and Spain, which legalized abortion during the 1970s and 1980s[10]. The Argentine Criminal Code is provided within Title I, Chapter I, with a specific section on crimes against life. This is primarily regulated in Articles 85, 86, 87 and 88[11]. These criminal norms were aimed at the protection of the human life of the unborn child, establishing the penalty of imprisonment for those who cause abortion both in the presence and absence of the woman's consent, Article 85, but also for the woman herself who gave permission for the termination of her pregnancy or in the case of self-induction of the practice, Article 87[12].

The novelty of the Criminal Code arises from Article 86, which, in the second paragraph, provides grounds for non-punishment regarding the crime of abortion. Abortion is deemed not punishable when performed by medical personnel on a consenting woman in two

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[6] Omar G. Encarnación, 'Latin America's Abortion Rights Breakthrough.' (2022) 33(4) Journal of Democracy 89.
[7] Id [6].
[8] Human Rights Watch, 'A Case for Legal Abortion' (*Human Rights Watch,* 31 August 2020) <www.hrw.org/report/2020/08/31/case-legal-abortion/human-cost-barriers-sexual-and-reproductive-rights-argentina> accessed 9 July 2024.
[9] Encarnación OG, [2022] (n.6).
[10] Id [9].
[11] Carla Maria Reale, '"¡ Abajo el patriarcado, se va a caer, se va a caer!". La recente disciplina dell'interruzione volontaria di gravidanza in Argentina ed il ruolo dei movimenti femministi' (2023) 1S BioLaw Journal-Rivista di BioDiritto 235.
[12] Ibid [11] 240.

cases: namely, in cases where the pregnancy causes an unavoidable danger to the life or health of the pregnant woman or in cases of sexual violence committed against a woman with a psychosocial-intellectual disability[13]. Concerning the first cause of non-punishment, it was not made clear what kind of danger was appropriate to allow abortion to be non-punishable[14]. With regard to the second provision, in addition to containing derogatory language[15], the interpretation of this article immediately gave rise to interpretive problems and quickly became one of the primary obstacles in accessing legal abortion.

In the article, it was not made clear whether rape allowed all women victims of the crime to have a legal abortion or whether the exception was restricted to women victims of sexual violence who had limited mental capacity[16]. To clarify the purpose of both exceptions contained in Article 86, this was amended in 1986 via decree law. While an element of the severity of health risk was added in clause one, the restriction related to the mental state of the woman who experienced sexual violence was eliminated from clause two[17]. At the same time rendering access to abortion more complex, with the decree law, it was stipulated that criminal prosecution would be required in cases of rape to access the services, and the legal representative's consent would be necessary to initiate medical procedures if the woman was a minor or found to be incapacitated[18]. In any case, following the return to democracy, the original wording was restored[19].

The uncertainty surrounding the exceptions in the Criminal Code led to the creation of an informal rule that effectively banned all types of abortion[20]. Studies of the attitudes of health providers and law enforcement officials during the 1990s showed that such practitioners often misinterpreted the article or, in other cases, believed that regardless of the language of the article, abortion was illegal under all circumstances[21].

Argentine authorities also failed to educate the public about the legal framework on the issue, preventing women from receiving the information they needed to claim their rights to

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[13] Reale CM [2023] (n.11).
[14] Id [13].
[15] The article employed terms such as "idiot" and "demented" to describe women victims of rape who might seek an abortion due to mental health issues.
[16] Nayla Luz Vacarezza, 'Abortion Rights in Uruguay, Chile, and Argentina: Movements Shaping Legal and Policy Change' (2023) 29 Sw J Int'l L 309.
[17] Maria Eugina Monte et al., 'Abortion Law Reform in Argentina: Regulatory Models, Rationale and Precedents' (2022) 2022 Estudios de Derecho 213.
[18] Id [17].
[19] Id [17].
[20] Vacarezza NL, [2023] (n.16).
[21] Paola Bergallo, '7. The Struggle Against Informal Rules on Abortion in Argentina'. in Rebecca J. Cook, Joanna N. Erdman and Bernard M. Dickens (eds.) *Abortion Law in Transnational Perspective: Cases and Controversies* (Philadelphia: University of Pennsylvania Press, 2014).

legally access the procedure[22]. In addition to this, in many communities in Argentina, abortion remained a taboo that had to be kept a secret despite the circumstances[23]. In the practical application of the exceptions that allowed legal abortion, the right to privacy of many women was also perpetually breached when asked to provide excessive information. Of particular delicacy was the situation of minors who were denied protection from potential conflicts with parents or legal guardians[24].

Between 1986 and 2020, numerous bills were proposed in Congress for abortion legal reform. The first model proposed changes to the conditions for the decriminalization of abortion outlined in subsections 1 and 2 of former Article 86 of the Penal Code. The second model proposed replacing the conditions for decriminalization with a system based on time limits, sometimes combined with specific conditions under which abortion was legal beyond the term limit. Finally, the third model proposed to replace decriminalization conditions with a total penalization of abortion by including specific criminal offenses related to the practice of abortion; or to the exact opposite to adopt a model that reduces or eliminates the circumstances under which abortion was a crime[25].

Regarding the proposed amendments to clause 1 of former Article 86, some amendments proposed removing the danger to life and maintaining only the threat to health, which is understood to include mental, social, and emotional health[26]. Other drafts instead called for re-introducing an element of gravity in the danger suffered by the woman, which a health professional was asked to confirm[27]. For what concerns the amendment of clause 2 of former article 86, some called for additional requirements such as reporting the sexual crime within a specific time frame or asking for informed consent from the patient or legal and medical representatives[28].

In the meantime, society was undergoing significant changes, and along with that, values were also evolving. With the transition to democracy and the return of feminist activists from exile, Argentina embarked on a period of reevaluation of political and social issues that brought gender issues such as divorce, domestic violence, and sexual and reproductive health back to the center of the institutional sphere[29]. The discussion of these issues led to the

[22] Human Rights Watch, [2020] (n.8).
[23] Id [22].
[24] Bergallo P, [2014] (n.21).
[25] Monte ME et al., [2022] (n.17).
[26] Ibid [25] 219.
[27] Ibid [25] 220.
[28] Ibid [25] 223.
[29] Reale CM, [2023] (n.11).

emergence and establishment of a population described as more liberal than other Latin American countries in terms of its attitude toward birth control and divorce[30].

In this climate of demand to ensure the protection of more rights and freedoms within the country's legal framework, the national institutions responded with the amendment of the Argentine Constitution in 1994. This led to all international treaties guaranteeing human rights to have a constitutional status within the Latin American country's legal system[31]. As a result of this amendment and in a favorable social and political context, several gender equality laws[32] were enacted in the first decade of the twenty-first century's[33]. However, abortion remained illegal, and women continued to face institutional violence and opposition from health professionals when seeking to terminate unwanted pregnancies.

The analysis can now focus on the national and subnational governments' stance on abortion during the transition to democracy, with a particular focus on the figure of the President. This aspect is essential because, since Argentina is characterized by hyper-presidentialism, the President's personal views and the government's political orientation could explain a shift in the abortion debate towards a more conservative or liberal direction. The first President elected following the end of the military dictatorship, Radl Alfonsín enacted several measures to eliminate policies that had drastically limited reproductive autonomy and gender equality. In 1986, the President repealed the ban on contraception and recognized the right of couples to decide the number of family components freely, paving the way to further liberalization of sexual and reproductive rights[34].

However, in the decade between 1989 and 1999, President Carlos Saúl Menem pursued a conservative footprint through his neoliberal agenda. At the international level, Menem established a strong alliance with the Vatican that emerged during the 1994 Cairo Conference[35]. At the national one, the President called for a constitutional reform to include anti-abortion language restricting public access to contraceptives, to guarantee, and even establish an

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[30] Pew Research Center, 'Religion in Latin America: Widespread Change in a Historically Catholic Region.' (*Pew Research Center*, 13 November 2014) <https://www.pewforum.org/2014/11/13/religion-in-latin-america/> (accessed 9 July 2024).

[31] Encarnación OG, [2022] (n.6)

[32] The law on public contraception passed in 2003, sexual education passed in 2006, gender-based violence passed in 2009, equality marriage passed in 2010, gender identity passed in 2012 and legislative parity passed in 2017.

[33] Debora Lopreite, 'The long road to abortion rights in Argentina (1983–2020).' (2023) 42(3) Bulletin of Latin American Research 357.

[34] Yamin AE & Ramon Michel A, [2023] (n.4).

[35] Debora Lopreite, 'Transnational Activism and the Argentinean Women's Movement: Challenging the Gender Regime?' in D. Caouette, D. Masson and P. Dufour (eds.) *Transnationalizing Women's Movements: Solidarities beyond Borders* (UBC Press: Vancouver 2010).

anniversary day dedicated to unborn children[36]. In the end, the initiative failed thanks to the intervention of former President Alfonsín, liberal members of the constitutional assembly, and above all thanks to an initiative carried out by several women's organizations that became known as MADEL[37].

In a context where governmental forces continued to oppose abortion and where the new President, Eduardo Duhalde, was openly Catholic, collaborations between women's NGOs and female legislators began to emerge[38]. Since legal changes at the national level seemed contrary to the political orientation, human rights movements shifted their strategies to focus on the local level. Between 1986 and 2002, as activists continued to press the federal government for an abortion law, fifteen of Argentina's provinces adopted reproductive rights policies. Some of these provinces, famously Río Negro and Córdoba, explicitly recognized in their provincial laws that contraception was a right[39].

A breakthrough on the issue occurred in 2002, with the implementation of the National Reproductive Health Law, which created a program to promote reproductive health counseling and allowed access to contraception[40]. Although the new law did not cover abortion services, for the first time, a law applied a rights-based approach to sexual and reproductive rights issues in the country[41].

During the presidency of Néstor Kirchner, between 2003 and 2006, the regulation of abortion entered the government's public health agenda for the first time. The then health minister Ginés González García made maternal mortality a priority on his agenda, asserting that the criminalization of abortion was one of the leading causes for such a high rate[42]. The minister worked with feminist lawyers and experts in public health policies to create a guide on the issue. The '*Guía técnica para la atención integral de los abortos no punibles*' was released in 2007, and defined the interpretive details of Article 86 of the Criminal Code[43]. The attempt to implement this guide was short-lived as González García lost his position as minister

[36] Ysabella Carmen St Amant, 'Whose Right is it Anyway? A Study of Human Rights Language on Both Sides of the Abortion Debate in Post-Dictatorial Argentina.' (2020).
[37] Bergallo P, [2014] (n.21).
[38] Debora Lopreite, 'Explaining Policy Outcomes in Federal Contexts: The Politics of Reproductive Rights in Argentina and Mexico' (2014) 22(4) Bulletin of Latin American Research 389.
[39] Susan Franceschet & Jennifer M. Piscopo, 'Federalism, decentralization, and reproductive rights in Argentina and Chile.' (2013) 43(1) Publius: The Journal of Federalism 129.
[40] Bergallo P, [2014] (n.21).
[41] Yamin AE & Ramon Michel A, [2023] (n.4).
[42] Alba Ruibal & Cora Fernandez Anderson, 'Legal obstacles and social change: strategies of the abortion rights movement in Argentina' (2018) Politics, Groups, and Identities.
[43] Sandra Salomé Fernández Vázquez, 'Los antecedentes de una conquista: transformaciones políticas y normativas en el proceso de legalización del aborto en Argentina.' (2022) Derecho y Ciencias Sociales.

shortly after its creation with the election of the new President[44]. However, successive governments implemented new versions of the 2007 guide.

At the beginning of the twentyfirst century, a phenomenon defined as 'pink tide' expanded throughout Latin America[45]. This expression refers to leftist governments' acquisition of political power, usually led by women. Among these, it can be found the one of Cristina Fernández de Kirchner in Argentina between 2007 and 2015. Although the literature suggests that leftist governments should promote reproductive rights, none of them advocated for the legalization of abortion during their tenure[46]. In 2015, the Ministry of Health published a new document regarding the issue of abortion called '*Protocolo para la atención integral de las personas con derecho a la Interrupción Legal del Embarazo*' (ILE). This new technical guide marked a major step forward for Argentina. However, the protocol's implementation was left to physicians' discretion and varied deeply based on location[47]. Additionally, the enduring conservative social stigma associated with the Catholic faith kept preventing eligible individuals from seeking the practice[48].

3.1.1 The 'Anti-Rights' Movement: Ideals and Strategies to Oppose Progressive Abortion Policies

When Argentina gained independence from Spain, the country plunged into confusion about the relationship that the newly founded state should establish with the Catholic Church[49]. Up to that point, Catholicism had served as a social and moral pillar for the population and had been the mainstay of the bond with the colonial homeland. Therefore, the former Spanish colonies decided to include the Catholic religion in their preliminary Constitutions, guaranteeing it a spiritual monopoly over the nation and a leading role in educating its citizens[50]. In addition, during the years of the military dictatorships in Argentina, the government established an intense collaboration with ecclesiastical leaders consolidated by the conservative and traditional values that guided the junta government, including preserving the patriarchal family structure and ecclesiastical prominence within the state[51].

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[44] Fernández Vázquez SS, [2022] (n.43).
[45] Encarnación OG, [2022] (n.6).
[46] Id [45].
[47] Reale CM, [2023] (n.11).
[48] Id [47].
[49] Danielle Teutonico, 'Being Pulled Apart: The Competing Influences of the United Nations and the Catholic Church on Abortion Laws in Latin America' (2017) 26 Tul J Int'l & Comp L 247.
[50] Teutonico D, [2017] (n.49).
[51] Peck M, [2023] (n.5).

All these factors create the perfect conditions for the religious right to be the most significant opposition to abortion rights in the country. Regarding the main assumptions that guided the opposition on the issue, three fundamental tenets can be highlighted. The first concerns the fact that the fetus is a creation of god, the second of all, that the fetus possesses a soul from the very moment of conception, and finally, the disruption of the soul of the fetus through the practice of abortion is considered murder[52].

During the 1990s, the proliferation of human rights instruments sparked a heated debate on abortion rights between feminists and conservative religious opposition. On the one hand, reproductive activists condemned the actions of religious oppositions as 'anti-rights.'[53] At the same time, conservatives rejected that connotation, and these groups began to use the unborn rights framework along with religious justifications to argue that abortion rights are not only not human rights but are a violation of them, as their application can harm the wellbeing of women[54]. Conservative actors found the legal basis for the protection of the right to fetal life in Article 33 of the Argentine Constitution in addition to Article 4.1 of the American Convention of Human Rights, which protects life from the moment of conception[55].

The first and most effective strategy conservatives and catholic groups adopted on the issue was the creation of informal rules regarding the interpretation of Article 86 of the Argentine Criminal Code[56]. After the unsuccessful attempt to amend the Constitution in 1994, conservatives asserted that considering the constitutional status guaranteed to the Inter-American Convention on Human Rights and the UN Convention on the Rights of the Child, both protecting the rights of the children, Article 86 had de facto become unconstitutional[57].

As for the public actions of the religious groups, these attempted to mimic the strategies of feminist movements by occupying the same public spaces and adopting the same *modus operandi* as their counterpart. This strategy involved using the same symbol, the headscarves, employed by the pro-abortion groups. In the case of the conservative groups, the headscarves were light blue, symbolizing the color of the Argentine flag[58]. The Latin American Catholic forces also founded the slogan of 'let's save both lives' and 'all lives are valuable' by proposing

[52] Teutonico D, [2017] (n.49).
[53] Marcos Carbonelli & Maria Pilar García Bossio, 'Religion and Democracy in Argentina Religious opposition to the legalization of abortion.' (2023) 14(5) Religions 563.
[54] Merike Blofield & Christina Ewig, 'The left turn and abortion politics in Latin America.' (2017) 24(4) Social Politics: International Studies in Gender, State & Society 481.
[55] Bergallo P, [2014] (n.9).
[56] Id [55].
[57] Ibid [55] 207.
[58] Carbonelli M & García Bossio MP, [2023] (n.53).

an approach similar to that used in recent years by American pro-life groups, which advocated the need to protect the life of the pregnant woman as well as the fetus she carried.[59]

When lobbying at the federal level, the conservative movement targeted legislators representing historically traditional Argentine provinces. In the case these legislators demonstrated to be too progressive on the abortion topic, they were accused of ignoring the voices of the citizens who elected them[60]. At the subnational level, in Mendoza, San Juan, San Luis, and Tucumán, pro-life groups worked together to pass provincial laws protecting the rights of children to be born[61]. As for the collaboration with the government, the proximity of many Argentine Presidents to the church's dogmas has enabled several members of Opus Dei[62] or evangelical organizations to become health ministers[63].

Opposition groups to abortion also pushed for Courts intervention to restrict sexual and reproductive health services. For example, in the Portal de Belen case, held in 2002, a Catholic anti-abortion group in the province of Córdoba initiated a legal proceeding against the province's health ministry to ban the so-called 'morning after pill.'[64] The Supreme Court of Córdoba expressed itself in favor of the Catholic group, demonstrating that it shared the religious arguments proposed by the accusing entity[65].

However, despite the religious opposition in Argentina being persistent in upholding its values and emulating the strategies of its counterpart to influence the political landscape on this issue, the abortion rights movements in the country have countered them with a strong and multifaceted strategy[66]. This could serve as an example for the United States, where reproductive rights activists do not seem to have employed an effective approach to impede the religious opposition from reversing Roe v. Wade[67].

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[59] Carbonelli M & García Bossio MP, [2023] (n.53).
[60] Ibid [58] 7.
[61] St Amant YC,[2020] (n.36).
[62] Opus Dei focuses on promoting the belief that everyone can achieve holiness through their everyday activities and professional work. In Argentina, Opus Dei is involved in educational initiatives, social projects, and spiritual activities.
[63] St Amant YC, [2020] (n.36).
[64] *Portal de Belén/Asociación Civil sin Fines de Lucro v. Ministerio de Salud y Acción Social de la Nación* [2002] Corte Suprema de Justicia de la Nación P.709.XXXVI, (2002) Fallos 759.
[65] Yamin AE & Ramon Michel A, [2023] (n.4).
[66] Peck M, [2023] (n.5).
[67] Ruth Graham, 'Will We Keep Marching?' On Roe's 50th Anniversary, Abortion Opponents Reach a Crossroads' (*The New York Times*, 19 January 2023) <www.nytimes.com/2023/01/19/us/abortion-roe-v-wade-50th-anniversary.html> accessed 9 July 2024.

3.2 Breaking Barriers: The Rise of the Reproductive Rights Movement in Argentina

Given the conservative turn on abortion rights of the last few years, it is crucial to note the significant role that feminist movements have held and continue to keep in the implementation of reproductive rights in South America. Argentine feminist movements began to emerge in the country during the first years of the democratic transition, bringing forward claims about the legalization of abortion, free and safe access to abortion services, as well as the autonomy and rights of women over their bodies[68]. This movement served as a unifying force for the different factions of Argentine activism and achieved undeniable advances in social, institutional, and legislative matters over forty years[69].

One of the most successful and critical traits of the pro-abortion movements in Argentina was the framing of abortion not as a private matter but as a social problem. In the United States, activists lobbied to protect the right to abortion based on individual choice and reproductive autonomy under the slogan 'my body, my choice.'[70] The framework was different in Argentina, where activists framed illegal abortion as something that impacted substantially and negatively on public health as well as on the human rights of citizens. Argentine activists have thus been successful in framing the issue more effectively, linking their demands to the issue of human rights and considering these rights as an extension of democratic citizenship and social justice[71]. Argentina had a long history of street activism in the name of economic justice, so adopting a social justice approach ensured the movement that women of all social extractions would create a sense of community and collective solidarity on the issue[72].

At the same time, the movement framed abortion in the context of human rights because of the country's recent history. In the post-colonial period, human rights were crucial in the transition from authoritarianism to democracy, particularly by holding the regimes accountable for their human rights violations and crimes[73]. Moreover, in the country, the language of human rights had already been used successfully to demand the extension of the rights of the LGBTQ+ community, people of African descent, and Indigenous people[74].

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[68] Diego Alfredo Arangue & Miguel Ángel Jara, 'El movimiento por el aborto legal y gratuito en Argentina. Un problema social en clave histórica' (2022).
[69] Dora Barrancos, 'Los caminos del feminismo en la argentina: historia y derivas,' (*APDH | Homepage*, 2014) <www.apdh-argentina.org.ar/sites/default/files/u62/feminismos%20dora%20barrancos.pdf> accessed 9 July 2024.
[70] Encarnación OG, [2022] (n.6).
[71] Id [70].
[72] Daby M. & Moseley MW, [2022] (n.1).
[73] Encarnación OG, [2022] (n.6).
[74] Id [73].

Although women's rights organizations began to advocate for the right to abortion as early as 1983, the first attempts of this type were ineffective[75]. In 1986, the pro-choice advocates founded an important mobilizing tool, the *encuentros*. These meetings were held in various regions of the country and served as venues for collecting the diverse grievances put forward by the activists[76]. Although useful for the debate, the *encuentros* proved ineffective[77].

An essential stage in the history of Argentine sexual and reproductive activism was the creation of the *Campaña Nacional para el Aborto Legal, Seguro y Gratuito* (The National Campaign for the Right to Legal, Safe and Free Abortion). The idea of creating an organization that could bring together several organizations on abortion was developed during the National Meeting of Women held in Rodario in 2003[78]. The National Campaign was officially founded on 28 March 2005, International Women's Health Day[79]. One of the first initiatives of the Campaign was to gather signatures to be handed over to legislators following a march in Buenos Aires. The event was a success, and a high level of participation was achieved, with people of diverse skin colors, ages, and social classes coming together[80].

The Campaign was founded around the slogan '*Educación sexual para decidir, anticoncepción para no abortar y aborto legal para no morir*' (Sexual education to decide, contraception to avoid abortion and, legal abortion not to die). The complexity of the expresses reflected the agreement reached between the different groups that make up the campaign and has helped to keep it united.[81]

Thus, the organization was founded on a transversal alliance between various social actors. The campaign describes itself as a vast and diverse federal alliance that is a fundamental part of Argentina's effort to support the right to legal, safe, and free abortion.[82] In confirmation of its varied character, at the beginning of the 21st century, groups promoting the rights of the LGBTQ+ community joined the struggle for legal abortion, expanding the language of the Campaign from referring to 'women' to 'people able to gestate.'[83]

Another fundamental aspect of the Campaign's ideology is that the legalization of abortion is considered as a debt that democracy has with its female citizens. According to the

[75] Daby M & Moseley MW, [2022] (n.1).
[76] Lopreite D, [2023] (n.33).
[77] Id [76].
[78] St Amant YC, [2020] (n.36).
[79] Id [78].
[80] María Alicia Gutiérrez, 'Rights and Social Struggle: The Experience of the National Campaign for the Right to Legal, Safe, and Free Abortion in Argentina.' in *Abortion and Democracy* (Routledge 2021).
[81] Ruibal A. & Fernandez Anderson C., [2018] (n.42).
[82] St Amant YC, [2020] (n.36).
[83] Yamin AE & Ramon Michel A, [2023] (n.4).

activists, the absence of a right that promotes freedom of choice violates democratic principles.[84] Thus, the idea of democracy promoted by the Campaign is substantial and participatory, enabling the pro-abortion group to focus on collective rights rather than individual ones. In this way, the National Campaign has successfully connected the personal moral dimension of autonomy with collective political expression, an objective that the American reproductive justice movement has yet to establish[85].

By 2020, the Campaign comprised over 300 organizations, including women's groups, political parties, unions, and human rights organizations[86]. In parallel with the strengthening of the Campaign, other initiatives, such as '*Yo abortè' ('I had an abortion'),* began to emerge. In '*Yo abortè,'* women from different backgrounds confessed to having had an abortion in order to raise awareness and de-stigmatize the issue[87]. For example, Zulema Yoma, President Menem's ex-wife, admitted during the run-up to the 1999 Presidential election that she had an abortion supported by her ex-husband; her confession had a massive impact on the population[88].

Another feminist organization that contributed extensively to the adoption of the right to abortion was '*Católicas por el Derecho a Decidir*' ('Catholic Women for the Right to Decide'). This group's creed encourages Catholic women to use their religious beliefs to fight for social justice[89]. This organization is part of a more comprehensive network of Catholic organizations that extends to all of Latin America[90]. The activism of such groups is crucial in that they use religious belief to support progressive policies, directly challenging the religious right approach to the topic.

Like the National Campaign, another feminist movement that has achieved unforeseen influence within Argentine society is '*Ni una Menos*' ('Not one [woman] less'). This movement emerged in 2015 following the murders of young women throughout the country[91]. The pinpointed episode that triggered the creation of the group was the femicide of Chiara Páez, a 14-year-old who was three months pregnant when her boyfriend killed her[92].

Initially, the group wanted to focus mainly on gender violence and the high number of femicides in the country. This caused tensions with the National Campaign because *Ni una*

[84] Gutiérrez MA, [2021] (n.80).
[85] Id [84].
[86] Yamin AE & Ramon Michel A, [2023] (n.4).
[87] Id [86].
[88] Yamin AE & Ramon Michel A, [2023] (n.4).
[89] St Amant YC, [2020] (n.36).
[90] Id [89].
[91] Daby M & Moseley MW, [2022] (n.1).
[92] Id [91].

Menos did not include abortion in their programs. However, in a short time, the movement began discussing the abortion issue, connecting illegal abortion with institutionalized forms of violence[93]. The importance of *Ni Una Menos* stems from the fact that it provided organizational structures to support the legalization of abortion and contributed to the mobilization of women who had never participated in politics before[94]. *Ni Una Menos*' activism also affected the orientation of influential political and institutional figures. One of them was former President Christina Fernández de Kirchner[95]. The ex-President asserted that one of the reasons that had led her to change her mind on the subject was to be found in the extent of mobilization that took place in the country[96].

During the prolonged struggle for sexual and reproductive rights, the feminist movement employed strategies that involved almost every aspect of the public and institutional life of the country. The strategies ranged from street protests and social media campaigns to lobbying on legislative committees and the Congress. The various activities carried out by the activists reflected the central holding that changing the law on abortion was insufficient, and the actions in that regard needed to be coupled with actions to destigmatize abortion and combat misinformation[97]. Through this wide variety of strategies, the movement has succeeded in addressing conservative religious ideologies on abortion in the Courts, in the legislature, and political discourse[98]. This element lacked in the United States experience where the law came at a time when public attitudes on the subject were still undefined.

Within the variety of strategies employed by pro-abortion activists, the organization of protests has been among the most impactful ones. This was due to the symbolic significance of public encounters and the crucial element of the headscarves. Protests are very common in Argentina, and although they have not always been effective, there have been several examples of government responsiveness to widespread demonstrations[99]. As for the symbolic element, activists of the first organization of the National Campaign have asserted that the employment of the headscarves connected the new activists with the old ones. As the grandmother and mothers who had protested against the disappearance of their loved ones during the dictatorship

[93] Lopreite D, [2023] (n.33).
[94] Daby M & Moseley MW, [2022] (n.1).
[95] Id [94].
[96] 'If you want to know who it was that made me change my mind, it was the thousands of girls who took over the streets. It was seeing them become true feminists'. (Christina Fernández de Kirchner's speech, August 8, 2018).
[97] Risa Kaufman et al., 'Global impacts of Dobbs v. Jackson Women's Health Organization and abortion regression in the United States.' (2022) 30(1) Sexual and reproductive health matters.
[98] Peck M, [2023] (n.5).
[99] Daby M & Moseley MW, [2022] (n.1).

of Videla had used the white handkerchiefs, the new generation of activists had decided to use the same symbol, this time with the color green, to symbolize the struggle for women's rights to abortion[100]. The widespread use of green scarves in pro-abortion demonstrations led to the creation of the term '*marea verde*' or green tide to denote these protests[101]. To this day, the green handkerchief symbolizes progressive feminist politics throughout the entire region[102].

During the heated protests that took place between 2018 and 2020, pro-abortion groups appealed widely to the impact that economic discrimination had on the availability of abortion. In a popular chant stating, 'rich women abort, poor women die,' activists highlighted how the most disadvantaged women were disproportionately affected by the inability to access legal abortion services[103]. This appeal was effective with the public and national institutions, resulting in a more than fifty percent increase in support for legal abortion in 2020.[104]

In 2018, during the most intense phase of the struggle for reproductive rights, the National Campaign coined the motto '*¡Aborto Legal Ya!'* ('Legal abortion now!') to emphasize the importance and urgency of legalizing abortion[105]. This message was conveyed in different fields, including protests, feminist publications, and social media. Mass media and social media use, especially since 2015, have helped increase the visibility and magnitude of feminist mobilization[106].

In terms of lobbying the parliament, many feminists who were involved in the National Campaign also participated in other public organizations such as political parties, trade unions, and human rights organizations, a phenomenon often referred to as '*doble militancia*'. These women helped forge alliances and foster solidarity for the Campaign's principles within and beyond the state[107]. One of the most outstanding achievements of the coalition between the National Campaign and its allies in Congress was the ratification of the country to the optional protocol of the Convention on the Elimination of All Forms of Discrimination Against Women through congressional law in 2007[108].

In addition, those members of the National Campaign who were also national legislators have proposed several bills to decriminalize abortion in the National Congress. These bills were

[100] St Amant YC, [2020] (n.36).
[101] Encarnación OG, [2022] (n.6).
[102] St Amant YC, [2020] (n.36).
[103] Encarnación OG, [2022] (n.6).
[104] Id [103].
[105] St Amant YC, [2020] (n.36).
[106] Daby M & Moseley MW, [2022] (n.1).
[107] Vicotoria Tesoriero, 'La Marea Verde como nuevo actor político: cambios en el movimiento feminista argentino.' (2019) 12(22) Revista Plaza Pública 101.
[108] Lopreite D, [2023] (n.33).

debated at different times in the Lower House Criminal Law and Health Committees but never reached the House floor until 2018[109]. In 2018, the National Campaign introduced a bill to legalize abortion for the seventh time. This led to the parliamentary debate being opened for the first time on the issue. Although the number of lawmakers supporting the amendment bill increased over the years, opposition from the Presidents was one of the biggest obstacles to advancing legislative debate during that time[110].

Finally, since 2009, a network of feminist organizations, deeply frustrated with the inaction of the Argentine institutions, has focused on a strategy centered on service delivery. One of the networks whose activities can fall within this category is '*Docentes por el Derecho al Aborto Legal, Seguro y Gratuito*' ('Teachers for the Right to Legal, Safe and Free Abortion') created in 2014[111]. The group members, who are teachers familiar with the challenges of implementing comprehensive sex education in schools, have created materials to develop a national-level educational strategy[112]. Another essential network was the '*Red de Profesionales de la Salud por el Derecho a Decidir*' ('The Network of Healthcare Professionals for the Right to Choose'). The group consisted of activists working in the field of public health who worked to improve the conditions for access to legal abortion[113]. In a similar context, SenRed was developed, an organization that supported women seeking abortion services by providing information on the use of a type of medication called misoprostol while connecting them with pro-choice doctors and centers in the country[114].

The first abortion hotline was launched in 2009 by the organization '*Lesbianas y Feministas por la Descriminalizacion del aborto*' ('Lesbians and Feminists for Abortion Decriminalization'). The line took the name '*Abortion: mas informacion, nenos riesgos'* ('Abortion: more information, less risks) and was inspired by a similar initiative launched in Ecuador[115]. The organization sponsoring the hotline believed that the criminalization of abortion did not deter people from seeking the procedure, but instead, it only made it more dangerous. The primary purpose of the hotline was to provide support and access to information for individuals seeking abortion services to empower women by helping them understand their rights[116].

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[109] Lopreite D, [2023] (n.33).
[110] Id [108].
[111] Gutiérrez MA, [2021] (n.80).
[112] Id [111].
[113] Id [111].
[114] Ruibal A & Fernandez Anderson C, [2018] (n.42).
[115] Vacarezza NL, [2023] (n.16).
[116] Id [115].

A few years after the hotline was created, a similar strategy emerged within the National Campaign. Since 2012, *Socorristas en Red* has offered information and support for the entire pregnancy period, ensuring that individuals were also aware of the possibility of self-management abortion practices outside the medical sector[117]. In addition to the abortion hotline services, the group has added a new practice of accompanying women through the decision-making process and also during the abortion procedure[118]. While the *Socorristas* believe that their services were necessary to prepare the ground for the legalization of abortion, *Lesbianas y Feministas* showed considerable skepticism toward legal reform[119].

In conclusion, the achievements that pro-abortion groups have made in recent years come from decades of political organizing, alliances with political groups and civil society, as well as another wide variety of political strategies. Notably, the movement has largely considered legal change a critical and essential step in a more ambitious long-term effort to secure bodily autonomy, sexual freedom, and reproductive justice[120]. Therefore, following the legalization of abortion in 2020, they have kept advocating for further policies to eliminate the obstacles to access to abortion within the country.

3.3 '*Politica por otros medios*': Struggles and Efforts to Initiate Change Through the Argentine Supreme Courts

In the literature regarding Latin America and, in particular Argentina, judicial cases brought before the Courts to advance human rights are referred to as '*política por otros medios*.' This expression refers to the fact that the Courts have become a space for political negotiation enabling minority actors to achieve significant results in the political arena[121]. This tool has been used extensively and with notable results by the pro-choice movement in Argentina.

Between 2005 and 2012, many cases brought to the Courts involved the non-punishable provisions of Article 86. For example, in the C.P de P.A.K case[122], a woman with a heart disease applied for an abortion at a clinic in the city of Buenos Aires. The clinic staff went to the Court of the first instance to obtain permission for the practice, which was denied in both the first and

[117] Silvina Ramos et al., 'Step by step in Argentina: putting abortion rights into practice.' (2023) International Journal of Women's Health 1003.
[118] Ruibal A & Fernandez Anderson C, [2018] (n.42).
[119] Id [118].
[120] Vacarezza NL, [2023] (n.16).
[121] Fernández Vázquez SS, [2022] (n.2).
[122] *C.P. D. P., A.K. s/Autorización* [2005] Suprema Corte de la Provincia de Buenos Aires Causa Ac. 95.464 | (2005) LLBA.

second instances[123]. Only when the case reached the Supreme Court of the province of Buenos Aires was the woman allowed to terminate the pregnancy. The Court further used that opportunity to affirm that in cases covered by Article 86, referring the case to the Courts was unnecessary[124].

A case that had an unexpected impact on public opinion was that of L.M.R. In this case, a minor with intellectual disability who had been a victim of sexual violence was requesting to terminate her pregnancy[125]. The girl was granted the right to undergo the procedure by the Supreme Court of the province of Buenos Aires. Despite the girl's mother complying with the demanding requirements to access the legal procedures, it took a long time for the girl to be granted the right to have an abortion. Even after the Buenos Aires Supreme Court's ruling, the family had considerable difficulty disposing of the procedure. The young girl was eventually forced to resort to a clandestine abortion, given the impossibility of being granted the procedure in the province's public hospitals[126]. In 2007, the case was brought to the UN Human Rights Committee since the treatment and delays suffered by the young woman were considered cruel, inhuman, and degrading. In 2011, the Committee condemned Argentina for that case[127].

All the uncertainties regarding the application of Article 86 seemed to find an answer in 2012 with a critical case discussed before the Argentine Supreme Court. The F.A.L. case featured a 15-year-old young woman, whose name during the trial was A.G. to protect her privacy, who became pregnant as a result of a sexual assault in Chubut province[128]. When asking for a legal abortion, the young girl and her mother, named A.F., for the sake of the trial, faced several rejections from medical and public institutions before being finally authorized by the highest Court in the country[129].

In January 2010, A.F. requested the Chubut Court to authorize her minor daughter to terminate her 11-week pregnancy[130]. The Court denied permission for the procedure both in the first and second instance, despite the pregnancy resulting from rape and the existence of medical documentation indicating that the young girl suffered from depressive symptoms and

[123] Reale CM, [2023] (n.11).
[124] Paola Bergallo, 'El derecho como modelador de las decisiones reproductivas y los límites del giro procedimental.' (2012) 1(1) *Revista Derecho Privado* 207.
[125] Yamin AE & Ramon Michel A, [2023] (n.4).
[126] Id [125].
[127] *L.M.R. vs. Argentina* [2011] Human Rights Committee CCPR/C/101/D/1608/2007, [2011] UN Doc.
[128] Andrea F. Noguera, 'Argentina's Path to Legalizing Abortion: A Comparative Analysis of Ireland, the United States, and Argentina' (2019) 25 Sw J Int'l L 356.
[129] María Eugenia Monte, 'Abortion, sexual abuse and medical control: the Argentinian Supreme Court decision on F.AL.' (2017) 26 Sexualidad, Salud y Sociedad (Rio de Janeiro) 68.
[130] Noguera AF, [2019] (n.128).

suicidal thoughts[131]. In March 2010, the Superior Court of Chubut Province overturned the earlier decision on the basis that first, the case fell within the non-punishable abortion outlined in Article 86 of the Criminal Code, and second, that this interpretation of Article 86 was in accordance with the constitutional law and human rights[132]. On this basis, on March 11, 2010, the Court authorized the minor to obtain a legal abortion. After the authorization, a public prosecutor's office representative filed an appeal against the decision made by the higher Court on behalf of the fetus[133].

Two years later, in March 2012, Argentina's Supreme Court unanimously upheld the provincial Court's decision[134]. It is believed that the appointment of the first female judge to the federal Supreme Court, Carmen Argibay, a feminist and pro-choice activist, pushed the issue onto the Supreme Court's agenda[135]. In its reasoning, the Argentine Supreme Court cited Roe to justify its decision to rule on the case even though the minor had already had an abortion and, therefore, was no longer pregnant at the time of the final decision[136]. Notably, the justices asserted that it was necessary to issue a decision in the case to generate a precedent for future cases of a similar nature[137]. In its ruling, the Argentine Supreme Court went beyond the right to privacy reconsidered in the Roe judgment, which is already covered by Article 19 of the Argentine Constitution. Instead, the Argentine Supreme Court recognized abortion, under certain circumstances, as a human right that must be guaranteed by the state and by its subnational units[138].

In the landmark judgment, the National Supreme Court also intervened to correct Article 86 of the Penal Code and clarify its interpretation. The Court rejected all arguments brought by conservative groups to justify a narrow interpretation of the article[139]. Then, it proceeded to delineate an interpretation of Article 86 in accordance with the Constitution and Human Rights law, a reference to human rights and international law that is entirely absent in both Roe and Dobbs's decisions[140]. This is because these instruments have been considered

[131] Reale CM, [2023] (n.11).
[132] Noguera AF, [2019] (n.128).
[133] Id [132].
[134] *F.A.L. s/ Medida autosatisfactiva* [2012] Suprema Corte de Justicia de la Nación No. 259, XLVI, (2012) vol. XLVI Fallos 33.
[135] Debora Lopreite, 'The Federal Restriction toWomen's Rights: Argentina's Politics on Abortion and Contraception' in J. Vickers, J. Grace and C. Collier (eds.) *Handbook on Gender, Diversity and Federalism* (Edward Elgar Publishing: Cheltenham, 2020).
[136] Noguera AF, [2019] (n.128).
[137] Id [136].
[138] Peck M, [2023] (n.5).
[139] Noguera AF, [2019] (n.128).
[140] Peck M, [2023] (n.5).

constitutional sources since 1994, and compliance with them implies obligations for national and provincial institutions[141].

The Court recognized that women have the right to non-punishable abortion, and it ruled that in cases of rape, the legality of abortion applies to all women, not just those with mental disabilities[142]. Applying the principles of equality and non-discrimination, the Court held that limiting the legality of abortion to only women with limited mental capacity would establish a discriminatory practice toward other rape victims[143]. The legal basis for this statement was found in international treaties such as the CEDAW. Specifically, those provisions that oblige states to condemn discrimination in all forms ensure the full development of women and eliminate prejudice against them[144]. In addition to this, the Argentine Supreme Court guaranteed the women's right to information and confidentiality. The Court ruled that in cases of pregnancies resulting from sexual abuse, women do not need to file criminal charges against the perpetrator or provide evidence of the abuse to access abortion services[145]. Concerning the conscientious objection, in its 2012 decision, the Court required this to be expressed at the beginning of the professional activities in the health care facility[146]. In any case, a delay, obstruction, or denial of non-punishable abortion practice within public facilities was considered illegal since it could severely endanger the health and life of the pregnant woman[147].

Regarding the need to determine whether or not the woman's right to choose overrides the fetus' right to life, as the U.S. Supreme Court had done in Roe, the Argentine Supreme Court ruled that a balancing test should be applied. So, the right to prenatal life is not deemed absolute and must be interpreted, balancing it with other rights[148].

The Supreme Court also asserted that state governments should take both negative and positive measures to provide abortion access. The Court called national and provincial authorities to implement protocols to remove barriers to access abortion and ensure that public hospitals effectively allow the practice[149]. Although Supreme Court decisions in Argentina do not automatically apply to similar cases, the 2012 case had a material and symbolic impact on the country[150]. The resonance of the case gave rise to profound social and institutional changes

[141] Noguera AF, [2019] (n.128).
[142] Yamin AE & Ramon Michel A, [2023] (n.4).
[143] Noguera AF, [2019] (n.128).
[144] Bergallo P, [2014] (n.21).
[145] Monte ME, [2017] (n.129).
[146] Human Rights Watch [2020] (n.8)
[147] Monte ME, [2017] (n.129).
[148] Noguera AF, [2019] (n.128).
[149] Id [148].
[150] Yamin AE & Ramon Michel A, [2023] (n.4).

and resulted in significant innovations in the health sector. As a result of F.A.L., the National Ministry of Health updated the national protocol to comply with the Court's decision and other statutes[151]. Despite some positive outcomes, noncompliance and pushbacks persisted in the more conservative provinces. This shows that the Argentine judiciary lacks the enforcement power to regulate the issue once and for all[152]. After the F.A.L. decision, the abortion system in Argentina remained highly fragmented, and legal abortion remained unavailable in many provinces of the country. Even if in nine provinces, hospital protocols were adopted in accordance with the Supreme Court decision of 2012, in eight provinces of the country, abortion was unavailable; in seven, unjustified barriers hindered women's access to such services[153].

3.3.1 The Judiciary's Restricted Enforcing Power: The Cases of Belén and Lucía

To illustrate that the Supreme Court ruling on abortion did not result in a drastic shift in doctrine on the issue for the entire country, the analysis will now focus on two cases that have arisen since the 2012 National Supreme Court decision. In 2014 Belén, a twenty-eight-year-old woman, went to a public hospital in Tucumán with severe vaginal bleeding, which turned out to be a miscarriage that occurred at twenty weeks of gestation[154]. Although the woman claimed to be completely unaware that she was pregnant, her opinion was ignored by the medical staff and the legal system[155]. She was sentenced to eight years in jail for aggravated murder[156].

The trial was characterized by contradictions, loss of evidence, and insufficient evidence to find the defendant guilty, severely restricting the woman's rights[157]. When the woman's story was made public, the case gained global attention, catching the interest of international organizations. The involvement of these organizations led to the Supreme Court of the province of Tucumán being prompted to rule on the case[158]. The Supreme Court of the province of Tucáman ruled on the case in 2017, overturning the Criminal Chamber's decision

[151] Id [150].
[152] Noguera AF, [2019] (n.128).
[153] Noguera AF, [2019] (n.128).
[154] Carla María Mora Augier, 'Caso Belén y Caso Lucía: dos situaciones de violencia en el sistema público de salud de Tucumán, Argentina.' (2022).
[155] Mora Augier CM, [2022] (n.154).
[156] Noguera AF, [2019] (n.128).
[157] Mora Augier CM, [2022] (n.154).
[158] Id [157].

and acquitting the woman for lack of sufficient evidence to prove her guilt[159]. Despite this, the woman had spent more than two years in prison at the time of the reversal[160].

The feminist activists who exerted social pressure to change the sentence in the Belén case were also involved in the Lucía case[161]. This case involved an eleven-year-old girl who became pregnant as a result of intra-family rape[162]. The minor and her legal guardian, her mother, had to face numerous obstacles before being allowed to access a legal termination of pregnancy. When the girl's mother requested an ILE, the healthcare organization where the procedure was requested did not take action to initiate the procedure, resulting in an advancement of the pregnancy[163]. The health authorities had no justification to suspend the practice since the case of Lucia fell in both categories of Article 86, having the girl also attempted suicide[164].

Finally, after a five-week standoff by health authorities, thanks to the intervention of organizations in the protection of human rights and intense media pressure on the case, the girl was given a cesarean section that resulted in the death of the fetus[165]. In the meantime, groups defined as '*anti-derechos*' gathered in front of the hospital with their light blue bandanas to intimidate the hospital personnel[166].

Lucía's case was brought before the Inter-American Commission on Human Rights in Washington. There, the failures of Argentine provinces in implementing the legal abortion system and the lack of consideration for the particular condition of children in the existing protocols in Argentina were reported[167]. The state and its health actors were accused of not correctly informing women about the possibilities of accessing legal abortion services, in addition to acting contrary to the guidelines established by the Protocols on the subject[168]. Concerning the province, Tucumán was criticized for not following national standards on abortion by not adhering to the legal protocol for abortion[169].

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[159] Monte ME et al., [2022] (n.17).
[160] Noguera AF, [2019] (n.128).
[161] Mora Augier CM, [2022] (n.154).
[162] Id [161].
[163]Mora Augier CM, [2022] (n.154).
[164] Encarnación OG, [2022] (n.6).
[165] Mora Augier CM, [2022] (n.154).
[166] Id [165].
[167] Mariana Claverie, 'Caso Lucía: una audiencia internacional pone a Tucumán en la mira' (*el tucumano | Noticias y actualidad de Tucumán*, 24 September 2019) <www.eltucumano.com/noticia/actualidad/258500/caso-lucia-una-audiencia-internacional-pone-a-tucuman-en-la-mira> accessed 10 July 2024.
[168] Id [167].
[169] Id [167].

3.4 Abortion Law Reform in Argentina: The Critical Two Years Leading to Legal Change

3.4.1 2018: The Abortion Debate Makes Its Way to Congress

The debate on abortion came to the forefront of political discourse in 2018, leading to the legalization of the issue in two years' time. In March 2018, President Mauricio Macri announced that he would not oppose a "responsible and mature" national debate on the decriminalization of abortion[170]. Although President Macri maintained a neutral position on the issue and tried to avoid intervening in legislative negotiations due to division within his party on the issue,[171] the statements of the conservative President Macri surprised many in the political and civil society spheres.

One of Argentina's most well-known newspapers, Clarín, published the news on its front page, stating that the President had given the "green light" to the discussions on abortion in Congress[172]. Another major newspaper, *La Nación* speculated that the President's stance was motivated by the massive feminist mobilization[173]. The surprise of civil society stemmed from the fact that when elected in 2015, Macri was the first conservative President in more than a decade. Since there had been no progress on the issue during the center-left governments, there was no expectation that a conservative President would support the issue[174]. The fact that a debate on abortion rights in the national institutions emerged only after the election of a conservative government and President contradicted not only the literature but also regional trends[175].

Considering the stance of the President on the topic, in 2018, the National Campaign presented a new bill for the legalization of abortion in the country. Concurrently with the presentation of the bill, the National Campaign organized a large public demonstration in front of the National Congress. This social event had an unprecedented resonance, forcing institutional representatives to become aware of society's demands[176]. Additionally, the local and international media coverage of the events of 2018 created an environment that encouraged active participation from both factions of the debate[177].

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[170] Daby M & Moseley MW, [2022] (n.1).
[171] Lopreite D, [2023] (n.33).
[172] Daby M & Moseley W, [2022] (n.1).
[173] Candela Ini, 'Aborto: finalmente Macri pidió que se abra el debate' (*LA NACION*, 2 March 2018) <www.lanacion.com.ar/politica/aborto-finalmente-macri-pidio-que-se-abra-el-debate-nid2113431/> accessed 10 July 2024.
[174] Daby M & Moseley MW, [2022] (n.1).
[175] Daby M & Moseley MW, [2022] (n.1).
[176] Gutiérrez MA, [2021] (n.80).
[177] St Amant YC, [2020] (n.36).

The bill was discussed and passed in the House of Representatives with 131 votes in favor and 123 against, but it was rejected in the Senate with 38 votes against and 31 in favor[178]. Among the senators who voted against the bill was former President Carlos Menem, while among those who voted in favor was former President Cristina Fernández[179]. The failure of the bill is attributed to conservative religious groups employing various arguments and strategies to increase pressure on legislators and push them to vote against the legalization of abortion[180]. These groups succeeded in persuading senators representing the northern provinces of Argentina to vote against the bill. Almost two-thirds of the votes against the bill came from senators representing these provinces, where the Church's presence is more robust, and education remains in the hands of religious institutions[181]. Even though the bill did not pass, the fact that the lower chamber expressed itself positively on the issue was still an essential success in the legalization of abortion.

Thousands gathered in Buenos Aires to witness the vote count in Congress, with thousands more gathered in other public squares within the country[182]. The House of Representatives' approval of the voluntary termination of pregnancy was celebrated in the streets of Buenos Aires, but the news also provoked a counteroffensive from conservative groups. In response to the news, the Argentine Episcopal Conference changed its initially moderate tone to an explicit call for mobilization against abortion[183]. Moral remained high even after the Senate's negative vote, as the events of 2018 led, according to feminist movements, to the social decriminalization of abortion[184].

3.4.2 Law 27.610: Approval Process and Legislative Content

One of the major unfulfilled promises of Argentine democracy was finally implemented in 2020, in a context of surprisingly less public debate compared to two years earlier[185]. At this

[178] Carbonelli M & García Bossio MP, [2023] (n.53).
[179] Mar Centenera & Federico Rivas Molina, 'Argentina vota la legalización del aborto en medio de una movilización masiva' (*El País Argentina*, 8 August 2018) <https://elpais.com/internacional/2018/08/07/argentina/1533659021_964914.html> accessed 10 July 2024.
[180] Pablo Gudiño Bessone, 'Discursos y repertorios de acción colectiva del activismo antiabortista: Emociones y producción de subjetividades contra la ley de IVE (Argentina, 2018)' in María Angélica Peñas Defago, María Candelaria Sgró Ruata and María Cecilia Johnson (eds.) *Neoconservadurismos y Política Sexual: Discursos, Estrategias y Cartografías de Argentina* (Río Cuarto: Ediciones del Puente, 2022).
[181] Centenera M & Rivas Molina F, [2018] (n.179).
[182] Yamin AE & Ramon Michel A, [2023] (n.4).
[183] Centenera M & Rivas Molina F, [2018] (n.179).
[184] Noguera AF, [2019] (n.128).
[185] Agustina Abril Boriosi & Gabriela Rodríguez Rial, 'Autonomía y aborto legal en la Argentina. Análisis del debate parlamentario de la Ley 27.610.' (2023) 30 Revista Electrónica Instituto de Investigaciones Jurídicas y Sociales AL Gioja 28.

point, it is necessary to analyze the elements of the 2020 campaign for legalization that enabled the passage of the legalization bill. Firstly, the lack of a heated public debate on the issue was due to the fact that by 2020, the social and legislative debate was already settled[186]. Therefore, it was reduced to shorten due to the urgency of enacting such a law. Secondly, for the first time, gender rights became an essential issue during the presidential race of 2019[187]. The center-left candidate from *Frente de Todos*, Alberto Fernández, committed to submitting a new abortion legalization bill to the National Congress[188]. Fernández was elected in October 2019, and the President's support on the issue of abortion had a significant impact on the push for legalization.

The President made women's rights the center of his governmental agenda. He spoke on behalf of the cause, starting his first annual speech to the bicameral Congress by asserting the necessity for the country to respect the individual right to choose over one's body[189]. Additionally, he created the Ministry of Women, Gender, and Diversity and appointed a human rights lawyer with strong connections to the *marea verde* as minister[190]. Since its creation, the ministry has played a crucial role in advocating for the legalization of abortion. The President also committed to pressuring senators to support the new law on the legalization of the abortion practice. During the negotiations for the new bill, the President personally engaged in debates with the most reluctant senators[191]. In doing so, the President wanted to avoid the 2020 abortion legalization bill the same fate as the one presented just two years earlier.

Regarding legislators' opinions on the issue, evident changes in the behavior of some legislators were identified during the 2020 debate. These changes were reflected in the votes on the proposed laws in 2020 and in the arguments and reasoning that characterized the debate preceding that vote[192]. Firstly, although some legislators referred to their religious beliefs, most opponents of the law tried to avoid having the public associate their vote with personal convictions, attempting a more pragmatic approach[193]. Among the arguments brought by those who opposed the legalization of abortion, it was emphasized the existence of provincial

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[186] Id [185].
[187] Lopreite D, [2023] (n.33).
[188] Id [187].
[189] Uki Goñi, 'Argentina President under pressure to keep election promise on abortion' (*the Guardian*, 28 September 2020) <www.theguardian.com/global-development/2020/sep/28/argentina-President-under-pressure-to-keep-election-promise-on-abortion> accessed 12 July 2024.
[190] Lopreite D, [2023] (n.33).
[191] Lopreite D, [2023] (n.33).
[192] Abril Boriosi A & Rodríguez Rial G, [2023] (n.185)
[193] Id [192].

Constitutions that protected life from the moment of conception. According to these legislators, supporting the executive's proposed bill would imply denying the autonomy of these provinces[194]. On the opposite side, Laura Russo, a deputy from the President's party *Frente de Todos*, referred to the recommendations of international organizations and human rights to justify her favorable position on the legalization of abortion[195]. Another argument brought by the faction in favor of legalization concerned the health of pregnant individuals. In turn, opponents to the initiative claimed that the 2020 bill placed women's autonomy above the issues the health system was experiencing due to the ongoing pandemic[196].

Although the COVID-19 pandemic seemed poised to disrupt the discussions on the abortion bill, in November 2020, the President managed to send the draft of the law to Congress, fulfilling the promise made to the population during his electoral campaign[197]. The President also presented a law that regulated health care during pregnancy and early childhood, the 'Comprehensive Health Care and Attention during Pregnancy and Early Childhood Law'[198] known as the '1,000-Day Plan.'[199] Regarding the law for the legalization of abortion, known as Law 27.610[200], it provided for the decriminalization of the '*Interrupción Voluntaria del Embarazo*' (IVE) or Voluntary Termination of Pregnancy, up to the fourteenth week. Beyond that period, abortion would be allowed according to the system in force until then, namely the '*Interrupción Legal del Embarazo*' (ILE) or Legal Interruption of Pregnancy[201]. On December 30, 2020, celebrations began in Buenos Aires and throughout Argentina as the Senate officially passed Law 27.610 and the 1,000-Day Plan Law[202]. Following the approval of both laws by the Chamber of Deputies some weeks prior, the Senate voted 38 in favor and 29 against the bill[203].

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[194] Ibid [192] 40.
[195] Id [194].
[196] Abril Boriosi A & Rodríguez Rial G, [2023] (n.185).
[197] Vacarezza NL, [2023] (n.16).
[198] Ley 27.611 del 30 de diciembre de 2020, Atención y Cuidado Integral de la Salud durante el Embarazo y la Primera Infancia (Argentina).
[199] Tanya Wadhwa, 'Right to abortion is one step closer to becoming law in Argentina : Peoples Dispatch' (*Peoples Dispatch*, 20 November 2020) <https://peoplesdispatch.org/2020/11/20/right-to-abortion-is-one-step-closer-to-becoming-law-in-argentina/> accessed 12 July 2024.
[200] Ley 27.610 del 30 de diciembre de 2020, Regulación del Acceso a la Interrupción Voluntaria del Embarazo y a la Atención Postaborto (Argentina).
[201] Augustina Rúa, 'Efectos De La Legalidad: Una Lectura Teórica Y Política De La Ley 27.610.' (2023).
[202] Yamin AE & Ramon Michel A, [2023] (n.4).
[203] Diego Laje & Kara Fox, 'Argentina's Senate approves historic bill to legalize abortion' (*CNN*, 30 December 2020) <https://edition.cnn.com/2020/12/30/americas/argentina-abortion-senate-vote-intl/index.html> accessed 12 July 2024.

After the results were confirmed, in Buenos Aires, victory music was played while green smoke filled the squares of the capital, and a triumphant message stating '*es ley*' (it is law) was projected on a large screen[204]. President Fernández expressed his pride towards the law's approval through a tweet[205]. Giselle Carino, head of the international section of the Planned Parenthood Federation, stated that Argentina's achievement on the issue would soon generate a ripple effect throughout the region, particularly referencing the debates on abortion in Brazil, Chile, and Colombia[206]. Mariela Belski, Amnesty International Executive Director in Argentina, described the legal achievement as an inspiration for all of the Americas[207].

Although the passage of this law was undoubtedly a success for both Argentine and Latin America, it should be noted that compared to the Roe-Casey framework in place until 2021, Law 27.610 had a limited impact on the legalization of the practice since it was made legal only up to fourteen weeks[208]. In any case, the IVE system offered greater health support than that in place at the federal level in the United States before 2021. Additionally, the 1,000-day law establishes a support mechanism for mothers and children, which the U.S. Congress attempted to implement but failed to do[209].

Turning to the analysis of Law 27,610 and its twin law, the 1,000-day plan law, these laws define access to pregnancy termination and post-abortion care as matters rooted in considerations of public health and human rights. The National Campaign's draft of the laws proposed waiving Articles 86 and 88 of the Penal Code. This would mean that pregnancy terminations would not be punishable for the pregnant person nor anyone involved in the medical procedure, even in the case abortion took place outside of the recognized medical organizations[210]. The Congress did not accept the National Campaign's proposal. The bills approved by the legislature in 2020 modified the articles of the penal code, but, in any case, they kept providing penalties for those who abort without authorized reasons after the fourteenth week, as well as those who cause or collaborate in the practice[211]. In any case, with

[204] Tom Phillips et al., 'Argentina legalises abortion in landmark moment for women's rights' (*the Guardian*, 30 December 2020) <www.theguardian.com/world/2020/dec/30/argentina-legalises-abortion-in-landmark-moment-for-womens-rights> accessed 12 July 2024.
[205] Id [204].
[206] Phillips T et al., [2020] (n.204).
[207] Id [206].
[208] Peck M, [2023] (n.5).
[209] Id [208].
[210] Rúa A, [2023] (n.201).
[211] Rúa A, [2023] (n.201).

the approval of the two laws, the National Campaign achieved many of its most critical demands.

In addition to making abortion legal, post-abortion care services were secured within the bills. Furthermore, the right to access information, sex education, and contraception was enshrined in the law[212]. This framework of the practice of legal abortion upholds the central vision of the National Campaign, which framed abortion as part of a broader spectrum of sexual and reproductive rights that the state and its institutions are obligated to guarantee[213]. Second, the law stipulated that services were to be guaranteed free of charge by both public and private institutions[214]. This provision fulfilled another goal of the National Campaign, which called for equitable access to comprehensive healthcare since it had framed the right to abortion as falling under social justice. In addition to this, the 27.610 law stipulates that abortion care must be provided in a period not exceeding ten days from the request, as it is recognized that abortion is a time-sensitive issue and that delays can impede access to the practice, as the many cases brought before the Argentine Courts in the years that preceded the approval of the new law had taught[215].

An element of significant legal innovation concerns the intended recipients of the Argentine law. From the very first article of the law, it recognizes the right to abortion not only for women but for all who have the ability to become pregnant, including trans men, non-binary people, and those who identify as queer or non-conforming[216]. Such framing demonstrates the extensive dialogue on abortion between feminist groups and the LGBTQ+ movements, especially those advocating for the rights of transgender people, to establish common ground on the issue[217]. To date, in most European countries, the inclusion of individuals other than women in abortion legislation is still a highly divisive issue within feminist movements.

By analyzing the characteristics of the 27.610 law and its twin legislation on post-abortion care, it is evident that individuals and their rights are at the core of the legislative system. Nonetheless, within the laws, space is also devoted to healthcare personnel. With regard to conscientious objection, a fundamental issue for a Catholic country like Argentina, this right is granted only to professionals who are directly involved in the abortion procedure[218].

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[212] Vacarezza N.L., [2023] (n.16).
[213] Barbara Sutton & Elizabeth Borland, 'Abortion and Human Rights for Women in Argentina.' (2019) 40(2) Frontiers: A Journal of Women Studies 27.
[214] Vacarezza NL, [2023] (n.16)
[215] Id [214].
[216] Id [214].
[217] Reale CM, [2023] (n.11).
[218] Agustina Ramón Michel et al., 'Objeción de conciencia en la Ley sobre Interrupción del Embarazo de Argentina.' (2021) 15 Serie Documentos REDAAS 1.

Other professionals and technicians who perform functions only indirectly related to the practice cannot invoke this right[219]. Nevertheless, public hospitals have an obligation to ensure access to the practice and bear the responsibility of covering the costs of referring patients to private healthcare facilities if they do not have the personnel to carry out the practice[220]. Furthermore, it is made explicit that post-abortion health care may not be withheld, and interruption of the pregnancy shall be performed, despite conscientious objection, in cases when the life or health of the person is in danger or requires immediate and undelayable attention[221].

3.5 The Post-law 27.610 scenario: National Implementation and International Impact

In a country where the struggle for the legalization of abortion has spanned several decades, it was not expected that the legalization of abortion would immediately eliminate the informal rules that had impeded the procedure for so many years. In any case, the law's passage has resulted in several advancements in the field despite Argentina's recent radical political changes. Javier Milei's victory in Argentina's presidential election of 2023 resulted in another right-wing populist leader gaining the apex of political power in Latin America[222].

During his presidential campaign, the newly elected President threatened to undo the legal achievement achieved in 2020. Nonetheless, there are several reasons to believe that the leader will not succeed. First of all, during his campaign, the right-wing leader has threatened to restrict the relations with the Vatican[223]. This stance led to the weakening of the President's position due to the loss of support from a historical ally in the debate on limiting reproductive rights, the Church. An additional element limiting his conservative desires on the issue of abortion relates to the opinion of the population on the topic. The pools demonstrate that 56 percent of the population is favorable to the current system in Argentina[224].

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[219] Vacarezza NL, [2023] (n.16).
[220] Yamin AE & Ramon Michel A, [2023] (n.4).
[221] Reale CM, [2023] (n.11).
[222] Camilla Reuterswärd & Cora Fernandez Anderson, 'Why Milei won't succeed in repealing Argentina's abortion policy' (*The Loop*, 5 December 2023) <https://theloop.ecpr.eu/why-milei-wont-succeed-in-repealing-argentinas-abortion-policy/> accessed 12 July 2024.
[223] Reuterswärd C & Fernandez Anderson C, [2023] (n.222).
[224] Natalie Alcoba, 'With Milei leading Argentina's presidential race, abortion is on the line' (*Al Jazeera*, 20 October 2023) <www.aljazeera.com/news/2023/10/20/with-milei-leading-argentinas-presidential-race-abortion-is-on-the-line> accessed 12 July 2024.

Additionally, Milei's campaign has been focused almost exclusively on his person, generating a weak far-right presence within Congress. Only 15 percent of legislators in the lower house and 10 percent in the Senate represent his party[225]. An internal lack of communication also weakens the presidential party. A member of the President's party, Rocío Bonacci, filed a bill in Congress requesting the repeal of the legal abortion law. The bill fell flat, and a presidential spokesperson stated that this initiative was not part of the official Agenda[226]. Despite all the difficulties faced by the President, the conservative ideals he brought forward still impacted the country. *Fundación Mujeres por Mujeres* claimed that following the election of the new President, more and more women had been misinformed online that abortion had returned to be illegal in the country or their doctors had told them so[227]. At the same time, a researcher and member of *Ni Una Menos* said that pointed out that Milei's cuts on public health had significantly impacted the availability of abortion pills throughout the country[228].

But the most significant element impeding the overturning of the abortion law, is to be found in the strength of the feminist movement in militating for the right to abortion[229]. After Milei's election, the National Campaign stated that it was prepared to continue fighting for the right to abortion. The feminist movement emphasized that the years of effort to bring the issue of abortion into the country's political agenda would not be made vain by the election of a new President[230]. When the bill for the reversal of Law 27,610 was presented in the national Congress, Argentine pro-abortion groups immediately became active, launching the slogan '*Ni un paso atrás*' (Not one step back) and convening public assemblies to organize against the government initiative[231]. In addition, after the legalization of abortion, the National Campaign had never ceased to be active, redirecting its efforts toward policy implementation and responding to conservative attacks on the legal system[232]. At the same time *Socorristas*, as of

[225] Reuterswärd C & Fernandez Anderson C, [2023] (n.222).
[226] Harriet Barber, ''The stigma has returned': abortion access in turmoil in Javier Milei's Argentina' (*The Guardian*, 18 March 2024) <www.theguardian.com/global-development/2024/mar/18/argentina-abortion-javier-milei#:~:text=Until%20Argentina%20legalised%20abortion%20in,to%20overturn%20the%20abortion%20law.> accessed 12 July 2024.
[227] Barber H, [2024] (n.226).
[228] Id [227].
[229] Reuterswärd C & Fernandez Anderson C, [2023] (n.222).
[230] Barber H, [2024] (n.226).
[231] Mar Centenera, 'El partido de Milei presenta en el Congreso un proyecto para penalizar el aborto en Argentina' (*El País Argentina*, 8 February 2024)<https://elpais.com/argentina/2024-02-08/milei-presenta-en-el-congreso-un-proyecto-para-derogar-el-aborto-legal-en-argentina.html> accessed 12 July 2024.
[232] Vacarezza NL, [2023] (n.16).

2021 started to engage in disseminating information regarding the new laws and increasing cooperation with the healthcare system[233].

Tuning to the changes implemented in the health sector at the national level, for what concerns health facilities that offered abortion services, the number of such institutions increased following the passage of law[234]. Additionally, some hospitals with many conscientious objectors have also hired new providers who are willing to perform abortions[235]. Concerning the safety of the methods employed to perform abortions, improvements were recorded nationwide. Across the nation, the use of the invasive and non-recommended method of dilation and curettage (D&C) became almost nonexistent[236]. In most facilities offering abortion, the administration of misoprostol accounts for the majority of abortions performed on patients[237].

Even though several changes were reported at the national level, and even if most providers are aware of the provisions allowing the legal performance of abortion, there is still a high rate of unwillingness to perform such services due to conscientious objection[238]. In addition, despite the work of the *Socorristas*, many cases of misinterpretation of the legal abortion provisions in the country were recorded, which led to instances of unmotivated denial or delays in accessing the procedure[239].

The decision to link the new abortion legislation to the national and international instruments of protection of human rights resulted in being crucial in granting the right to abortion in the country. In addition, the framework on which the decision was based allowed Argentina's legal experience to set a legal precedent for other countries, notoriously those of the same continent[240]. After the issue of the legalization bill in Argentina, in Brazil, feminist activists often used the green scarf symbol of the Argentine's pro-abortion protests to connect

[233] Vacarezza NL, [2023] (n.16).
[234] Ramos S et al., [2023] (n.117).
[235] Yamin AE & Ramon Michel A, [2023] (n.4).
[236] Guttmacher Institute, 'Abortion Law Reform in Argentina: An Early Look at Implementation in Three Provinces' (*Guttmacher Institute*, May 2024) <www.guttmacher.org/fact-sheet/abortion-law-reform argentina#:~:text=The%20new%20law%20allows%20abortions,and%20in%20cases%20of%20rape.> accessed 12 July 2024.
[237] Ibid [236].
[238] Paula Vázquez et al. 'Factors associated with provider unwillingness to perform induced abortion in Argentina: A cross-sectional study in four provinces following the legalization of abortion on request.'(2023) PloS.
[239] Vázquez P et al., [2023] (n.238).
[240] Kaufman R et al., [2022] (n.97).

the two movements in their request for abortion rights[241]. At the same time, in Chile, despite the strong opposition of the President on the legalization of abortion, Congress began debating decriminalizing abortion in the first fourteen weeks of gestation.

In a colonized region that had always looked northward for guidance, it was a significant change for the Latin Americans to start emulating each other to bring about legal and societal transformations[242]. The strength of Argentine activism and the results that the movement has achieved have been deeply inspiring not only for pro-abortion movements in Latin America but also in already progressive countries. The color green and the emblematic headscarf that had given rise to the powerful image of the *marea verde* in Argentina also appeared in the streets of the United States following the Dobbs v. Jackson ruling, symbolizing how resistance and solidarity for sexual and reproductive rights had achieved transnational significance[243].

To this date, From a legal perspective, the situation seems promising. Following the law's implementation, the country's courts have continued to be a site of contestation. During the first year of the law, thirty-seven lawsuits were initiated by Catholic NGOs and legislators against the 27.610 law, demanding it be declared unconstitutional[244]. At the same time, NGOs and government agencies protecting reproductive rights appeared in these trials to defend the law's constitutionality[245]. In any case, the petitions against the law have been either rejected or shelved. In 2022, there were no new Court cases against Law 27,610 or the protocol adopted for its implementation, and no groups of medical personnel were prosecuted for providing abortions[246].

3.5.1 The Fragmentation of Argentina's Health System: Disparities Among Provinces

While the national standards set by the new legislation may not change in the near future, the decentralization of Argentina's health system could potentially create significant

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[241] Katy Watson, '¿Puede la legalización del aborto en Argentina impulsar un cambio en toda América Latina?' (*BBC News Mundo*, 6 March 2021) <www.bbc.com/mundo/noticias-america-latina-56281594> accessed 12 July 2024.
[242] Watson K, [2021] (n.241).
[243] Vacarezza NL, [2023] (n.16).
[244] Yamin AE & Ramon Michel A, [2023] (n.4).
[245] Ministerio de Salud: Argentina, 'Direccion Nacional de Salud Sexualy Reproductiva, Segundo Informe Sobre Causas Jiudiciales Contra la Ley 27.610' (*Perma.cc*, June 2022) <https://perma.cc/7S7Q-HJNC> accessed 12 July 2024.
[246] Ministerio de Salud: Argentina, 'Acceso a Metodos Anticonceptivos y a Interrupción Voluntaria y Legal del Embarazo: Reporte Bimestral en base a secuencias' (*Salud.Gob.ar*, 31 August 2021) < https://bancos.salud.gob.ar/sites/default/files/2021-12/Informe_0800_Reporte_jul-ago_2021.pdf> accessed 12 July 2024.

challenges in accessing healthcare in a country where some areas have a high representation of anti-abortion activists.

According to the organization of the Argentine federal system, provinces, and their health ministers are responsible for implementing laws and related public health policies with a certain level of discretion[247]. In a demonstration of this, official data shows significant inequality between provinces during the first year after the implementation of the legislation. This fragmentation exists between provinces and within each of them, making access more arduous and worsening the quality of services[248]. After the implementation of law 27.610, while some provinces pursue progressive policies regarding abortion, others, especially the more catholic ones, remain conservative enclaves, significantly harming the rights of the women who live there and effectively blocking efforts by the central power to provide national coverage of the reproductive rights issue[249].

Regarding the policies adopted by the provinces, the political map of Argentina is divided into two main areas with substantial differences. With a north contrasting progressive provision on abortion and a south, including the autonomous city of Buenos Aires and the province of Buenos Aires, in favor of the legalization of abortion[250]. The two souls of Argentina are represented by this paradigm, with the north representing traditionalism and respect for existing law and the southern part of Argentina oriented toward modernity and legal-legislative innovation[251].

In the city of Buenos Aires, law 27.610 was implemented in an already existing and functioning framework built on the system developed by the ILE included in the criminal code of 1921[252]. In the province of Buenos Aires, one of the most complex territories in the country due to its extension and heterogeneity, a guide for implementing the new law was launched shortly after the implementation of the law[253]. By 2022, no deaths caused by unsafe methods were recorded in the province; this result was made possible by the extensive use of misoprostol

[247] Mora Augier CM, [2022] (n.154).
[248] Sandra Miguez, 'Aborto legal: A dos años de la sanción de la ley su aplicación sigue siendo despareja en las provincias' (*elDiarioAR.com*, 7 November 2022) <www.eldiarioar.com/sociedad/aborto-legal-anos-sancion-ley-aplicacion-sigue-despareja-provincias_1_9672098.html> accessed 12 July 2024.
[249] Franceschet S & Piscopo JM, [2013] (n.39).
[250] Abril Boriosi A & Rodríguez Rial G, [2023] (n.185)
[251] Id [251].
[252] REDAAS, 'Aborto legal vigente en toda la Argentina: los escenarios que se presentan en cada provincia – REDAAS – Red de Acceso al Aborto Seguro de Argentina' (*REDAAS – Red de Acceso al Aborto Seguro de Argentina*, 25 January 2021) <https://redaas.org.ar/noticias/redaas-en-los-medios/aborto-legal-vigente-en-toda-la-argentina-los-escenarios-que-se-presentan-en-cada-provincia/> accessed 12 July 2024.
[253] REDAAS, [2021] (n.253).

in most cases and the minimal use of the dangerous D&C[254]. Regarding the province of Santa Cruz, this had always adhered to the protocols on abortion issued by the national government, even applying the provisions outlined in the National Supreme Court's F.A.L. case of 2012. Thus, Santa Fe has also taken specific measures to ensure the correct application of Law 27,610. However, in 2022, the province continued to experience difficulties in providing services beyond the twelve weeks of gestation[255].

Traveling to northern Argentina, in Misiones, the majority of physicians have registered themselves on conscientious objectors lists to avoid lawsuits for their refusal to perform abortions[256]. Another conservative province is Tucumán, where the government stated that it would not oppose the application of the national law, but the willingness to adopt a protocol in this regard remains unknown[257]. In addition to that, the province's governor, Juan Manzur, who administered the province at the time the law was implemented, not only was of solid opposition to abortion legalization but had also actively participated in the campaign against the passage of the law in 2018[258]. San Juan, where most legislators voted against the law and where the population protested against it, proved to be one of the most conservative provinces on the issue. Nevertheless, the provincial government seems to have promised to implement the new legislation[259].

Regardless of which province is analyzed, in the areas far from the cities, especially in the smaller realities, pregnant persons continue to fear the violation of the confidentiality of the abortion practice. Guided by that fear, many decide to use alternative avenues provided by civil society organizations instead of requesting legal practice at public facilities[260]. This trend is confirmed by Ivana Romero, an abortion counselor, who reports that especially in the wake of the election of the new far-right President Milei, many women are reticent to provide their private details to official institutions for fear that these will be used against them[261].

When data are considered, these confirm the division of Argentina into two blocks. Regarding the actual number of abortions that are performed in the provinces, among the

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[254] Guttmacher Institute, [2024] (n.236).
[255] Mariana Romero et al., 'Reporte anual 2022: Los rumbos de la experiencia argentina con el aborto legal' (2023) Proyecto Mirar.
[256] REDAAS, [2021] (n.253).
[257] Id [257].
[258] Id [257].
[259] Id [257].
[260] Olivia Sohr, 'A un año de la legalización del aborto: cuántos se registraron en el país y cuáles son los desafíos' (*Chequeado*, 3 January 2022) <https://chequeado.com/el-explicador/a-un-ano-de-la-legalizacion-del-aborto-cuantos-se-registraron-en-el-pais-y-cuales-son-los-desafios/> accessed 12 July 2024.
[261] Barber H, [2024] (n.226).

provinces in which the fewest abortions are performed are the more conservative northern Argentine provinces such as Corrientes, Formosa, and Misiones, with about 0.6 abortions performed for every 1,000 women of childbearing age[262]. At the same time, the jurisdiction with the highest number of abortions is the progressive Buenos Aires, followed by Tierra del Fuego[263].

In conclusion, while there are significant disparities in the implementation of the new legal system among Argentine provinces and the healthcare system has not yet adequately adapted to the provisions of Law 27,610, the national and substate public systems seem to have the capacity to meet the demand of Argentine people who have the right to access the abortion services[264]. Future research will be needed to observe whether the country and its provinces will be able to implement the system effectively despite the systematic difficulties.

Conclusion

In conclusion, Law 27.610 represents a milestone in the protection of the sexual and reproductive rights of pregnant persons, not only for the country itself but for all of Latin America. Several factors made the implementation of this law possible, including the presidential involvement in policies regarding the issue, the human rights framework employed in the framing of the law, and the albeit limited role of Argentina's Supreme Courts. However, the driving force behind the legalization of abortion was undoubtedly the strength of the pro-choice movements in the country, which continue to advocate for its implementation up to this date.

The importance of pro-abortion movements also emerged as an essential element in securing the future of the legal system on the issue, not only for Argentina but also for other countries. The analysis has suggested that supporters of abortion rights should stay organized and active even after legalization is achieved. This element is of critical importance for the protection of existing abortion rights and preventing their reversal, as has happened in the United States.

The first section of the chapter considers the period leading up to the first attempts at reforming the abortion system. Although a pioneering abortion law was enacted in 1922, Article 86, which outlined the conditions for the practice of legal abortion, remained

[262] Sohr O, [2022] (n.261).
[263] Yamin AE & Ramon Michel A, [2023] (n.4).
[264] Claudia C. Anzorena,'El derecho al aborto legal, seguro y gratuito en Argentina: obstáculos y desafíos de la política en acto a 18 meses de su implementación (2021-2022).' (2024) 19 Salud Colectiva.

unenforced and was often interpreted narrowly by the health staff. When the first legal reform bills were presented on the topic, the positions of Argentine Presidents and the groups linked to the Church played a significant role in blocking these reforms.

The second section showed how feminist movements were essential in leading to the legalization of abortion in 2020. Their goal was to create a unified community that brought together various strands of Argentine activism while making significant social, institutional, and legislative progress despite the opposition.

Both pro-choice and religious rights groups in Argentina have used the judicial system to achieve significant progress in their respective fields. The third paragraph focused specifically on the Argentine Supreme Court's interpretation of Article 86 in the 2012 F.A.L. case. Yet, enforcement of this decision has remained fragmented and hampered in many Argentine provinces, as shown in the Belén and Lucía cases, demonstrating the limited enforcement capacity of the judicial system.

The turning year for the debate on abortion in Argentina was 2018, initiating a process that would culminate in the legalization of the practice just a few years later. In March of that year, the conservative President Mauricio Macri announced that he would not oppose a debate on the decriminalization of abortion. The campaign for the legalization of abortion presented a new bill for legalization, which was approved in the House of Representatives but rejected in the Senate. In 2020, the issue was again up for discussion within the legislature. The opportunity to discuss the topic in the chambers was provided by a President elected in 2019 who personally committed to the legalization of abortion. In the final days of 2020, the law for the legalization of abortion and the twin law on post-abortion care were approved by the Senate and the House of Representatives. The details of the laws have been discussed in detail in the fourth paragraph of the chapter.

The last paragraph of this chapter dealt with the scenario that characterized the period following the law's implementation at the national and sub-national levels. Even though informal norms and the election of right-wing President Javier Milei posed challenges to the Latin American country, several improvements have been achieved. Thanks to the effective activism of the pro-abortion movement, which has remained at the forefront of the fight for abortion rights after the introduction of Law 27.610, it seems unlikely that there will be a reversal on the issue.

In addition, the legalization of abortion in Argentina has had significant repercussions not only in Latin America but also internationally, including in the United States. The Argentine experience has demonstrated how a well-organized and persistent feminist movement can

achieve fundamental legislative changes even in a complex political and cultural context, serving as an example for other countries striving to implement these rights.

Finally, the adoption of the national law in the Argentine provinces has been shown to be one of the most fragile aspects of the country's system. The decentralization of the healthcare system has posed challenges in accessing abortion, particularly in provinces where anti-abortion activists have strong, leading to significant disparities between the more progressive and the more traditional sub-national entities. The Argentine healthcare system at the subnational level still needs to be fully adequate to the law, and future research will be required to assess whether the different provinces will be able to meet the national standard prescribed by the 2020 law.

Chapter IV

Under a Demographic Lens: An Analysis of the Argentina and the United States Abortion Regimes at Federal and Local levels

Introduction

This chapter examines the impact of changes in legal policies on abortion and the resulting repercussions on demographic indices in two distinct geopolitical contexts that have very distinct recent legal histories: the United States and Argentina. The choice of the two cases reflects the intent to understand how radically different legislative trajectories can affect public health, particularly maternal and infant mortality rates.

Indeed, recent studies have shown that legal restrictions on abortion are correlated with higher maternal mortality rates[1]. In the United States, the recent wave of abortion restrictions leading up to the Dobbs v. Jackson decision in 2022 has posed a severe challenge to the reproductive rights framework established by the 1973 Roe v. Wade ruling. When considering the past and current demographic situation of the United States, the chapter aims to test whether the predictions in the literature linking abortion restrictions to increased maternal mortality are reflected in post-Dobbs demographic data.

On the other hand, the Argentine case offers a different example. The Latin American country made a significant breakthrough with the legalization of abortion in 2020 through Law 27,610. In the analysis of the Argentine demographic data, the chapter aims to observe if the legalization of abortion may result in lower maternal and infant mortality rates and, more generally, improve the health of pregnant women. The chapter will be divided into three distinct parts to study the demographic characteristics of the two countries under study. The first two will focus on the demographic analysis of the two countries, while the third part will aim to develop policies to improve the living and health conditions of the citizens in both countries.

The first part of the chapter will focus on the United States and will be divided into three sections. The first section will cover the analysis of demographic indices in the period prior to the overturning of Roe v. Wade. It will explore how the introduction of the legalization of abortion through the landmark decision of 1973 affected the demographic indices under study. It will also observe how the same indices changed following the introduction of restrictive laws by conservative states, culminating in the Supreme Court's 2022 decision.

[1] Maya Manian, 'The Ripple Effects of Dobbs on Health Care beyond Wanted Abortion' (2023) 76 SMU L Rev 77.

The second section will study the demographic profile of the United States after introducing the Dobbs v. Jackson abortion framework. This section will focus on how the overruling affected the most fragile fractions of the population and the legal repercussions on the healthcare workforce. It is important to note that since the reversal of the legal abortion system in the United States is a recent issue, the analysis is primarily concerned with projections and assumptions as data take time to be fully collected and processed.

The third section addresses the differences between the states of the North American country regarding access to abortion and, in general, to healthcare during and after pregnancy. Historically, the states of the North American federation have maintained considerable independence in regulating health care policies. Moreover, following Dobbs v. Jackson, the regulation of abortion has returned to state jurisdiction[2]. The section will thus note how the restrictive laws and consequential policies adopted by conservative states have affected maternal and infant mortality rates in these localities. In addition, in this section, the challenges faced by states where abortion remains legal as a result of the decision and the difficulties faced by women living in hostile states will be observed.

The fourth section introduces the case of Argentina, exploring the demographic situation in the country prior to the legalization of abortion in recent times. The section will end with the initial wave of reforms related to the social acceptance of abortion to observe whether and how these had an impact on the health of pregnant people and infants.

In the fifth section, the focus will be on the immediate effects of the legalization of abortion in Argentina. Regarding the data in this section, as of now, the only reliable data refer to 2021 and, partially, 2022. This is due to the complexity of the South American country, which is composed of several territorial entities, and the slowness of the data collection process in the country. In any case, the section will highlight how ensuring access to legal and safe abortion services decreases deaths caused by the practice. At the same time, the impact of the COVID-19 pandemic in driving an increase in maternal mortality for 2021 will be considered[3].

The sixth section analyzes the disparities in healthcare access among Argentine provinces. This section will show how, despite the introduction of a national legal abortion system, the country's more conservative provinces continue to experience higher maternal mortality rates than the more progressive ones.

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[2] Louise Marie Roth & Jennifer Hyunkyung Lee, 'Undue burdens: state abortion Laws in the United States, 1994–2022.' (2023) 48(4) Journal of health politics, policy and law 511.
[3] Mariana Romero et al., 'Reporte anual 2022: Los rumbos de la experiencia argentina con el aborto legal' (2023).

Finally, the third and concluding part of the chapter corresponds to an analysis of policies that the two countries could implement to improve the health of pregnant women and lower the maternal and infant mortality rates in the two countries. For both the United States and Argentina, the proposals focus on improving the medical conditions of the groups most affected by maternal mortality and narrowing the gap between the entities that comprise the two federations.

4.1 The United States: Demographic Data Pre-Dobbs vs. Jackson

The United States, despite being fully considered a developed country, exhibits demographic characteristics that align it closely with still developing countries[4]. This result is not due to a lack of financial investment in healthcare. The United States, one of the wealthiest countries in the world, spends more than twice the average amount of money developed countries devote to healthcare[5]. From such a high expenditure, one would expect the United States healthcare system to be far more robust than that of low-income nations and allow the country to record low rates of maternal mortality[6] as well as infant mortality[7]. But the reality is very different from that[8]. In order to understand the contradictory case of the United States, the first part of the chapter will examine the changes in the health status of pregnant people and children during the country's troubled legal history on the issue of abortion.

The United States began recording the data necessary for the development of the maternal mortality ratio in the early 1900s when 800 women died from pregnancy-related causes per 100,000 births[9]. An initial drop was recorded in 1920 thanks to the discovery of penicillin[10]. After this initial rapid decrease, the overall trend from 1969 to 2018 indicates

[4] Nicholas J. Kassebaum et al., 'Global, regional, and national levels of maternal mortality, 1990–2015: a systematic analysis for the Global Burden of Disease Study 2015.' (2016) 388(10053) The Lancet 1775.
[5] Emily Siron, 'This Is Not New: Addressing America's Maternal Mortality Crisis' (2022) 25 Rich Pub Int L Rev 177.
[6] Deaths occurred while pregnant or within 42 days of the end of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes. The maternal mortality rate (MMR) is calculated as the number of maternal deaths per 100,000 live births in a given period of time, usually one year.
[7] Infant mortality refers to the death of a child under the age of one year. The infant mortality rate (IMR) is a key indicator often used to assess the health and well-being of a population. It is typically expressed as the number of infant deaths (<1 year) per 1,000 live births in a given year.
[8] Siron E, [2022] (n.5).
[9] Khiara M. Bridges, 'Racial Disparities in Maternal Mortality' (2020) 95 NYU L Rev 1229.
[10] Id [9].

minimal changes in maternal mortality rates in the country, but the scenario shown is very different on closer examination[11].

Graphically, two distinct trends can be observed in the maternal mortality index over that long period. The period from 1969 to 1982 saw a significant decrease in maternal mortality (See Figure 1), reaching its lowest record in 1998 when only seven women died from pregnancy-reported causes per 100,000 live births[12]. On the other hand, a notable increase in maternal mortality characterizes the subsequent period from 1999 to 2017 (See Figure 1)[13].

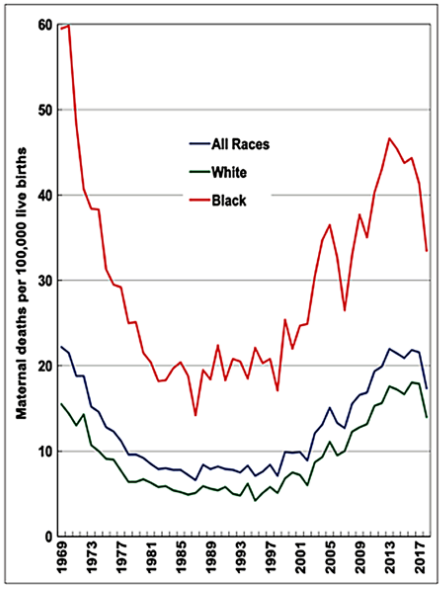

Figure 1: Trend in Maternal Mortality by Race, United States, 1969-2018
SOURCE: Data derived from the National Vital Statistics System

In the period from 1969 to 1982, the maternal mortality rate in the country declined rapidly at a rate of 8 percent per year[14]. The subsequent period from 1982 to 1998 was a period of stabilization, with no significant change from the previous one[15]. Among the main reasons for the drop in maternal mortality in the 70s and early 80s are healthier living conditions, better maternity services, safer surgical procedures, and access to antibiotics[16]. But undoubtedly, one of the primary drivers of this decline in maternal deaths is precisely the decline of deaths from illegal abortion[17].

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[11] Gopal K. Singh, 'Trends and social inequalities in maternal mortality in the United States, 1969-2018.' (2021) 10(1) International Journal of Maternal and Child Health and AIDS 29.
[12] Bridges KM [2020] (n.9).
[13] Singh GK [2021] (n.9).
[14] Id [13].
[15] Id [13].
[16] Eugene Declercq & Laurie Zephyrin, 'Maternal mortality in the United States: a primer.' (2020) 10 Commonwealth Fund.
[17] Jeff Diamant et al., 'What the data says about abortion in the U.S.' (*Pew Research Center*, 24 June 2024) <www.pewresearch.org/short-reads/2024/03/25/what-the-data-says-about-abortion-in-the-us/> accessed 20 August 2024.

The Global Health Policy Summit's Maternal Health working group determined that access to safe abortion is one of the top seven factors that can explain a decrease in maternal mortality rates globally[18]. This assumption is confirmed by the examples of several countries, such as Romania and South Africa, where data show that following the legalization of abortion, maternal mortality rates have decreased by more than half[19]. Returning to the situation in the United States, in 1955, in an annual report from Los Angeles County Hospital, it was made explicit that the most significant cause of maternal death at the time came from complications related to abortion[20]. The danger of abortion stemmed precisely from its illegality. This led to it being performed by unqualified healthcare providers or pregnant individuals who lacked knowledge of the subject[21]. Once the practice was made legal, the incidents of morbidity and mortality caused by abortion were quickly reduced to zero. The deaths for illegal abortions reported in 1972 were 39 in 1972, falling to 19 the following year and then to a single-digit number or zero each year that followed[22].

In addition to the decline in maternal mortality and morbidity[23], following the legalization of abortion in the early 1970s, births declined in the country, particularly among younger women. This finding is hugely positive since such births would have resulted in unintended pregnancies that would have worsened the mental and physical condition of pregnant women[24]. Infant mortality is considered to be deeply connected to pregnancies of younger women, especially teenagers, who often lack the means to care for newborns[25]. As a confirmation of that, Krieger et al. observed how infant death rates declined rapidly between 1970 and 1973 in states that had legalized abortion following the Supreme Court ruling[26].

When, barely a decade after the historic Roe v. Wade ruling, the first restrictive state-level policies on abortion began to be introduced, the demographic changes were immediately evident. Maternal mortality rate in the U.S. increased by about 5.4 percent a year from 1999

[18] Philip D. Darney et al., 'Maternal Mortality in the United States Compared With Ethiopia, Nepal, Brazil, and the United Kingdom' (2020) 135 OBSTET. & GYNECOL. 1362.
[19] Kira Eidson, 'Addressing the Black Mortality Crisis in the Wake of Dobbs: A Reproductive Justice Policy Framework' (2023) 24 Geo J Gender & L 929.
[20] Don Harper Mills, 'A medicolegal analysis of abortion statutes.' (1957) 31 S. Cal. L. Rev. 181.
[21] N.d, 'A Functional Study of Existing Abortion Laws.' (1935) 35(1) Columbia Law Review 87.
[22] Diamant J, [2024] (n.17).
[23] The maternal morbidity rate (MMbR) is calculated as the number of women who suffer physical or psychological complications related to pregnancy, childbirth or postpartum for every 100,000 pregnancies or live births in a given period of time, usually one year.
[24] Caitlin Knowles Myers, 'The power of abortion policy: Reexamining the effects of young women's access to reproductive control' (2017) 125(6) Journal of Political Economy 2178.
[25] Xiaojia He et al, 'Trends in infant mortality in United States: A brief study of the southeastern states from 2005–2009.' (2015) 12(5) International journal of environmental research and public health 4908.
[26] Nancy Krieger et al., 'Reproductive justice and the pace of change: socioeconomic trends in US infant death rates by legal status of abortion, 1960–1980.' (2015) 105(4) American journal of public health 680.

and 2017 compared to the preceeding period [27]. Whereas in 1999 there were 9.9 deaths per 100,000 births, the index rose to 14 in 2008 to reach a value of 17.4 in 2018[28]. There can be several reasons that could explain the reversal in maternal mortality. First, it should be noticed that changes in the coding and classification of maternal deaths following the implementation of the International Classification of Diseases partly explain the upturn in maternal mortality since 1999[29]. Among the other reasons contributing to the increase in maternal mortality rate is the rise in C-sections within the country. There was a recorded increase of over 50 percent in the employment of C-sections as a delivery method, during the period, and the employment of this practice is considered between 8 to 10 times riskier than natural childbirth[30]. Lastly, another motivating factor is the declining health of pregnant women, along with increasing rates of obesity in the childbearing population, advanced maternal age, and socioeconomic and racial disparities[31].

However, the dramatic increase in maternal mortality rates in the second period under analysis is primarily attributed to the restriction on legal abortion and the resulting increase in unwanted pregnancies carried to term. The highest number of legal abortions in the country was recorded between 1980 and 1990, coinciding with the lowest data for maternal mortality[32]. After that, the number of abortions declined at a slow yet steady pace. According to Guttmacher, the number of abortions in 2021 was 36 percent lower than that recorded in 1991[33]. The decrease in legal abortions led to more women being forced to continue their pregnancies. Several studies conducted before Dobbs demonstrated that giving birth in the United States carried more risk than undergoing an abortion[34]; hence, restricting access to abortion leads to higher mortality and morbidity rates[35].

In addition to this, restrictions on abortion generate negative impacts on the mental health of women denied the practice and are related to increased infant mortality and child

[27] Singh GK, [2021] (n.9).
[28] Id [27].
[29] Singh GK, [2021] (n.9).
[30] Ibid [28] 12.
[31] Nisha Verma & Scott A. Shainker, 'Maternal mortality, abortion access, and optimizing care in an increasingly restrictive United States: A review of the current climate.' In *Seminars in Perinatology* (WB Saunders, 2020).
[32] Diamant J, [2024] (n.17).
[33] Id [32].
[34] Elizabeth Kukura, 'Pregnancy Risk and Coerced Interventions after Dobbs' (2023) 76 SMU L Rev 105.
[35] Estimates showed that the risk of dying from childbirth was approximately fourteen times higher than the risk of dying from abortion.

homicide[36]. However, infant mortality rates continued to decline during the last century[37]. But as women are denied the possibility to interrupt their pregnancies, infant mortalities are expected to soar. As a result, infants who were born in states with restrictive laws on abortion were significantly more likely to die before their first year of life than those born in states without restrictions[38]. In 2017, 22,000 infant deaths were recorded in the country, a disproportionate number of which occurred in states with restrictive abortion laws[39].

When the demographic data for the United States are compared to those of other Western countries, it is striking how critical the situation for the federal government was and still is. In 2000, with the Millennium Development Goals, the United Nations, among other goals, emphasized the need for a global commitment to decrease maternal mortality by 75 percent[40]. This prompted efforts to unite developed and developing countries to implement that goal.

But as the rest of the world was introducing legal abortion and global maternal deaths gradually were on an ongoing decline worldwide[41], the United States continued to maintain its role as an outlier in that health field. The reasons for this are varied, but one of the most important is to be found in a wave of state legislation[42]. In 2017, the World Health Organization reported that the United States and the Dominican Republic were the only countries to report a significant increase in maternal mortality ratio from the values reported in 2000[43]. If in 2018, the maternal mortality rate in the United States was 17.4, the same index for Norway was 1.8, for Australia 4.8, and for neighboring Canada 8.6 (See Figure 2).

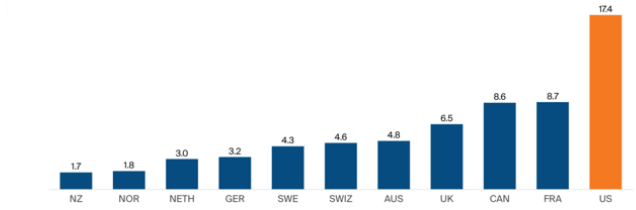

Figure 2: Maternal Mortality Ratios in Selected Countries, 2018 or Latest Year
SOURCE: Roosa Tikkanen et al. Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries.

[36] Dovile Vilda et al., 'State abortion policies and maternal death in the United States, 2015–2018' (2021) 111(9) American Journal of Public Health 1696.
[37] The infant mortality rate dropped from 6.1 per 1,000 births in 2009 to 5.8 per 1,000 births in 2015.
[38] Roman Pabayo et al., 'Laws restricting access to abortion services and infant mortality risk in the United States' (2020) 17(11) International Journal of Environmental Research and Public Health 3773.
[39] Id [38].
[40] Rolanda L. Lister et al., 'Black maternal mortality-the elephant in the room. World journal of gynecology & womens health' (2019) 3(1).
[41] Between 1990 and 2015, global maternal mortality rates have been estimated to have decreased by 44%.
[42] Roth LM & Hyunkyung Lee J, [2023] (n.2).
[43] Declercq E & Zephyrin L. [2020] (n.16).

As the 2022 Dobbs v. Jackson ruling approached, the data for maternal mortality were increasingly bleak. In 2020, 861 women died of pregnancy-related causes in the country, compared to 754 in 2019[44], and the maternal mortality for that year was 23.8 deaths per 100,000 live births, a 3.7 percent increase from the previous year[45].

4.2 The Consequences of the Overuling: The Maternal Mortality Crisis

It is well-documented in research and history that restricting abortion puts the health of people who can get pregnant and give birth at risk[46]. Considering that the majority of American people spend the majority of their lives avoiding pregnancies and that abortion is a common practice in the country[47], the scenario that is foreshadowed as a result of bans on abortion at the state level is not favorable for the health conditions of these people.

As states respond to the reversal of Roe v. Wade through abortion bans, maternal deaths are expected to increase simply because those who would have chosen abortion, a practice with low mortality risk, will be forced to be exposed to the much higher risks of carrying a pregnancy to term[48]. It, therefore, comes as no surprise that two years after the ruling, Dobbs and the abortion bans that have followed the decision have had noticeable effects on maternal death rates in the country. The worsening of the health condition of pregnant people has been described as a "maternal health crisis."[49] To address this crisis in 2018, the U.S. Congress passed the 'Improving Acess to Maternity Act' and in 2022, the Biden-Harris administration issued a White House footprint to address the issue in the country, but experts argue that the problem will not be solved in the short term and that several changes are required to bring about actual results[50]. To observe and document the detrimental effect of the restrictive reproductive rights climate on maternal and infant health, this section will examine the ongoing crisis in the United States and how it affects women and infants.

In 2022, 817 women died from pregnancy-related causes in the United States; in 2021, there were 1,205 recorded deaths[51]. Although in 2022, the number of fatalities decreased with

[44] Donna L. Hoyert, 'Maternal mortality rates in the United States, 2020' (2022) Health E-Stats. National Center for Health Statistics.
[45] Id [44].
[46] Eidson K, [2023] (n.19).
[47] Christina Jung et al., 'Abortion Care in the United States—Current Evidence and Future Directions' (2023) 2(4) NEJM evidence.
[48] Amanda Jean Stevenson et al, 'The maternal mortality consequences of losing abortion access' (2022).
[49] Eidson K, [2023] (n.19).
[50] Nayanah Siva, 'Maternity care crisis worsening across the USA' (2023) 402(201416) The Lancet, 2023, 1956.
[51] Hoyert DL, [2024] (n.44).

respect to the previous year (see Figure 3), the number remains exceptionally high compared to those of other Western countries.

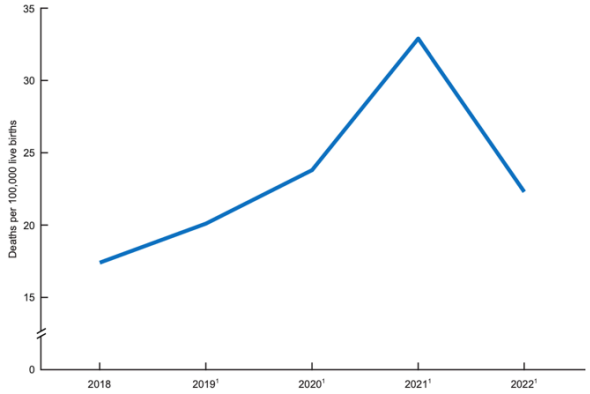

Figure 3: Maternal mortality: United States, 2018-2022
SOURCE: National Center for Health Statistics, National Vital Statistics System, mortality data files.

The impact of the Dobbs decision on maternal mortality and morbidity is best observed at the state level. A study examining the public health impact in Texas as a result of restrictive abortion laws shows an increase in maternal morbidity that resulted in a 57 percent increase in the number of patients with severe health impacts compared to the 33 percent recorded in states without such legislative limits[52].

After the reversal of Roe v. Wade, scholars also anticipated a potential increase in births in the United States, resulting in a worsening of the mental health of pregnant people. Analysis shows that in early 2023, there was a 2.3 percent increase in births in states that enforced total abortion bans when compared to states where abortion rights remained protected[53]. The increase in births accounts for approximately 32,000 and is mainly attributed to younger women and women of color[54]. This rise is attributed to unintended pregnancies being carried to term, which can have a significant impact on women's mental health, as being forced to bring a pregnancy to term is associated with higher risks of perinatal depression and anxiety[55]. Confirming this assumption, a 2016 study demonstrated that compared to women who were able to obtain an abortion, those who were forced to carry their pregnancies to term incurred higher risks of suffering from psychological disorders up to five years after the end of the

[52] Anjali Nambiar et al., 'Maternal morbidity and fetal outcomes among pregnant women at 22 weeks: gestation or less with complications in 2 Texas hospitals after legislation on abortion' (2022) 227(4)American Journal of Obstetrics & Gynecology 648.
[53] Daniel Dench et al., 'The effects of the Dobbs decision on fertility' (2023).
[54] Dench D et al., [2023] (n.53).
[55] Amalia Londoño Tobón et al., 'The end of Roe v. Wade: implications for Women's mental health and care' (2023) 14 (1087045) Frontiers in Psychiatry.

pregnancy as well as registering poorer physical health[56]. The worsening of the physical and mental conditions of pregnant people will also result in the poorer physical conditions of their newborns. This is because mental illnesses among pregnant women have been associated with an increased risk of infant mortality[57].

Another source of danger arises when women, unwilling to continue a pregnancy, are compelled to seek unsafe alternatives. Global epidemiological evidence indicates that laws preventing access to abortion care services do not reduce the frequency of abortion but only limit the rate of legal abortions, thereby increasing the rate of unsafe abortions[58]. As illegal abortions increase also maternal mortality and morbidity rates will. The reason for that lies in the fact that while legal induced abortions are a particularly safe procedure, illegal and self-induced abortions are risky procedures and were considered one of the major contributors to maternal mortality pre-Roe[59]. Another issue of particular concern among the Black community is the fear of a resurgence of eugenic sterilization tendencies. Abortion bans, combined with difficulties in accessing contraceptives, may result in implicit coercion towards sterilization[60]. In this regard, several advocates fear such medical impositions, particularly for minority communities and people with disabilities[61].

After two years since the ruling, the full effects of the legal changes at both the federal and state levels following the abortion bans are not yet entirely clear. However, Dobbs is undoubtedly set to worsen existing social and reproductive health disparities[62]. The United States was already a dangerous place for Black women to give birth before the Supreme Court's Dobbs v. Jackson decision in 2022. In 1915, the maternal mortality rate for Black women was 1.8 times that of White women[63]. In the aftermath of Roe v. Wade, Black women continued to die at a rate three to four times higher than that of White mothers[64]. Looking at the 2018 data (see Figure 4), the gap remained consistently at approximately 2.5, illustrating a highly challenging situation to alter[65]. With the Dobbs decision approaching, this disparity has only

[56] Antonia M. Biggs, et al., 'Women's mental health and well-being 5 years after receiving or being denied an abortion: a prospective, longitudinal cohort study' (2017) 74(2) JAMA psychiatry 169.
[57] Susan E. White & Robert W. Gladden, 'Maternal mental health and infant mortality for healthy-weight infants' (2016) 22(11) Am J Manag Care e389.
[58] David T. Zhu et al., 'Public health and clinical implications of Dobbs v. Jackson for patients and healthcare providers: A scoping review' (2024) 19(3) Plos one.
[59] Diamant J, [2024] (n.17).
[60] Manian M, [2023] (n.1).
[61] Id [60].
[62] Zhu DT et al., [2024] (n.58).
[63] Declercq E & Zephyrin L, [2020] (n.16).
[64] Bridges KM, [2020] (n.9).
[65] Declercq E & Zephyrin L, [2020] (n.16).

intensified. In 2020, Black women reached a mortality rate of 55.3 (see Figure 4), dying at almost three times the rate of their White counterparts[66].

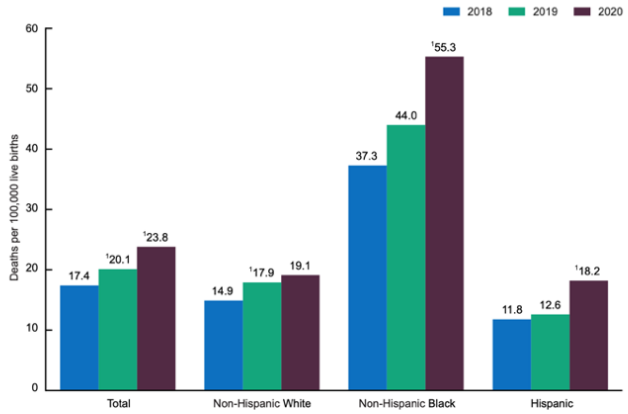

Figure 4: Maternal mortality rates, by race and Hispanic origin: United States, 2018–2020
SOURCE: National Center for Health Statistics, National Vital Statistics System, Mortality.

Recent evidence has shown that reducing access to abortion poses a significant risk to both the health and financial stability of the most vulnerable segment of the population[67]. In the case of the United States, given that Black women are 200 percent more likely to fall below the federal poverty level, this is indeed the category of women most at risk from the bans imposed by the states[68]. Even when considering the example of California, one of the states with a maternal mortality rate well below the national average, Black women continue to die at a rate three times higher than that of their White counterparts[69]. For the reasons considered above and looking at the data, it can be stated that the country's maternal mortality crisis can also be reframed as a "Black maternal health crisis."[70] Undoubtedly, the restrictions on abortion have created legal, geographical, and financial barriers that have increased maternal death rates for all groups in the United States population[71]. Still, the Black birthing population is particularly affected by these changes.

As for the reasons behind this ethnic disparity, part of it can be explained in terms of higher poverty rates, as well as unhealthier health conditions compared to White women. However, traditional explanations are not sufficient to account for the higher rates of maternal deaths among Black women. The primary reason why Black women are disproportionately affected by maternal mortality and morbidity lies in the structural racism that characterizes the

[66] Bridges KM, [2020] (n.9).
[67] Dench D et al., [2023] (n.53).
[68] Samantha Artiga, et al., 'What are the implications of the overturning of Roe v. Wade for racial disparities?' (2022) KFF.
[69] Lister RL, et al., [2019] (n.40).
[70] Anna Kheyfets, et al., 'The impact of hostile abortion legislation on the United States maternal mortality crisis: a call for increased abortion education.' (2023) 11 Frontiers in public health.
[71] Id [70].

United States[72]. Analyses show that approximately 60 percent of maternal deaths in the Black community are preventable, whereas barely 9 percent of the pregnancy-related deaths of White women are preventable[73]. The reason behind that is the idea that healthcare providers often downplay the pain of Black patients due to an implicit bias regarding their pain tolerance[74]. As a consequence of this bias, Black women are less likely to receive epidural analgesia during childbirth, and several women belonging to the Black community are subjected to unnecessary cesarean sections, which have a much higher mortality rate compared to natural childbirth[75]. To sum up, it can be said that a large part of the maternal mortality problems in the United States is related to racial disparities and that if the mortality rate of Black women were brought to the same level as that of White women, the United States maternal mortality rate would approach that of other developed countries[76].

Turning to the repercussions on healthcare personnel, following Dobbs, the proliferation of state-level bans has created an area marked by uncertainty in which healthcare workers are forced to operate. Operating in this grey area and out of fear of legal repercussions, sanctions, and charges, obstetric care is being delayed or denied until there are clear signs of severe health problems[77]. The medical staff at the University of Louisville reported being forced to turn away patients experiencing miscarriages, ectopic pregnancies, and fetal anomalies because they feared that providing the appropriate care would violate the state's abortion bans[78]. Even in cases that fall under the medical exceptions provided by state laws, doctors employ riskier methods to assist their patients, thereby further endangering the lives of mothers due to the risk of routine procedures being mistaken for illegal abortions[79]. In the long term, overturning Roe v. Wade will also negatively affect medical and nursing education for the providers operating in restrictive states. Future medical personnel lacking training in abortion procedures will have limited skills in managing pregnancy complications as many of

[72] Eidson K, [2023] (n.19).
[73] Verma N & Shainker SA, [2020] (n.31).
[74] Hoffman KM et al., 'Racial bias in pain assessment and treatment recommendations, and false beliefs about biological differences between Blacks and Whites' (2016) 113(16) Proceedings of the National Academy of Sciences 4296.
[75] Bani Saluja & Zenobia Bryant, 'How implicit bias contributes to racial disparities in maternal morbidity and mortality in the United States' (2021) 30(2) Journal of women's health 270.
[76] Bridges KM, [2020] (n.9).
[77] Londoño Tobón A et al., [2023] (n.55).
[78] Offices of Catherine Cortez Masto et al., 'Two Years Post-Dobbs: The Nationwide Impacts of Abortion Bans' (2024).
[79] Manian M, [2023] (n.1).

the surgical operations and medications employed in abortion care are similarly used in cases of obstetric complications[80].

Contrary to popular belief, restrictive abortion laws have adverse effects on patients not actively seeking an abortion and non-pregnant individuals as well. In the post-Dobbs United States, the link between abortion care and a wide variety of health issues has become increasingly apparent[81]. Restrictions on various medications, including limits on the use of mifepristone, have led to a healthcare regime in which this drug cannot be used even in cases of miscarriage[82]. According to Bré Thomas, the CEO of a reproductive healthcare provider in Arizona, many patients are unaware that the procedures for miscarriage care and other emergencies are the same as those performed in abortion cases[83]. Thus, restricting access to abortion negatively impacts those who experience a miscarriage.

Over the past two years, there have been multiple reports of women living in Southern or Midwestern states being denied or having delayed access to medications like methotrexate or misoprostol. These medications are generally associated with abortion procedures or the treatment of ectopic pregnancies, but in the reported cases, the medications were needed to treat chronic conditions such as autoimmune diseases or cancer[84]. One in seventeen people using methotrexate to cure their illnesses have reported having faced barriers in obtaining it after Dobbs[85]. Pharmacists living in restrictive states have raised concerns regarding when and whether to order specific drugs connected to abortion for fear of being prosecuted or losing their licenses[86]. While patients are beginning to share their stories with the media, empirical data on how abortion bans are altering medical care for female patients with conditions requiring treatment with specific medications remain limited[87].

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[80] Ariana M. Traub et al. 'The implications of overturning Roe v. Wade on medical education and future physicians' (2022) 14 The Lancet Regional Health–Americas.
[81] Manian M, [2023] (n.1).
[82] Greer Donley, 'Medication Abortion Exceptionalism' (2022) 107 Cornell L Rev 627.
[83] Offices of Catherine Cortez Masto et al., [2024] (n.78).
[84] Brittni Frederiksen, 'Abortion Bans May Limit Essential Medications for Women with Chronic Conditions | KFF' (*KFF*, 17 November 2022) <www.kff.org/womens-health-policy/issue-brief/abortion-bans-may-limit-essential-medications-for-women-with-chronic-conditions/> accessed 20 August 2024.
[85] Zhu DT et al., [2024] (n.58).
[86] Frederiksen B, [2022] (n.84).
[87] Manian M, [2023] (n.1).

4.3 Healthcare Disparities Across States: Between Restrictive and Protective Approaches

In 1995, the American maternal mortality rates were comparable across the country's states[88]. As abortion restrictions began to be implemented in conservative states, maternal mortality rates also rose in those same states, leading to a widening of the gap. By 2009, maternal death rates in restrictive states were nearly double those in states that protected abortion rights[89]. Although the number of restrictive states in the United States has not changed much, the Dobbs decision has worsened the health conditions of women living in those states[90].

In the post-Dobbs scenario, 23 million Americans live in states where abortion bans are in effect[91]. The living and health conditions of these people are endangered by the fact that in these states, maternal mortality rates are, on average, 60 percent higher than in states without bans[92]. The condition of women living in restrictive states is further worsened by the fact that these states, on average, have taken the fewest measures to address the maternal mortality crisis and lack basic social family policies such as paid family leave, making the financial cost of denying abortion very high[93]. In contrast, several states record low maternal death rates and have implemented laws to protect reproductive rights following the overturning of Roe v. Wade. These states are California, Illinois, Colorado, and Connecticut[94].

Currently, between the abortion restrictive and the abortion-sanctuary states, there are significant and notable differences in maternal mortality rates. In 2021 California reported a maternal mortality rate of 9.7 deaths per 100,000 births (see Figure 5), followed by Massachusetts (see Figure 5) with 17.4.[95] Other states, however, recorded extremely high rates, such as Louisiana, where 61 women die every 100,000 births[96].

[88] Darney PD et al., [2020] (n.18).
[89] Eidson K. [2023] (n.19).
[90] Ibid [89] 8.
[91] Offices of Catherine Cortez Masto et al., [2024] (n.78).
[92] Stevenson AJ et al., [2022] (n.48).
[93] Jung C et al., [2023] (n.47).
[94] Eidson K, [2023] (n.19).
[95] Anne K. Driscoll et al., 'National Vital Statistics Reports' (2023) 72(1).
[96] Id [95].

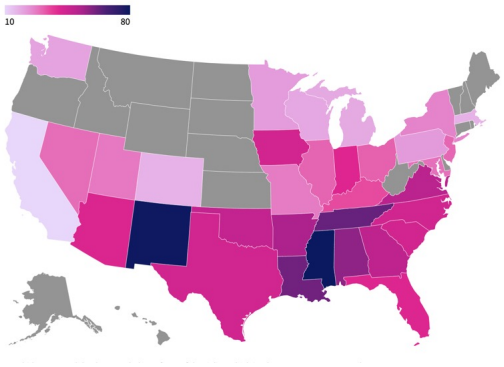

Figure 5: Maternal Mortality Rate per 100,000 births per state, 2021. The darker the shade, the higher the maternal mortality rate.
SOURCE: Centers for Disease Control and Prevention

Another example comes from Mississippi (see Figure 5), which, in 2021 recorded the highest mortality rate in the country, with 82.5 deaths per 100,000 births[97]. These differences among states have led to the conclusion that the risk of dying from pregnancy-related causes in the United States is not due to a 'natural' distribution but is generated by state-by-state policies[98].

Further worsening this hostile scenario is the fact that the increase in maternal death rates after the 2022 Supreme Court's decision is expected not to be limited to hostile states. Those states bordering hostile states will experience an increase in maternal mortality rates as a consequence of the bans of their neighbors[99]. The reason for that is due to the influx of patients that the states still offering abortion services will have to deal with. For example, Florida's Constitution protects the right to abortion. Thus, Florida serves as a "haven state" for pregnant people living in close localities, as it is surrounded by states that have banned abortion[100]. For states in the same situation as Florida, the increase in people seeking abortions will lead to a scarcity of resources to ensure care for all patients in need, and it will leave many patients waiting for extended periods[101].

Previous research indicates that abortion bans lead to increased travel distances to obtain abortion, causing healthcare chaos. In Ohio, where abortion has become legal again, there are so many out-of-state patients seeking abortion care that state residents themselves are forced to travel outside their local cities to receive timely care[102]. When pregnant individuals have to wait long periods before receiving abortion care, they risk being too far along in their

[97] Driscoll AK et al., [2023] (n.95).
[98] Bridges KM, [2020] (n.9).
[99] Eidson K, [2023] (n.19).
[100] Elyssa Spitzer at al., 'Abortion Bans Will Result in More Women Dying' (2022) CTR. FOR AM. PROGRESS.
[101] Id [100].
[102] Offices of Catherine Cortez Masto et al., [2024] (n.78).

pregnancy by the time an appointment becomes available, possibly forcing them to bring the pregnancy to term due to delays[103]. In Colorado, waiting times have increased to twenty-eight days following the Dobbs decision due to a surge of patients from other states. Today, the waiting time has stabilized at ten days, which is still significantly longer than in previous years[104].

In addition to the time-related challenges posed by the post-Dobbs scenario, there are also increasing distances that women in hostile states have to travel to find facilities that offer abortion care. The number of facilities offering abortion services in the United States is constantly decreasing. While there were nearly 3,000 facilities that provided abortion services in 1982, by 2020, that number had been halved, leaving several states without these services[105]. States without hospital facilities or birth centers offering obstetric services are referred to as 'maternity care deserts.'[106] Alarmingly, 36 percent of the United States counties fall into this category, and the number is growing annually[107].

Before Dobbs, less than 15 percent of the reproductive-age population lived more than an hour away from the nearest abortion facility[108]. Three months after Dobbs, that percentage had already risen to 33 percent[109]. Although several patients can travel to abortion-protective states, Nicole Barnett of Planned Parenthood Northern California points out that many others are unable to make such a journey due to logistical and financial barriers[110]. These individuals, unable to move from one state to another, disproportionately belong to Black communities and low-income households.

The long distances pregnant individuals have to travel to reach a 'safe-haven' may also impact birth rates due to the distance being too great. The estimated effects on birth rates in states that have banned abortion range from a 0.4 percent increase in births in Missouri to a 5.1 percent increase in Texas[111]. Several studies have shown that the greater the distance a woman

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[103] Eidson K, [2023] (n.19).
[104] Offices of Catherine Cortez Masto et al., [2024] (n.78).
[105] Diamant J, [2024] (n.15).
[106]Jazmin Fontenot et al., 'Navigating geographical disparities: access to obstetric hospitals in maternity care deserts and across the United States' (2024) 24(1) BMC Pregnancy and Childbirth 350.
[107] Noelene K. Jeffers, 'Confronting the Issue of Maternity Care Deserts - Johns Hopkins School of Nursing' (*Johns Hopkins School of Nursing*, 28 August 2023) <https://nursing.jhu.edu/magazine/articles/2023/08/confronting-the-issue-of-maternity-care-deserts/> accessed 21 August 2024.
[108] Jasmine Cui et al., 'One year without Roe: Data shows how abortion access has changed' (*NBC News*, 22 June 2023) <www.nbcnews.com/data-graphics/dobbs-abortion-access-data-roe-v-wade-overturned-rcna88947> accessed 21 August 2024.
[109] Cui J et al., [2023] (n.108).
[110] Offices of Catherine Cortez Masto et al., [2024] (n.78).
[111] Dench D et al., [2023] (n.53).

must travel to reach a provider, the lower the likelihood that she will obtain an abortion and the higher the probability she will be forced to continue with the pregnancy[112]. The inability to access abortion leads to an increase in unintended births, which negatively impacts the health and lives of mothers, children, and families in general[113]. This effect is evident in Texas since the state is surrounded by other states that ban or partially ban abortion and far away from those states that still permit the procedure. As a consequence, in Texas, infant mortality increased by 12 percent in 2022 due to births characterized by congenital disabilities or genetic conditions that would have been avoided if abortion access had been possible[114]. These indices are expected to rise in many states, considering that seventeen states currently have total or partial abortion bans, many of which do not allow exceptions for fetal anomalies[115].

Even in cases where distances are minimal, state requirements for abortion procedures can pose insurmountable obstacles. For example, in 2014, eleven states of the United States required women to have an in-person consultation, followed by a waiting period ranging from 24 to 72 hours before obtaining an abortion[116]. Considering the onerous requests, even short distances could represent a significant barrier to service access for women not residing in those states.

4.4 Argentina: Demographic Data Pre-Legalization

One of the most striking demographic similarities between Argentina and the United States is that in both countries a large number of maternal deaths are preventable and avoidable[117]. But contrary to the United States, the Argentinian government recently voted to make abortion legal in the South American country, which should result in significantly lower rates of maternal mortality. One of the historical causes of maternal mortality in Argentina was related to complications resulting from clandestine abortions. Before the legalization of abortion, statistics reported that about 500,000 illegal abortions were performed nationwide per

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[112] Ibid [11] 14.
[113] Deidre McPhillips, 'Births have increased in states with abortion bans, research finds | CNN' (*CNN*, 21 November 2023) <https://edition.cnn.com/2023/11/21/health/abortion-bans-increase-births/index.html> accessed 21 August 2024.
[114] Id [113].
[115] Claire Cain Miller, 'In Texas, Infant Mortality Rose After Abortion Ban' (*The New York Times*, 26 June 2024) <www.nytimes.com/2024/06/26/upshot/texas-abortion-infant-mortality.html#:~:text=In%20Texas,%20Infant%20Mortality%20Rose,driven%20by%20fatal%20birth%20defects.&text=New%20data%20from%20Texas%20shows,a%20rise%20in%20infant%20mortality.> accessed 21 August 2024.
[116] JM Bearak, at al., 'Disparities and change over time in distance women would need to travel to have an abortion in the USA: a spatial analysis' (2017) 2 Lancet Public Health.
[117] Ianina Tuñón & Matías Maljar, 'Mortalidad infantil y materna: su asociación con las vulnerabilidades socioeconómica y geográfica en la Argentina' (2024).

year, resulting in complicationts that could potentially lead to the fatalities of pregnant people[118]. This data demonstrates that in order to prevent unnecessary maternal deaths witin the country it is essential to ensure the decriminalization of the practice.

In the early 2000s, under a global intiative to reduce maternal mortality, the Argentine government implemented efforts to improve the health and living conditions of pregnant women. In those years, the United Nations declared that a high rate of maternal morbidity and mortality was not acceptable and that prevention of those cases constituted an essential human rights issue[119]. As a consequence of that, in 2002, Law 25,673 was enacted by the Argentine institutions, resulting in the creation of the *Programa Nacional de Salud Sexual y Procreación Responsible* (National Program for Sexual Health and Responsible Reproduction), entering into effect the following year[120]. This program was intended to establish a national public policy program to protect sexual and reproductive rights. However, despite efforts made by the state, national policies not intended at legalizing abortion did not seem to substantially reduce maternal mortality and morbidity figures in the country.

Between 1995 to 2010, the decline of maternal mortality was only of 0.8 percent[121]. Looking at the overview of maternal death rates in the country over the years, there is a noticeable fluctuating trend, demonstrating how arduous it was for the government to lower the mortality rate. When analyzing the period between 2004 and 2008, abortion-related complications continued to be the leading cause of maternal mortality in fourteen of the country's twenty-four provinces and the second leading cause of mortality in five others[122]. Additionally, for the year 2015, the cause of death register indicates that the top fifty causes of maternal deaths in the country still include deaths caused by abortion[123].

In 2017, the Latin American country implemented another program to fight another phenomenon: that of teenage pregnancies. With the *Plan Nacional de Prevención del Embarazo No Intencional en la Adolescencia* (National Plan for the Prevention of Unintentional Teenage Pregnancies), the government aimed to raise awareness and thus reduce

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[118] Human Rights Watch, 'Human Rights Watch: Women's Human Rights: Abortion' (*Human Rights Watch | Defending Human Rights Worldwide*, 2004)
<www.hrw.org/legacy/women/abortion/argentina.html> accessed 21 August 2024.
[119]Evelyn Elizabeth Horta Fiallos, 'Análisis del aborto legal en derecho comparado con Argentina y Uruguay' (2022).
[120] Daniela Guberman & Mariana Romero, 'Inequidades en salud: el caso de la morbilidad y mortalidad materna e infantil en la Argentina' (2021).
[121] Juan Carlos Del Bello, 'LAS VERDADERAS CAUSAS DE LA MORTALIDAD MATERNA EN ARGENTINA' (2013) Fundación para la Cultura Contemporánea.
[122] Horta Fiallos EE, [2022] (n.119).
[123]Lenin De Janon Quevedo, 'Cuando los datos responden a los argumentos: revisión breve de las estadísticas sobre aborto' (2018).

unintended pregnancies[124]. The initiative also aimed at strenghtening the delivery of sexual and reproductive health services as well as promoting informed choices, especially among adolescents. A public program was introduced leading to a reduction of the number of births in women between the ages of 10 and 19 of around 20 percent, and twelve provinces recorded the lowest infant mortality rate recorded for over a decade[125].

In 2018, the process of social decriminalization had largely commenced, although abortion had not been legalized in Argentina. By that time, there were 257 deaths registered in the country, according to the latest data made available by the nation's Ministry of Health, representing a maternal death rate of 3.7 per 10,000 births (see Figure 7)[126]. A maternal mortality rate of 37 per 100,000 births recorded in that period was relatively low on a global scale. However, it was still higher than what is typically seen in high-income countries. However, of these deaths, only 13.6 percent were due to pregnancies that ended in abortion (see Figure 6), demonstrating healthier access to the procedure[127].

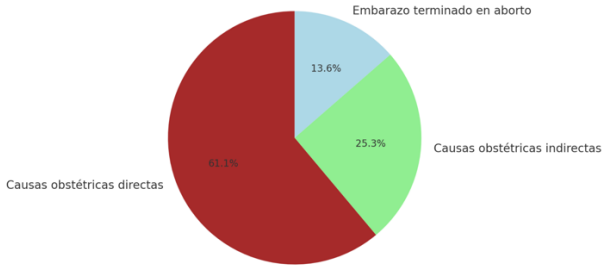

Figure 6: Percentage distribution of the grouped causes of maternal mortality in Argentina. 2018
SOURCE: Daniela Guberman & Mariana Romero, 'Inequidades en salud: el caso de la morbilidad y mortalidad materna e infantil en la Argentina' (2021).

Abortion had already been made safer even in the absence of national legalization thanks to improved abortion techniques, greater access to health services, and education and awareness of the population on the issue[128]. Although Argentina recorded improving figures with respect to maternal mortality, the Latin American still had rates that were twice as high as those of some of its neighbors on the Latin American continent, such as Uruguay and Chile[129].

[124] Ministerio de Salud, 'Argentina logró importante descenso de la mortalidad infantil y materna' (*Argentina.gob.ar*, 28 February 2019) <www.argentina.gob.ar/noticias/argentina-logro-importante-descenso-de-la-mortalidad-infantil-y-materna> accessed 21 August 2024.
[125] Id [124].
[126] Please note the following information: contrary to the standardized version, the maternal mortality rate in Argentina is expressed as 10,000 live births. In the following sections, the data will be converted to 100,000 for the purpose of comparison.
[127] Guberman D & Romero M, [2021] (n.120).
[128] Ministerio de Salud, [2019] (n.124).
[129] De Janon Quevedo L, [2018] (n.123).

This outcome is not unexpected, given that both Uruguay and Chile had previously legalized abortion and were, therefore, expected to have lower mortality rates.

Finally, when analyzing infant mortality data for Argentina, it is found that it is closely linked to maternal mortality. Both of these issues are rooted in social causes that can be vastly reduced, particularly in the most vulnerable communities[130]. Although under a worldwide trend of decreasing this rate, the 2017 data shows that Argentina also had a general trend of reducing infant mortality; when comparing Argentina's data, with a child mortality rate of 6.22, to those of the Latin American and Caribbean region, Argentina presents values below the regional average[131].

4.5 Argentina: Post-Abortion Law, Effect of Access to Safe and Legal Abortion Services

In recent years, it has been repeatedly claimed that the legalization of abortion leads to a drastic reduction in the maternal mortality rate. Indeed, it is argued that the introduction of legal abortion results in the practice no longer being performed under precarious conditions that are unsafe for women and, therefore, lowering the fatalities caused by that[132]. So, the solution to maternal mortality, especially in the case of Argentina, where the majority of deaths were caused by illegal abortion, primarily comes from legalization. In this section, the demographic situation following the legalization of abortion in Argentina law will be analyzed to observe whether this resulted in improved health conditions for pregnant people.

With Law 27,610 in 2020, Argentina legalized abortion nationwide. Four years after legalization, data from the Ministry of Health indicate improving trends in the health and living conditions of pregnant people despite exogenous factors affecting the health of pregnant people during this period[133]. First, after legalization, the most immediate effect that was recorded was a decrease in unintended pregnancies. Although this change was of small magnitude, it was found in all the country's provinces[134]. The decrease in unintended pregnancies was coupled with a reduction in teenage fertility. The policy initiated by the government as early as 2017

[130] Tuñón I & Maljar M, [2024] (n. 117).
[131] Guberman D & Romero M, [2021] (n.120).
[132] Manian M, [2023] (n.1).
[133] Ministerio de Salud, 'El Ministerio de Salud de la Nación anunció el valor más bajo de mortalidad infantil en la historia del país' (*Argentina.gob.ar*, 6 February 2023) <www.argentina.gob.ar/noticias/el-ministerio-de-salud-de-la-nacion-anuncio-el-valor-mas-bajo-de-mortalidad-infantil-en-la#:~:text=historia%20del%20país-,El%20Ministerio%20de%20Salud%20de%20la%20Nación%20anunció%20el%20valor,un%20punto%20en%20dos%20años.> accessed 21 August 2024.
[134] Romero M et al., [2023] (n.3).

has borne fruit in the post-legalization period. However, this improvement was not consistent across the entire country. The number of girls and adolescents who carried a pregnancy to term in the country decreased significantly in some provinces of the country, while in others, the situation remained unchanged or worsened[135].

As for maternal mortality, during the last decade in Argentina, there has been a slow and oscillating decline in the rate of pregnancy-related mortality (see Figure 7). However, in 2021, there was a spike in deaths caused by the pandemic that was then bending the country's healthcare system[136]. The maternal mortality rate for Argentina for 2021 was about 74 per 100,000 births (see Figure 7, where estimates are in 10,000 births)[137], while for the United States, it was 32.9 deaths per 100,000 births[138]; thus, the gap between the two countries was still considerable.

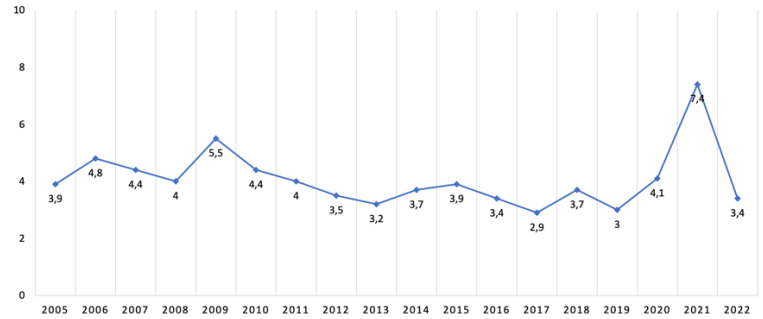

Figure 7: Maternal mortality rate (per 10,000 live births) in Argentina, 2022.
SOURCE: Ministerio de Salud (2024) and EPH Total Urbano del tercer trimestre de 2022 (INDEC)

However, when the causes of this mortality rate for Argentina are considered, it can be observed that between 2021 and 2022, the increase in maternal deaths was primarily due to the effect of the COVID-19 pandemic. Indirect causes, between which we find the impact of the pandemic, explained nearly 70 percent of these deaths occurred in 2021, while direct causes, thus those related to pregnancy complications in childbirth or the postpartum period, amounted to about 27 percent of these deaths, while maternal deaths from abortion were only 3.3 percent[139].

Hence, although maternal mortality dramatically increased in the country due to external factors, the legalization of abortion almost immediately had a positive impact on the safety of abortion practices, reducing the number of maternal deaths due to that cause. When looking at the projected data for 2022, which is still being collected and analyzed, it appears

[135] Romero M et al., [2023] (n.3).
[136] Ibid [135] 10.
[137] Ministerio de Salud, 'Análisis de la natalidad, y de la mortalidad materna y en la niñez' (2023).
[138] Kukura E, [2023] (n.34).
[139] Ministerio de Salud, [2023] (n.137).

that maternal mortality in Argentina may have reached 34 deaths per 100,000 births (see Figure 7). This figure brings Argentina closer to the United States, which has a rate of 22.3 deaths per 100,000 births, as well as other Western countries[140].

As for the infant mortality rate, positive data continue to be recorded in the federation. Health Minister Carla Vizzotti has recently announced that the infant mortality rate in Argentina has decreased by more than one point compared to 2019[141]. This figure constitutes the lowest historical value recorded in the country. The decrease in this index is mainly due to initiatives aimed at improving the health of children under one year of age. The policies implemented under the 1,000-day law, which seeks to protect women's health during and after pregnancy and the early childhood of infants, have been particularly significant in reaching the objective[142].

In summary, this section demonstrates that although recent data on maternal and infant mortality are scarce, the legalization of abortion appears to have helped reduce maternal mortality in the country. However, national policies must be put in place to avoid obstetric deaths caused by direct and indirect causes in the country, especially considering the devastating impact of COVID-19 in the country.

The data for 2023 and 2024 have not yet been published because Argentina's processing and verification time takes quite some time. For this reason, it is postponed to future publications to observe whether the maternal and infant mortality rates will continue to decline in the years to come and whether the gap with the United States, and with more progressive South American countries, will narrow.

4.6 Maternal Mortality and Abortion Access: A Tale of Two Argentinas

An analysis concerning the maternal mortality rates in Argentina must consider that the provinces have always presented significant disparities for these rates. The reasons for this condition stem from the distribution of health personnel and medical instruments needed for such procedures[143]. Considering the disparity between provinces in 2010, if most of the provinces in the Northeast and Northwest of Argentina presented maternal mortality rates similar to the worst-performing Latin American countries, other progressive provinces, such as the city of Buenos Aires or Neuquén, presented rates comparable to the countries of lower

[140] Hoyert DL, [2024] (n.44).
[141] Ministerio de Salud, [2023] (n.133).
[142] Id [141].
[143] Gabriela Luchetti et al., 'La formación de grado en obstetricia en Argentina: una exploración de planes y programas de estudio' (2022).

maternal mortality of the region[144]. When comparing the mortality rates of the best-performing provinces to those of other developed countries, it is shown that these provinces had lower mortality rates than those of the United States and were very similar to those recorded by Canada[145]. This condition of disparity has persisted and continues to characterize these rates even after the national legalization of abortion.

In 2018, the first reforms related to the legalization of abortion began to take shape at the national level in Argentina. Given the country's vast geographic extent and cultural diversity among regions, these reforms were expected to result in significant variations in their implementation and acceptance across different territories. The provinces' reactions were mixed, with some areas quickly embracing the legal changes while others showed resistance or delay. For example, the province of La Pampa stood out for its rapid and favorable attitude concerning the legalization of abortion and achieved positive outcomes in terms of maternal mortality data. The province recorded a value of zero deaths from pregnancy-related causes already in 2018[146]. By contrast, there were ten provinces with values above the national maternal mortality rate recorded in the same year. Among them, those with higher values were Formosa and Santiago del Estero, with 14.4 and 12.2 maternal deaths per 10,000 births, respectively[147].

In 2021, primarily due to the COVID-19 pandemic, maternal mortality increased in all jurisdictions except Juguy, where abortion was already among the highest in the country, and Ciudad de Buenos Aires[148]. The provinces with the highest maternal mortality values were Santiago del Estero, Chaco, and La Rioja, with values above 10 deaths per 10,000 births (see Figure 8). At the same time, the best-performing provinces like Ciudad de Buenos Aires, San Luis, and Neuquén reported values below 4 deaths per 10,000 births (see Figure 8).

[144] Horta Fiallos EE, [2022] (n.119).
[145] Id [144].
[146] Guberman D & Romero M, [2021] (n.120).
[147] Id [146].
[148] Ministerio de Salud, 'Mortalidad infantil y materna Año 2021' (2022).

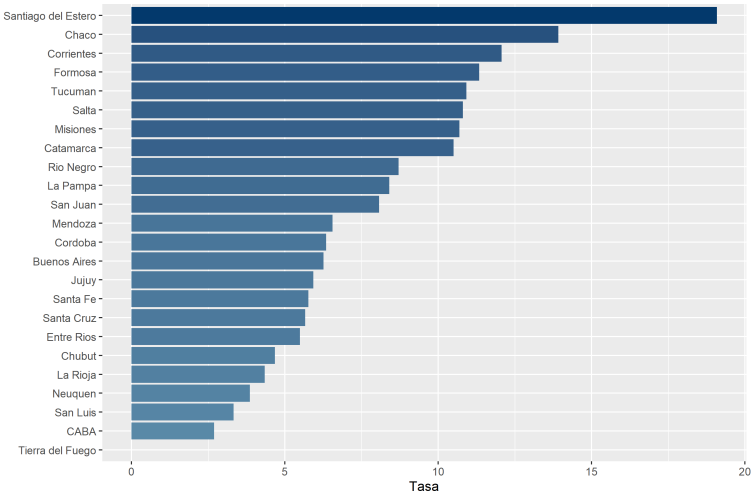

Figure 8: Maternal mortality by province of residence, Year 2021
SOURCE: Ministerio de Salud Argentina, Mortalidad infantil y materna Año 2021

Based on the data recorded by the provinces in 2022, it is evident that the provinces with the highest and lowest performance remained consistent[149]. However, despite this, maternal mortality rates decreased in several provinces that were identified as the worst performers. In 2022, Santiago del Estero and Chaco had maternal mortality rates well above the national average, with 8.6 and 8.3 maternal deaths per 10,000 births, respectively[150]. However, these rates have decreased compared to the previous year, indicating that the legalization of abortion has had an impact even in more restrictive regions. Meanwhile, data registered in other jurisdictions, between which Ciudad de Buenos Aires and Neuquén stand out, with values of 1.2 and 1.3, showed indices closer to those of Western countries than South American ones[151].

The divergences between the provinces also translate into the perinatal mortality tax. Eleven jurisdictions, many of which correspond to the one with the highest maternal mortality rate in the country, have a higher level of perinatal mortality than that recorded for the national level[152]. In any case, after further analysis of the variation of infant mortality rates over the last few years, the differences between the Argentine provinces for this rate have been shortening. In 2020, there was an 11.5-point difference in infant mortality rates between the provinces with the highest and lowest levels, while in 2021, this difference decreased to 7 percentage points[153]. This figure reflects an improvement in the distribution of resources and health services among the provinces.

[149] Tuñón I & Maljar M, [2024] (n.117)
[150] Id [149].
[151] Tuñón I & Maljar M, [2024] (n.117).
[152] Ministerio de Salud, [2023] (n.137).
[153] Ministerio de Salud, [2023] (n.133).

Concerning access to abortion services at the provincial level, also in this regard, there are significant differences between the Argentine entities when analyzing the recent data. The number of IVE and ILE services per 100,000 women rose to 40 services per 100,000 women in Neuquén, Santa Fe, and La Pampa, which, not surprisingly, are some of the provinces with the lowest maternal mortality rates in the country[154]. At the same time, the availability of these services fell to 3 per 100,000 women in the regions of Chaco, Mendoza, and Santiago del Estero, rendering access for women living in these provinces difficult, if not impossible[155].

The geographical inequality is exacerbated by the vulnerability of specific categories of people living in the worst-performing provinces. Several provinces with the highest mortality rates also have higher poverty rates than the national average[156]. Women characterized by such inequalities are also those who are least likely to have access to anti-contraceptive methods or adequate information to protect their reproductive health and lives. This condition puts these women at serious risk of unwanted and unplanned pregnancies as well as generating an increase in unsafe abortions.

4.7 Tackling Maternal Mortality and Health Disparities: Policy Insights for the United States and Argentina

This analysis showed that in the United States, many of the causes of maternal mortality are highly preventable if pregnant women are assured a healthcare system that assists them at all stages of pregnancy and following the birth of their children. In the case of Argentina, despite the maternal mortality and morbidity rates are decreasing, a substantial discrepancy exists between the entities that comprise the Argentine federation. According to the analysis carried out in the chapter and the literature, policies will be elaborated in this section that could decrease maternal mortality and morbidity and reduce disparities between the local entities in the two countries.

One of the most significant flaws in the United States healthcare system, which is also replicated in the Argentine one, is not allowing midwives to operate independently[157]. In many United States' local entities, pre-and postnatal care laws require midwives to be supervised by

[154] Romero M et al., [2023] (n.3).
[155] Id [154].
[156] Tuñón I. & Maljar M., [2024] (n. 117).
[157] The Commonwealth Fund, 'Policies for Reducing Maternal Morbidity and Mortality and Enhancing Equity in Maternal Health' (*Home | Commonwealth Fund*, 16 November 2021) <www.commonwealthfund.org/publications/fund-reports/2021/nov/policies-reducing-maternal-morbidity-mortality-enhancing-equity> accessed 21 August 2024.

physicians when caring for patients[158]. Considering data from the World Health Organization, midwifery-led care has been shown to substantially reduce maternal mortality[159]. Not allowing midwives to act autonomously thus constitutes a significant deficit for the country. This is because midwives are trained to care for patients who have low-risk deliveries and without serious complications, which are the majority of patients in the United States[160]. In the United States, even low-risk deliveries must be performed by physicians, which results in some patients lacking adequate care[161].

Furthermore, an expansion of midwives' forces is linked to better management of health resources, resulting in a decrease in the massive use of C-sections that generate several adverse health consequences for patients in the United States. Finally, the intervention of midwives in the care of pregnant patients also seems to be linked to an improvement in maternal psychosocial well-being, including an estimated lowering of postpartum depression[162]. All these reasons highlight the importance of the United States's governmental institutions increasing the number of midwives working within the health care system while at the same time changing the adverse state laws to allow them to operate independently from other medical professions[163].

For what concerns the improvement of the conditions of Black pregnant individuals in the United States, it is essential to implement policies that address the factors putting them at greater risk of maternal death[164]. Recognizing these factors is the first step toward effectively lowering this trend and addressing the issue. The causes for which this category of pregnant people die at higher rates than its White counterpart is due to poor consideration of the pain and needs of these patients[165].

Such abuses are perpetrated because of the absence of racial and ethnic diversity within the workforce in obstetrical care. Indeed, it is estimated that Black patients who are cared for by Black physicians have greater trust in their providers and, at the same time, are more likely

[158] Tony Y. Yang et al., 'State scope of practice laws, nurse-midwifery workforce, and childbirth procedures and outcomes' (2016) 26(3) Women's Health Issues 262.
[159] United Nations Population Fund, 'The State of World's Midwifery 2014: A Universal Pathway. A Woman's Right to Health' (2014).
[160] The Commonwealth Fund, [2021] (n.157).
[161] Id [160].
[162] Roosa Tikkanen et al., 'Maternal mortality and maternity care in the United States compared to 10 other developed countries' (2020) 10(22) The Commonwealth Fund.
[163] The Commonwealth Fund, [2021] (n.157).
[164] Eidson K, [2023] (n.19).
[165] Hoffman KM et al., [2016] (n.74).

to obtain the medical care they need[166]. Investing in racial and ethnic diversification programs could thus ensure improved health conditions for the most fragile group in the United States.

Another issue of high complexity in a federal country like the United States is data collection. In 2003, the government introduced a standardized pregnancy checkbox in the death certificates, decreasing the possibility that pregnancy-related deaths went unnoticed by the national estimates[167]. The introduction of this mechanism increased the effectiveness of the data collected at the national level, namely the National Center for Health Statistics and the Pregnancy Mortality Surveillance System. However, since both systems operate at the national instead of the state or local level, there is still a high possibility that several pregnancy-related deaths will be overlooked[168]. In this regard, Maternal Mortality Review Committees (MMRCs), which operate in data collection at the state level instead of the national level, can produce better information for pregnancy-related deaths and thus can be an excellent source for preventing them[169]. The expansion of the activities of MMRCs is therefore of paramount importance in better processing data concerning maternal mortality and morbidity in the United States. It is essential to ensure that these committees are active in all states of the United States, particularly in areas where communities most affected by today's maternal mortality crisis reside.

It is now necessary to move the analysis towards those policies that could improve the health conditions of people living in states with restrictive laws on abortion. While some women in these states can access abortion procedures in neighboring states, not everyone can do so due to physical distance or the cost of travel. In this scenario, telehealth services and other digital health tools can be crucial in reducing physical and financial barriers[170]. Telehealth services have proven particularly effective in building doctor-patient relationships, even in isolated areas usually characterized by a shortage of obstetric personnel[171].

Through telehealth services, women residing in restrictive states can obtain abortion pills via online consultations and have them delivered to their homes, ensuring access to medical care for women unable to travel. Moreover, research shows that self-managed abortions can be as safe as those performed in clinics[172]. In cases where patients carry out this practice, online telemedicine is substantially relevant to ensure adequate consultation regarding

[166] The Commonwealth Fund, [2021] (n.157).
[167] Bridges KM, [2020] (n.9).
[168] Siron E, [2022] (n.5).
[169] The Commonwealth Fund, [2021] (n.157).
[170] The Commonwealth Fund, [2021] (n.157).
[171] Fontenot J et al., [2024] (n.106).
[172] Kheyfets A et al., [2023] (n.70).

the practice. To make telehealth services genuinely effective, it is necessary to invest not only in digital tools that can ensure women have sufficient and safe access to the services provided online but also in reducing cultural barriers that prevent some women from accessing these services because of lack of knowledge regarding how to access them[173].

When it comes to the beneficial policies for Argentina, it is vital to note that while the country has seen a decrease in maternal and infant mortality rates in recent years, particularly related to deaths caused by abortion, government institutions still need to focus on reducing mortality from other direct or indirect causes. For this reason, it is necessary to increase public expenditure for sexual and reproductive health to expand the medical personnel who provide prenatal and postpartum care in addition to abortion services[174].

In addition, as in the United States, substantial differences persist among the various entities that make up the federation in Argentina. To ensure that pregnant individuals nationwide have sufficient access to obstetric services, the government could provide additional funding for poorer regions[175]. As the analysis indicates, these areas have higher mortality rates and require support to ensure proper infrastructure and access to medication and medical equipment[176].

Another policy that could be successfully implemented comes from the United States' experience with telehealth. Considering that several Argentine provinces with very low maternal and infant mortality rates successfully provide abortion services, these could adopt telemedicine to facilitate access to their services even in the most remote areas of the country.

Additionally, in Argentina, pregnant Indigenous women constitute the community most likely to face difficulties in accessing medical care[177]. Data shows that Indigenous women living in poverty and rural areas have the highest maternal mortality rates in the country[178]. The causes of this condition are due to the geographical areas where these communities live and their difficulties in understanding and adapting to the customs and cultural practices of the Argentine civil society. In this context, the *Salud Materna Intercultural* (Intercultural Maternal Health) project was launched in 2021 to improve the health of pregnant Indigenous women,

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[173] The Commonwealth Fund, [2021] (n.157).
[174] Organización Panamericana de la Salud, 'Nueve pasos estratégicos para reducir la mortalidad materna en la región' (*PAHO/WHO | Pan American Health Organization*, 23 May 2023) <www.paho.org/es/noticias/23-5-2023-nueve-pasos-estrategicos-para-reducir-mortalidad-materna-region> accessed 21 August 2024.
[175] Id [174].
[176] Ministerio de Salud, [2023] (n.133).
[177] UNICEF Argentina, 'Una iniciativa para proteger a las madres y sus bebés' (*UNICEF*, 15 November 2023) <www.unicef.org/argentina/historias/salud-materna-intercultural> accessed 21 August 2024.
[178] Ministerio de Salud, [2023] (n.133).

especially adolescents[179]. The project's program consists of several initiatives. Between this, there is the plan to organize an educational campaign to reduce disparities in accessing information, raise awareness on reproductive rights, and prevent unintended and adolescent pregnancies.

The initiative is still in its early stages but has already had a significant impact on indigenous communities living in the regions of Chaco, Misiones, and Salta, all provinces with higher maternal mortality rates than the ones recorded at the national level[180]. The implementation of this project and similar ones aimed at the most vulnerable groups in society is expected to lead to a decrease not only in national maternal and infant mortality rates in the years to come but also in the reduction of disparities between different provinces and communities.

Conclusion

The purpose of this chapter has been to demonstrate the effect that legal changes have generated in the demographic sphere of the countries under analysis. When considering the recent reversal of Roe v. Wade, it has been observed that limits on abortion are linked to higher maternal mortality and morbidity rates. For what concerns the case of Argentina, it has been shown that abortion is a safe practice associated with a low level of morbidity and mortality and that the legalization of abortion decreases maternal mortality and as a consequence the infant one.

Employing a healthcare framework, such as the one utilized in this chapter, and approaching the abortion topic in a less politicized manner, can be beneficial in demonstrating to the general public how abortion care is an essential policy. This approach highlights how abortion support is an integral part of every country's healthcare system that aims at protecting the lives of not only mothers and newborns but the entire population.

The first three sections were devoted to analyzing and observing the change in demographic indices in the United States. In the first section, it was noted that following the legalization of abortion in the 1970s, the country experienced an improvement in the health conditions of pregnant women, leading to a reduction in maternal and infant mortality. However, with the reintroduction of restrictive abortion laws at the state level, maternal mortality rates have risen again.

[179] UNICEF Argentina, [2023] (n.177).
[180] Id [179].

The second section has deepened the consequences of the abortion restrictions implemented following the Dobbs v. Jackson decision in 2022. Following the decision, the maternal mortality rate, which was already rising in the country, continued to increase. The section observed that the group most affected by the new restrictions is that of Black women. Additionally, after Dobbs, doctors and medical staff are forced to operate under a stare of fear of legal repercussions, thus delaying or denying patient care to avoid personal implications. Finally, the section highlighted how abortion restrictions have a negative impact even on individuals who suffer from various medical conditions.

The third section concerns the disparities among the states that make up the United States. In states where abortion is illegal, the maternal mortality rate is rising and is expected to increase further. In addition, the situation of states bordering restrictive ones is also becoming increasingly complex. As for the condition of citizens living in so-called "maternity care deserts," they are often forced to travel long distances to obtain the care they need when they have the financial capacity to do so.

The fourth, fifth, and sixth sections investigated the demographic rates in Argentina. In Argentina, maternal mortality has long been very high, primarily due to the dangers of clandestine abortions. In 2018, the situation in the country began to change despite abortion not yet being legal, and maternal deaths began to decrease. However, maternal mortality rates continued to double those of neighboring countries like Uruguay and Chile, where abortion had already been legalized.

In the fifth section, it has been noted how, after the legalization of abortion through Law 27.610, improvements were observed in the health of pregnant people, including a reduction in unintended pregnancies and adolescent fertility. However, in 2021, maternal mortality spiked in the country due to the COVID-19 pandemic. Despite this, maternal deaths from abortion have drastically decreased in the Latin American country thanks to access to safe abortion practices.

In the sixth section, the demographic discrepancies between Argentine provinces were investigated. As with the United States, in Argentina, an analysis of maternal mortality rates reveals significant disparities between provinces. The legalization of abortion has exacerbated the differences between the Argentine provinces. While more conservative ones continue to register maternal mortality rates higher than the national average, Buenos Aires and Neuquén have maternal mortality rates close to zero.

Finally, the last section highlighted possible intervention strategies for the two countries to improve living and health conditions for pregnant women and infants. For the United States,

policies should aim to ensure the autonomy of midwives in the healthcare system. At the same time, racial and ethnic diversity among doctors should be promoted to improve trust and access to care among Black women. Lastly, considering the difficulties faced by women living in conservative states, the telemedicine system should be expanded to facilitate access to online care. For Argentina, it is also proposed that a telemedicine system be introduced to improve access to healthcare services in remote areas. Additionally, it is suggested to reduce inequalities in access to medical care for Indigenous people, who suffer from extremely high maternal mortality rates, and finally to strengthen funding to the poorest regions.

Final Remarks

In answering the research question[1], it can be stated that the constitutional texts of the two countries are very similar, and to a certain extent, the Argentine Constitution of 1853 may even appear to be a copy of the United States's one[2]. Despite this, from the moment of formulation of the Argentine constitutional text, the two countries have diverged in fundamental elements such as the organization of powers between central power and federated units, the system of protection of human rights, and the separation and organization of power at the national level. However, in recent years, some of the issues characterizing the Argentine political scenario even before the creation of the constitutional text seem to have been replicated in the North American federation.

Getting to the heart of the research question, the legal history of the United States concerning the issue of abortion and in line with the common law legal family has been shaped by the Supreme Court's decisions[3]. In the case of Argentina, the legal history, much more recent than that of the United States, has taken on hybrid features relying on both Court's decisions and legislation to advance the legalization of abortion in the country[4]. Therefore, in both countries, the judiciary has played a fundamental role in consecrating and protecting human and, specifically, reproductive rights. However, in both case studies, it is doubtful whether the Supreme Courts still possess the independence necessary to perform its functions.

For what concerns the United States, 'legal certainty' has been undermined due to the to the swiftness with which precedents, such as in the abortion case, can be overruled as a result of changes in the Supreme Court's composition and the Court's different interpretation of the constitutional text[5]. This has led to the recent adoption of more conservative stances by the Higher Court of the United States, particularly on the issue of abortion[6]. This has been highlighted as one of the elements that have led to the overthrow of the abortion protection system in the country. In the case of Argentina, the judicial power has also never been

[1] What are the reasons that can explain the different paths and recent outcomes of abortion legalization in Argentina and the United States?
[2] Franklyn D. Jr Rogers, 'Similarities and Differences in Letter and Spirit Between the Constitutions of the United States and Argentina' (1945) 40(4) Georgetown Law Journal 582.
[3] Alberto F. Garay, 'Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitution Model' (1991) 22 U Miami Inter-Am L Rev 161.
[4] Santiago Legarre & Christopher R. Handy, 'A Civil Law State in a Common Law Nation, a Civil Law Nation with a Common Law Touch: Judicial Review and Precedent in Louisiana and Argentina' (2021) 95 Tul L Rev 445.
[5] Ariana Baio, 'As Biden Proposes Overhaul of Supreme Court, How Did We Get Here?' (*The Independent*, 17 July 2024) <www.independent.co.uk/news/world/americas/us-politics/supreme-court-reform-biden-trump-b2581567.html> accessed 20 September 2024.
[6] *Dobbs v Jackson Women's Health Organization* [2022] US Supreme Court No. 19-1392, [2022] 597 U.S.

considered independent from the executive, which has always prevailed over the other branches of government[7]. However, the Courts, and in particular the Argentine Supreme Court, have been more progressive in recent years, as it was demonstrated by the F.A.L. case that in 2012 clarified and upheld the right of access to abortion in some instances[8]. In addition, in the Argentinian system, the ultimate source of legality is always found in the law[9]. The lack of independence of the judiciary is a significant flaw in the Argentinian system; however, it does not hinder progress in the field of rights.

Another element that has differentiated the approach to abortion legalization in the two countries is to be found in the impact that the pro-abortion movements have had on politics. In the United States, the social conflict concerning the legalization of abortion has historically pitted two groups against each other: the pro-choice and pro-rights. Following the historic Roe v. Wade ruling, the social debate continued to escalate between the two factions[10]. In the years following the Supreme Court decision, the conservative movement became increasingly vocal in expressing their dissent by escalating violent incidents[11]. At the same time, the pro-choice movement was unable to adequately respond to the actions and positions of the pro-life groups, putting at serious risk what was established with the precedent of 1973[12].

Moreover, in those years, the pro-choice group became to be accused of being more similar to its conservative counterpart than it wanted to portray. The group's goal was to secure the 'choice' paradigm that only a narrow section of the population could take advantage of, while those living in precarious and deprived conditions and who turned out to be the most in need of access to abortion services, continued to be deprived of it[13]. The failure of the strategies employed by the pro-choice movement proved to be a significant factor contributing to the overturning of the precedent that legalized abortion nationwide in the United States.

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[7] Manuel José Garcìa-Mansilla, 'Separation of Powers Crisis: The Case of Argentina' (2004) 32 Georgia Journal of International and Comparative Law 307.
[8] *F.A.L.* [2012] Supreme Court of Argentina 335:197 (2012) 335 Fallos 197.
[9] Abelardo Levaggi, 'La Interpretaci6n del Derecho en la Argentina del Siglo XIX' (1980) 7 Revista de Historia del Derecho 23.
[10] Neal Devins, 'How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars' (2009) 118 Yale L J 1318.
[11] Leslie King & Ginna Husting, 'Anti-abortion activism in the US and France: Comparing opportunity environments of rescue tactics' (2003) 8(3) Mobilization: An International Quarterly 297.
[12] Marlene Gerber Fried, 'Reproductive rights activism in the post-Roe era' (2013) 103(1) American Journal of Public Health 10.
[13] Kimala Price, 'What Is Reproductive Justice? How Women of Color Activists Are Redefining the pro-Choice Paradigm' (2010) 10 Meridians 42.

In contrast, movements in support of reproductive rights and abortion played a crucial role in pushing governmental institutions to legalize abortion in Argentina[14]. The pro-choice movement in Argentina has successfully unified the entire society through a collaborative approach, allowing various sectors of Argentine activism to join forces despite continuous opposition from Catholic and conservative groups[15].

Another element that enabled the legalization of abortion in Argentina came from the framing of human rights in the country. In 1994, the Argentine Constitution was revised to ensure that international treaties were considered a source of law within the Argentine legal system[16]. In addition, Argentine society has always been very attached to the concept of human rights, having fought against an authoritarian regime that violated those rights for many years. Pro-abortion groups have effectively employed such framing to emphasize the necessity of legalizing abortion. In this way, they succeeded in getting closer to the population and, simultaneously, to other fringes of Argentine activism[17]. Moreover, since the relevance of international treaties in the Argentine legal landscape and the pro-abortion movement activities in the protection of these, it is deemed unlikely that there will be a reversal of the abortion issue even following the recent election of conservative President Javier Milei[18].

Although the study highlights the reasons explaining the different trajectories and outcomes of the two countries in legalizing abortion policies, the two countries share several criticalities for accessing these services. In both countries, an executive with conservative positions may imply additional limitations to the practice. In the case of the United States, it has been observed how the appointment of Supreme Court justices during Donald Trump's Presidency has led to a radical change in the Court's orientation from the precedent set in 1973[19]. The Supreme Court's 2022 decision triggered a series of reactions that led to the introduction of a bill named the 'Life at Conception Act' on the recognition of the fetus as a

[14] Omar G. Encarnación, 'Latin America's Abortion Rights Breakthrough.' (2022) 33(4) Journal of Democracy 89.
[15] Alba Ruibal & Cora Fernandez Anderson, 'Legal obstacles and social change: strategies of the abortion rights movement in Argentina' (2018) Politics, Groups, and Identities.
[16] Encarnación OG, [2022] (n.14).
[17] Id [16].
[18] Natalie Alcoba, 'With Milei leading Argentina's presidential race, abortion is on the line' (*Al Jazeera*, 20 October 2023) <www.aljazeera.com/news/2023/10/20/with-milei-leading-argentinas-presidential-race-abortion-is-on-the-line> accessed 20 September 2024.
[19] Jeffrey M. Jones, 'Approval of U.S. Supreme Court down to 40%, a New Low' (*Gallup.com*, 23 September 2021) <https://news.gallup.com/poll/354908/ap-proval-supreme-Court-down-new-low.aspx> accessed 20 September 2024.

legal person. This law is still pending before the Congress, but if passed, it will further limit pregnant people's access to health care[20]. In the case of Argentina, although several elements make the overturning of the national legislation on the legalization of abortion challenging to repeal, the recent election of a conservative President puts pro-abortion groups in a difficult situation.

Another element that constitutes a limit to accessing health services in both countries is found in the federal structure of the two states. In the United States, as a result of Dobbs v. Jackson, the abortion issue was remitted to the federated states. This has further widened the gap between the more progressive and the more conservative states, generating a condition of strong discrimination towards people living in pro-life states[21]. At the same time, although abortion has been legalized at the national level in Argentina, not all provinces have responded to the national law with the same level of compliance. Some provinces have been immediately responsive in ensuring access to health services for their pregnant citizens, while other, more traditionalist provinces have been more reluctant, generating a significant discrepancy between best-performing and worst-performing territorial entities[22]. In any case, since the legalization of abortion has only recently occurred, some provinces may need more time to implement national laws on the topic.

Finally, the last part of the study analyzed how the phenomenon studied at the legal and social levels impacted demographic data regarding the living and health conditions of pregnant persons and newborns. Providing data and estimates resulting from specific legal change offers the reader an apolitical and less controversial lens to analyze the topic at issue. What has been noted is that in the United States, limits to abortion practice have been linked to an increase in maternal mortality and morbidity in the country[23]. In Argentina, safer access to abortion has been associated with a decrease in maternal and, consequently, infant mortality rates[24]. Demographic data also confirmed that there are significant discrepancies between territorial

[20] Yvonne Lindgren, 'Dobbs v. Jackson Women's Health and the Post-Roe Landscape' (2022) 35 J Am Acad Matrimonial Law 235.
[21] Adrienne R. Ghorashi & DeAnna Baumle, 'Legal and Health Risk of Abortion Criminalization: State Policy Responses in the Immediate Aftermath of Dobbs' (2023) 37 JL & Health 1.
[22] Sandra Miguez, 'Aborto legal: A dos años de la sanción de la ley su aplicación sigue siendo despareja en las provincias' (*elDiarioAR.com*, 7 November 2022) <www.eldiarioar.com/sociedad/aborto-legal-anos-sancion-ley-aplicacion-sigue-despareja-provincias_1_9672098.html> accessed 12 July 2024.
[23] Donna L. Hoyert, 'Maternal mortality rates in the United States, 2020' (2022) Health E-Stats. National Center for Health Statistics.
[24] Ministerio de Salud, 'El Ministerio de Salud de la Nación anunció el valor más bajo de mortalidad infantil en la historia del país' (*Argentina.gob.ar*, 6 February 2023) <www.argentina.gob.ar/noticias/el-ministerio-de-salud-de-la-nacion-anuncio-el-valor-mas-bajo-de-mortalidad-infantil-en-la#:~:text=historia%20del%20país-,El%20Ministerio%20de%20Salud%20de%20la%20Nación%20anunció%20el%20valor,un%20punto%20en%20dos%20años.> accessed 20 September 2024.

entities in federal countries such as the two considered in the study. This results in some localities recording values that are better than those recorded nationally and others with values that are far worse than those recorded nationally.

In conclusion, it has been shown how the system of protection of reproductive rights in the United States, based on domestic instruments and not being anchored in international law, has been limited recently by changing a precedent in place for almost fifty years[25]. Although the Supreme Court is considered one of the protectors of citizens' rights, it, having lost independence over the years, changed the interpretation of the constitutional basis for the legality of abortion and reversed a decision settled in 1973, putting other rights of a similar nature at risk[26]. Moreover, the reversal in the U.S. was made possible by a conservative and religious movement that has gained much ground in recent years. Several Western countries are experiencing the emergence of a similar movement, and this study could provide an example to avoid the reversal of reproductive rights in other countries.

Regarding Argentina, the lesson that can be extrapolated from this study is that other Latin American countries, through reproductive movements that mimic the actions and symbolism of the '*marea verde*', could push, in the near future, their national institutions to recognize greater reproductive rights[27]. Moreover, finding the constitutional basis of reproductive rights in both the country's Constitution and international rights instruments provides greater security to a right that conservative presidents, such as the newly elected Javier Milei, could threaten.

[25] *Dobbs v Jackson Women's Health Organization* [2022] US Supreme Court No. 19-1392, [2022] 597 U.S.
[26] Lindgren Y, [2022] (n.20).
[27] Risa Kaufman et al., 'Global impacts of Dobbs v. Jackson Women's Health Organization and abortion regression in the United States.' (2022) 30(1) Sexual and reproductive health matters.

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