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THE RIGHT TO ABORTION IN THE SUPREME COURT'S JURISPRUDENTIAL EVOLUTION: ITS PROTECTION IN THE UNITED STATES CONSTITUTION AND A COMPARISON WITH ITALY'S LEGAL FRAMEWORK

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A mia mamma e a mia nonna,
e a tutte le grandi donne della mia vita.

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INTRODUCTION……..

The right to obtain an abortion has been a deeply contested and debated matter, both from religious, moral, and social perspectives and within the judicial context. The issue of individuating when and why a certain characteristic should find relevance in the legal framework becomes yet more problematic when it concerns reproductive aspects peculiar only to the female body.

In a nation symbol of liberalism and democracy like the United States of America, the recognition of reproductive rights intertwines with the characteristics typical of a federal system, the two-house Congress, the great power held in the hands of the Supreme Court, the highest court of appeal, and, of course, the great variety of American citizens living on the almost 10,000 million km² territory and their belief's systems.

Throughout the multifaceted elements that compose the liberties connected to the female reproductive system, the right to abortion has been a consistent terrain of debate for more than half a century, and its relevance has been pushed into such a politicization that it is sometimes possible to lose track of the fact that women bear the consequences of the regulations.

Focusing on the Supreme Court's jurisprudential evolution on the abortion right, this thesis aims to historically recollect the relevant steps that have preceded and determined the current extremely diversified current approach to the regulation of the right, ever since its protection at a Constitutional level has been denied by the majority of Justices, wiping away the somewhat uniform federal system in place before Dobbs v. Jackson Women's Health Organization was decided in 2022.

Starting rather far back, Chapter One introduces how the American social sentiment started evolving in the 1960s, displaying how tension on the matter of abortion, which was criminalized in some States and legalized in others, was already present way before any Supreme Court ruling decided on the issue.

On the one side, though rather cautiously, the rationality of medical advancement started to find consensus in recognizing that the original intent for criminalizing the procedure was losing relevance, as allowing surgical and legal abortions had become safer than denying them and leaving women to 'back-alley' solutions. On the other side, the religious opposition proved its reluctance to recognize greater access to the termination of pregnancy from the start, due to the incompatibility of the legalization of abortion with their set of moral and spiritual principles.

When the Supreme Court intervened in 1973, pronouncing the landmark decision that the Constitution of the United States generally protected a right to obtain an abortion, the debate was already ongoing, and the Roe v. Wade ruling did not settle the controversy. Twenty years later, the Supreme Court followed the precedent in deciding Casey v. Planned Parenthood, but not without difficulty, and the fragility and precariousness of the foundations on which the Constitutional protection of the right to abortion was standing was evident.

In Chapter Two, the jurisprudential framework and its instability are momentarily put aside to better focus on the real impact of the Supreme Court's decisions on the lives of American women. Though the right to abortion had been recognized as deserving equal protection at the federal level, the opposition was

far from over, and, rather, it started to push forward strategies to eventually overturn the Roe and Casey precedents.

The counteraction was shaped in different forms, from religious movements initially preaching the rescuing of unborns' innocent lives and violently attacking abortion providers and clinics later on, to legislative bills attempting to escape through the cracks and impose restrictions that, though it was formally guaranteed, truly limited access to the procedure of abortion.

Furthermore, the Chapter analyzes the history of the Supreme Court's appointments to show how the politicization of the process played a role in tailoring a Conservative majority that would eventually necessarily succeed in overturning Roe. Before getting there, though, the Supreme Court also decided other relevant cases in which science and its findings played a significant role, but with which the Justices did not appropriately comply.

Finally, Chapter Three describes the most recent anomalous Supreme Court decision of 2022, in which the Majority's opinion deviates from the structural principle of stare decisis and overrules the precedents. An analysis of the content of the Dobbs v. Jackson Women's Health Organization is provided to verify the reasonableness of the arguments presented and the grave implications that restoring the States' power to regulate abortion in their territory are recapitulated.

As the scenery that unravels from the decision to today becomes more and more alarming, especially because of the lack of respect for the reproductive rights of women, some of the solutions that are already being enacted to counteract the liberty's violations and some more theoretical proposals that are still hypothetical are laid out in the last paragraph.

Chapter Four concludes the dissertation with a comparison of apparently dissimilar systems, the American approach with its peculiarities analyzed throughout the earlier chapters on one side, and the Italian framework on the other, to prove how, in the end, the two countries share more than it would seem like at a superficial level.

Through a historical review of the evolution of the right to abortion in the Italian legal scenario as well, the relevance of the highest court of appeal in the Mediterranean country is proven to be rather pervasive as the Constitutional Ruling 27 of 1975 recognized a right to therapeutic abortion only two years after the equivalent overseas landmark sentence of 1973.

The consequential legislative intervention from which Law 194 of 1978 stemmed is then thoroughly analyzed, both concerning the normative meaning of its provisions and their concrete application. It is quickly revealed that, because of the vast percentage of conscientious objectors, and the lack of telemedicine applications for therapeutic abortions, the material access that should be guaranteed by Law 194 is, in fact, widely restricted.

Conclusively, then, the status of reproductive rights in general and the right to abortion more specifically is proved to be under attack both here, in Italy, and over there, in the United States. Instead of advancing women's rights and striving for equality, which is only reachable through allowing women to decide for themselves what to do with their bodies and, consequently, with their lives, the development that originates from this recollection seems to be going in the opposite direction, limiting the autonomy of choices based on the female reproductive characteristics.

Besides the intricated and complicated consequences, arising at a legal and social level, that the lack of bodily autonomy determines for women, the need for abortions will not disappear just because the law makes legal access harder, and women in need will have to resort to illicit measures to terminate their pregnancy.

The pursuit of this course of action not only contravenes principles of equality and infringes upon the sexual and reproductive health and rights of women but also presents a significant peril to their lives, warranting safeguarding by the State.

CHAPTER ONE

THE JURISPRUDENTIAL EVOLUTION ON THE ACCESS TO SAFE AND LEGAL ABORTION

1.1. The impact of the American Law Institute Abortion Law of 1959……..

The everlasting question of whether life begins at conception or birth – or any stage in between these moments – represents the nucleus from which many political, moral, and religious discourses have stemmed, generating debates and disagreements. Many answers to this inquiry have been given throughout the centuries, to either criminalize or legalize the practice of abortion, but the issue remains unresolved.

Strictly legally speaking, according to the common law of the 1800s, the perceptible movement in the womb signified that human life had begun, and therefore the deliberate destruction of the fetus was to be considered criminal only if it occurred after the so-called *quickening.* [1] Though performing post-quickening abortions resulted in the prosecution of the abortionist, not always a medical practitioner, no case can be found in the American jurisprudential history of the century in which the woman undergoing the procedure was prosecuted, neither pre or post-quickening. [2]

In the following century, the prohibition of abortion in the legislatures of the United States became predominant, and the termination of a pregnancy was deemed a statutory crime, commonly accompanied by a limiting exception that only protected the mother when her life was at stake. [3] The emerging picture was everything but coherent: early legislations had criminalized abortion because of the dangers connected to the procedure, and, therefore, such provisions were based on the concern of the woman's health. However, the social negative perception of the matter was growing greatly, condemning the practice and the practitioner, though still exempting the woman from liability. [4]

In 1959, an effort to shift directions was made by the American Law Institute, a group of judges, lawyers, and legal scholars whose objective was to promote the revision of laws in the name of adapting them to societal development through periodic recommendations. [5]

The legalization of abortion proposed by the research institute was part of a larger project aiming to formulate a Moral Penal Code that could guide the drafting of legislatures in each State. [6] More specifically, the proposal authorized the treatment of therapeutic abortion to «preserve the health of a pregnant

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[1] R. BYRN, *The Abortion Question: A Nonsectarian Approach* in *The Catholic Lawyer*, Number 4, Volume 11, Autumn 1965, 316 – 322.

[2] S.W. BUELL, *Criminal abortion revisited*, in *New York University Law Review*, Volume 66, December 1991, 1774 – 1831.

[3] R. BYRN, *The Abortion Question: A Nonsectarian Approach* in *The Catholic Lawyer*, *op. cit.*, 316 – 322.

[4] S.W. BUELL, *Criminal abortion revisited*, *op. cit.*, page 1783 ss.

[5] L. GREENHOUSE, R. SIEGEL*, American Law Institute Abortion Policy, 1962,* a cura di L. GREENHOUSE, R. SIEGEL, *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 2012, 24 – 25.

[6] L. GREENHOUSE, R. SIEGEL*, American Law Institute Abortion Policy, 1962, cit.*, 24 – 25.

woman» whenever a licensed physician believed that there was a «substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother, or that the child would be born with grave physical or mental defects, or that the pregnancy resulted from rape, incest or other felonious intercourse». [7]

In addition, two physicians were required to attest to the existence of the circumstances that justified the abortion, and criminal sanctions were imposed for inducing or aiding a woman to commit self-abortion. [8]

On the one hand, implementing and adopting this proposition allowed for subsequent safer access to the practice of abortion in 12 States that amended their prohibitive precedent legislatures. [9] In the late Sixties, the States of New York and Hawaii fully decriminalized the practice, removing all requirements of justification in their statutes, and imposing only that the operation be performed by a licensed physician in an accredited hospital. [10]

On the other hand, the wording of the recommendation emphasized the purpose of shielding the doctors from criminal liability, rather than shifting the focus onto the woman's right to choose. [11]

Though the belief that medicine, rather than law, should be regulating the practice of terminating a pregnancy was spreading, the idea was mainly shared and argued between male doctors, lawyers, and clergy, leaving minimal space for any female voice to intervene on the matter. [12]

1.1.1 Access to therapeutic abortion and the controversy of Miss Sherri's case……...

Even if reliable data concerning the incidence of abortion during the 19th century is fairly limited, the apparent trend that took over towards the end of the century was that induced abortions were growing progressively more common. [13]

In the following decades, the statistics still only provided partial insights into the actual incidence of abortion. However, during a conference that took place in 1959, Dr. Mary Steichen Calderone, the medical director of Planned Parenthood at the time, estimated that the frequency of illegal abortion could be as low as 200,000 and as high as 1,200,000 per year depending on the studies referenced, denoting the existence of an undeniable problem of illegal abortions. [14]

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[7] A statement by the New York Academy of Medicine prepared by the COMMITTEE ON PUBLIC HEALTH, *The present status of abortion laws,* in *Bulletin of the New York Academy of Medicine*, Vol. 46, Number 4, April 1970, page 282.

[8] S.W. BUELL, *Criminal abortion revisited*, *op. cit.*, page 1796 ss.

[9] L. GREENHOUSE, R. SIEGEL*, American Law Institute Abortion Policy, 1962, op. cit.*, 24 – 25.

[10] S.W. BUELL, *Criminal abortion revisited*, *op. cit.*, page 1796 ss.

[11] L. GREENHOUSE, R. SIEGEL*, American Law Institute Abortion Policy, 1962, op. cit.*, 24 – 25.

[12] L. GREENHOUSE, R. SIEGEL *Before (and After) Roe v. Wade: New Questions About Backlash*, a cura di L. GREENHOUSE, R. SIEGEL, *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 2012, 263 – 317.

[13] R. KRANNICH, *Abortion in the United States: Past, Present, and Future Trends,* in *Family Relations*, 1980, Number 3, Volume 29, 365 – 374.

[14] M. STEICHEN CALDERONE, *Illegal Abortion as a Public Health Problem*, in L. GREENHOUSE, R. SIEGEL*, Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 2012, 21 – 24.

The growing social recognition of the impact that unlawful abortions had on women and the discontent regarding restrictive abortion laws began to push the liberalization of the procedure into the spotlight. The public was becoming more and more conscious of the need for change in the social paradigm and of the need for consequential adaptation to this development of the medical and legal standards.

The controversial case of Miss Sherri perfectly portrayed society's newfound focus on abortion laws and women's choices, shedding light on both the strong opposition and the heartfelt support that the American people held towards her, and other women's, complicated position.

Sherri Chessen Finkbine was the host of a popular children's television program who had inadvertently taken a drug containing Thalidomide while pregnant with a much-wanted fifth child. [15] The medicine, originally prescribed for the husband and only available in Europe, as it was attending federal approval in the States, had later proven to be linked to an epidemic of limbless and deformed babies being born.

On the recommendation of her doctor, Mrs. Finkbine sought an abortion in Phoenix, but the international scandal that came along with the publishing of an article warning of the dangers of Thalidomide caused the doctors to cancel the operation, fearing that the surgery could be challenged by any citizen on the vagueness of the existing laws.

The request of Miss Sherri's physician to obtain a court order to achieve the termination was then dismissed without a hearing, as the judge briefly concluded that as a human being, he would have liked to hear the case, but «as a judge under existing Arizona law», he could not. [16]

At this point, Mr. and Mrs. Finkbine's names became a matter of court, and therefore public, record, and letters and phone calls invaded their home, so much so that the FBI was brought in to protect her and her famiily as a consequence of the death threats they had received. Forced to go overseas, the abortion eventually took place, legally, in Sweden, after a complex bureaucratic procedure and the approval of a medical board.

Though the public's reaction was mainly negative, as testified in the hate mail received by the Finkbine family, advice and aid were also offered, from skydiving with the promise of a miscarriage to aborting through a 'quick and easy' telephone hypnosis. [17] Whether for the good or the bad, the minds of the Nation were now clearly set on the controversy of abortion, and the debate was only getting started.

Alongside the social perception, the 1959 American Law Institute's intervention started a domino effect on the reconsideration of the legality of therapeutic abortion not only within state legislations but in other professional organizations and lobbying groups too.

The American Medical Association, which in the 1800s had played a crucial role in the criminalization of the procedure, upheld a policy in 1970 that adapted

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[15] S. CHESSEN FINKBINE, *The Lesser of Two Evils,* in L. GREENHOUSE, R. SIEGEL*, Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 2012, 11 – 18.

[16] S. CHESSEN FINKBINE, *The Lesser of Two Evils, op. cit.*, page 15.

[17] S. CHESSEN FINKBINE, *The Lesser of Two Evils, op. cit.*, 11 – 18.

its tune to the new voice of transformation. [18] The resolution stated that «the Principles of Medical Ethics of the AMA [did] not prohibit a physician from performing an abortion [realized] in accordance with good medical practice and under circumstances that [did] not violate the laws of the community in which he [practiced]» [19], allowing for much more medical independence on the matter in comparison with past statements. Essentially, the authority of medical science and the evolving values of society were ultimately agreeing on the collective disease that illegal abortion represented. [20]

Yet, even if therapeutic terminations of pregnancies were allowed, the differences between an illegal abortion and a therapeutic one were artificial: money and a good connection defined the line between wealthy women like Sherri Finkbine with access to a safe procedure and poor women left alone to deal with their burden.

1.1.2 Griswold v. Connecticut (1965) and the unenumerated right to privacy……...

As the discourse surrounding the legality of induced termination of pregnancies was materializing into the social and legislative scene of America, issues concerning other means of fertility control were being raised in front of the judiciary system.

In 1962, Estelle Griswold, Executive Director of the Planned Parenthood League of Connecticut, and its medical director, a licensed physician and professor at Yale Medical School, were convicted of aiding and abetting in the dissemination of contraceptive devices in violation of Connecticut statute. [21] The appellants were fined 100$ each, guilty of giving information, instruction, and medical advice to married couples to prevent conception. [22]

In a ruling that became a landmark decision, defining a constitutional right to privacy, the Supreme Court reversed that conviction. Writing for the majority, Justice William O. Douglas held the Connecticut legislature unconstitutional, basing the judgment on the violation of the right to privacy, which he considered constitutionally based, though not explicitly mentioned in the text. [23]

Reflecting on the First Amendment, the Justice argued that, although the Constitution and the Bill of Rights did not mention associations of people, the right to form such associations was considered essential to protect the expression of opinions. [24] If the First Amendment had a penumbra in which privacy was

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[18] L. GREENHOUSE, R. SIEGEL*, American Medical Association Policy Statements, 1967 and 1970,* a cura di L. GREENHOUSE, R. SIEGEL, *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 2012, 25 – 29.

[19] L. GREENHOUSE, R. SIEGEL, *American Medical Association Policy Statements, 1967 and 1970, cit.*, page 29.

[20] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[21] D. HELSCHER, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, in *Northern Illinois University Law Review*, Number 1, Volume 15, November 1994, 33 – 61.

[22] D. HELSCHER, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, *op. cit.*, 33 – 61.

[23] D. HELSCHER, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, *op. cit.*, 33 – 61.

[24] D. HELSCHER, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, *op. cit.*, 33 – 61.

protected from governmental intrusion, then it naturally followed that the existence of zones of privacy emanating from the Bill of Rights and other Amendments, such as the Third, the Fourth, the Fifth, and the Ninth, had to be recognized. [25]

Furthermore, Douglas attentively cared to specify that the Supreme Court did not identify itself as a 'super-legislature', partially defending his opinion from Justice Hugo Black's concerns of usurpation of the legislative function. He clarified that the case at hand concerned instead a «relationship lying within the zone of privacy created by several fundamental constitutional guarantees». [26]

Tying together the First Amendment's argument on the right of association and the recognition of the right of privacy as a right «older than the Bill of Rights, than the political parties, and even older than the school system», the majority's opinion concluded that marriage was an association with a purpose as noble as any involved in related and cited prior decisions. [27] It followed, therefore, that the law in question, by forbidding the use of contraceptives, destructively impacted that sacred relationship.

1.1.2.1 Goldberg's attempt to give substance to the IX Amendment……..

Although concurring and therefore joining in the majority's opinion and judgment, Justice Arthur Goldberg's opinion justified the holding of the unconstitutionality of Connecticut's birth-control law on different grounds. [28] In an attempt to fill with meaning the content of an Amendment on which the Court had been silent for 175 years [29], Goldberg asserted that the concept of liberty embraced the right to marital privacy. Regardless of the absence of an explicit mention in the Constitution, this right was rooted in the «language and history of the Ninth Amendment». [30]

More specifically, both the text of Amendment [31] and the history surrounding its adoption, a work mainly to be attributed to James Madison, had laid the foundations for the recognition of additional fundamental rights alongside the ones specifically mentioned. [32]

Admittedly, as the Constitution was being submitted to the States for ratification, Madison feared that any attempt at an exhausting list of rights would have constricted the government's ability to react to some future, unpredictable events. However, his initial concern was satisfied by the elaboration of the content of the Ninth Amendment, which allowed the protection of rights against intrusion by the federal government. [33]

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[25] D. HELSCHER, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, *op. cit.*, 33 – 61.
[26] *Griswold v. Connecticut*, 381 U.S. 479 (1965), at 485.
[27] *Griswold v. Connecticut*, at 485-486.
[28] *Griswold v. Connecticut,* at 486.
[29] D. HELSCHER, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, *op. cit.*, 33 – 61.
[30] *Griswold v. Connecticut*, at 487.
[31] *U.S. Constitution, Amendment IX,* «The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.»
[32] *Griswold v. Connecticut*, at 488.
[33] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, in *Yale Journal of Law and Feminism,* Number 2, Volume 18, 2006, 317 – 388.

Furthermore, in his assessment, Justice Goldberg decisively negated that judges could decide cases solely «in light of their personal and private notions». [34] Presumably guided by Douglas' defensive passage, he reiterated instead that they had to determine whether a principle was rooted enough in the traditions and collective conscience of the American people to be ranked as a fundamental principle. [35]

Lastly, the concurring opinion specified how the objective of the Court was far from interfering with the State's regulations on sexual promiscuity or misconduct. Rather, it aimed to demonstrate that the safeguarding of marital fidelity could be more effectively served by a tailored statute that needn't infringe on the privacy of married couples. [36]

1.1.2.2 Black's dissent and fear of a 'great unconstitutional shift of power to the courts'…….

Justice Black held a divergent view from the majority and concurring opinions. He contended that there was no basis in either historical or textual evidence for either Justice Goldberg's or Justice Douglas' conclusions, deeming their assessments on the wisdom of legislation as an «attribute of the power to make laws, not of the power to interpret them». [37]

His dissent was not premised on the content of the Connecticut legislature, as he shared the viewpoint of other judges who deemed it offensive. [38] Instead, his objection stemmed from the absence of a constitutional foundation for the newly recognized right to privacy.

Agreeing on the fact that there were guarantees in certain specific constitutional provisions designed partially to protect privacy at specific and definite places and times, the Justice disputed that the broadening of the term 'right to privacy' to a vast, abstract, and ambiguous concept could easily be interpreted as including a constitutional ban against many further things than the ones specified in the Constitution. [39]

Conscious of the strict and traditional approach of his judgment, Black justified his argument by reiterating that, though he liked his privacy «as well as the next one», the government had a «right to invade it unless prohibited by some specific constitutional provision». [40] Therefore, the test of the constitutionality of laws could not be based on criteria such as the wisdom or correctness of the policy. [41]

The main idea expressed in the dissent was straightforward: Justice Black acknowledged that the Supreme Court had the responsibility to invalidate unconstitutional laws, but only if the Constitution explicitly stated so. He argued that the Constitution did not grant the Court the power to strike down laws based on unchecked judicial control, as this would threaten the separation of powers.

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[34] *Griswold v. Connecticut*, at 493.
[35] *Griswold v. Connecticut*, at 493.
[36] *Griswold v. Connecticut*, at 498-499.
[37] *Griswold v Connecticut*, at 513.
[38] *Griswold v Connecticut*, at 507.
[39] *Grswold v Connecticut*, at 508-509.
[40] *Griswold v Connecticut,* at 510.
[41] *Griswold v Connecticut*, at 507.

On the contrary, he believed that if changes to the Constitution were necessary to reflect the needs of the times, the solution was for elected representatives to propose amendments, not for the Court to reinterpret the original text. [42]

1.1.3 The enaction of New York State Legislature decriminalizing abortion…….....

The legislative history of the State of New York regarding abortion is exemplary in delineating the phases that developed in the quick and forceful transformation that was slowly taking place. In the 1800s, the State's approach was consistent with the rest of America's statutes, which, as it can be recalled, considered abortions a felony only if they took place post-quickening. In 1872 a law was passed that criminalized abortion with penalties of up to 20 years in prison. [43]

Almost 100 years later, in 1970, Republican Governor Rockefeller signed a bill that increased the sphere of application of exceptional cases in which therapeutic abortion could take place. [44] Until then, women seeking abortions had to demonstrate that the abortion was 'therapeutic', meaning that their lives were at stake, even if the danger wasn't an external fact but rather a personal act like threatening suicide. As it was briefly anticipated earlier, only women with the money necessary for the psychiatric consultations that could guide them in knowing the right words to use («*If I have this kid, I'll kill myself*») could usually obtain the hospital's committee approval, leaving the majority of (poor) women in the arms of death of illegal and unsafe abortions. [45]

Once again, the debates preceding the passing of the New York legislation had focused more on the scope of the doctor's authority to prescribe abortions rather than the women's free choice to obtain them. [46] The need for greater revolution subsequently left the path of reforming legislation and, instead, sought the enactment of abortion at a higher legal level, looking to base it on constitutional grounds. [47] In this respect, the effort made by the lawyer and abortionist activist Roy Lucas, who drafted the theoretical background from which the landmark ruling Roe v. Wade elaborated its principles, was undeniably crucial.

Before the law decriminalizing abortion had passed, in one class action suit against State Attorney General Lefkowitz and New York City's district attorneys, arguing with other lawyers from three different lawsuits, Lucas thoroughly listed why a permanent injunction against New York's restrictive abortion law should be granted. [48] The main argument originated from the issue of the legislature's language, and more specifically how the «necessity to preserve the woman's life» was scarcely self-explanatory, leaving a void of content that the law did not

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[42] *Griswold v Connecticut*, at 522.
[43] S.W. BUELL, *Criminal abortion revisited*, *op. cit.*, page 1783.
[44] L. GREENHOUSE, *Constitutional Question: Is There a Right to Abortion?,* in *The New York Times*, 1970, reprinted in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 2012, 130 – 139.
[45] S. BROWNMILLER, *Everywoman's Abortions: "The Oppressor Is Man"* (March 27, 1969), in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 2012, 127 – 130.
[46] S. BROWNMILLER, *Everywoman's Abortions: "The Oppressor Is Man", op. cit*, 127 – 130.
[47] L. GREENHOUSE, *Constitutional Question: Is There a Right to Abortion?, op.cit.,* 130 – 139.
[48] L. GREENHOUSE, *Constitutional Question: Is There a Right to Abortion?, op.cit.,* 130 – 139.

determine how to fill in. The 14th Amendment required specificity as an essential guarantee of the Due Process Clause and the vagueness of the New York previsions violated such requirement.

Furthermore, Lucas claimed that the law violated the right to privacy, both towards the patient and physician's relationship and the marital relationship. The reference explicitly tied an unmistakable connection with the revolutionary, yet young, precedent of Griswold v. Connecticut, in which the Supreme Court had ruled unconstitutional the State's restriction on the liberty of married couples to use contraceptives. [49]

On the other side of the courtroom, Assistant Attorney General Lewittes based the State's defense on two main claims.

First, he stated that the issue pertained to the power of legislature rather than being considered a choice of a Court. Secondly, there was a state's interest in the protection of the unborn child that overrode «whatever right the woman may have to control the use of her body». [50] Predictably enough, the same argument would later be used in Roe v. Wade by the District Attorney defending the Texas' position. Nonetheless, in this case, the arguments proved unconvincing, and, on April 10, 1970, Senator Rockefeller decriminalized abortion in the State of New York. [51]

1.1.4 The Rise of the Religious Right…….....

As anticipated, in 1970, the State of New York, alongside Hawaii, Alaska, and Washington, enacted a statute that allowed broader access to abortion, amidst the Catholics' malcontent. Just two years later, the pressure to abrogate New York's liberalizing legislation was so intense that the repeal almost prevailed, but Republican Governor Rockefeller vetoed the bill, leaving the abortion law intact. [52]

In a message accompanying the veto, Rockefeller refused the revocation of the 1970 reform and underscored the significance of maintaining the law's integrity. He asserted that the abolition would result solely in the cessation of abortions carried out in safe and monitored medical settings, rather than completely ending the phenomenon, as some were prospecting. The brief communication concluded that it was inequitable for a single group to impose its moral convictions on the entirety of society. [53]

For the first time, though not within a legal text but in an informal message to the people, the focus was not the State, nor the protection of the physician, but finally the woman's free choice. More importantly, the preservation of the statute decriminalizing abortion had been defended by a Republican.

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[49] L. GREENHOUSE, *Constitutional Question: Is There a Right to Abortion?, op. cit.,* 130 – 139.
[50] L. GREENHOUSE, *Constitutional Question: Is There a Right to Abortion?, op. cit.,* page 138.
[51] L. GREENHOUSE, *Constitutional Question: Is There a Right to Abortion?, op. cit.,* 130 – 139.
[52] *Governor Nelson A. Rockefeller's Veto Message* (May 13, 1972), in *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 2012, 158 – 160.
[53] L. GREENHOUSE, R. SIEGEL*, Governor Nelson A. Rockefeller's Veto Message* (May 13, 1972) a cura di L. GREENHOUSE, R. SIEGEL, *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 2012, 158 – 160.

As puzzling as it may sound today, the Republican Party hadn't always been characterized by strong opposition to abortion, but such a radical position was the result of years of strategies aiming to attract religious voters to the polls.

Political engagement of religiously oriented organizations and bodies has always played a crucial role in shaping the history and society of America. [54] In this instance, as the popular support for refining access to abortion was growing stronger, the Catholic Church began to battle legislative reform state-by-state. [55] During these years of great changes, the Catholics became so preoccupied with the growing abortion reforms that were being enacted in individual state legislatures that they were prepared to enter the political arena if it meant ensuring that the content of secular laws would remain consistent with Christian principles.

A series of additional factors affected this religious activism, from the concerns of the sexual revolution taking place to the widespread availability of birth control, occurring in a context of familial precariousness caused by the angst about race and the rising crime rates. [56]

In the book 'The Emerging Republican Majority' Kevin Philips presented a strategy that aimed to solidify the Republican political dominance through the recruitment of blocs of voters traditionally affiliated with the Democratic Party unhappy with the racial desegregation and the abandonment of the traditional family values. [57]

Soon after, the abortion issue became a distinctive concern of the Church and the Republican Party started to shift its position on the matter in hopes of attracting Catholics as voters. [58]

In an excerpt from an article published by the United Press International of 1972, four reasons were given as motives that could have caused the shift of a vast majority of America's Catholics and Jews from the Democratic to the Republican party. [59] In addition to the economic issues, the racial problem of growing antisemitism, and the American support of Israel, the most crucial topic was abortion. In the run for the presidential elections, Democrats were losing votes because of their take on the matter and the piece reminded the reading public not to overlook past statements of the Democrat Senator running for the national presidency.

Though Sen. McGovern was making an effort at rephrasing the abortion issue as a matter best left off for the States to decide, only a few months prior he had expressed that abortion was «a private matter which could be decided by a

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[54] M.J. MCVICAR, *The religious right in America*, in *Oxford Research Encyclopedia of Religion*, 2016.

[55] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[56] M.J. MCVICAR, *op. cit.*

[57] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[58] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[59] L. CASSELS*, Swing to Right Seen Among Catholics, Jews* (August 5, 1972) in L. GREENHOUSE, R. SIEGEL, *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 212 – 215.

pregnant woman and her own doctor». [60] In the view of the religious author, this meant that the Senator was favoring the enablement of abortion on demand with no legal restrictions, an approach that Christians, and Jews, could not in good faith support.

Furthermore, those who mocked McGovern as a 'triple-A' candidate who favored amnesty, acid, and abortion attacked his position on the latter considering it supportive of an overall permissive and anti-authoritarian culture. [61]

It must be specified, though, that the Republican strategists condemned abortion not because the members of the Party considered it murder, as the Catholic Church maintained. Rather, the legalization of abortion was perceived as the failure of traditional roles, in which men were the providers and women were saving themselves for marriage in pursuance of devoting their lives to family values. [62] Regardless of the differences in reasoning, both Republicans and Catholics were aiming for the same outcome: prevailing in the abortion debate and preserving conservative values.

On the one hand, abortion was a vital issue dividing Democrats from the inside out; on the other, it was the matter on which further support for the Republican Party could be found.

Eventually, the strategy proved successful. Concrete proof of the achievement was exemplified by the re-election of Republican President Richard Nixon, in November of 1972, thanks to the support of a majority of Catholic voters. Nevertheless, only a couple of months later the Supreme Court would rule in favor of the right to abortion, finding proof of its constitutional basis in the majority's opinion of Roe v. Wade. [63]

1.2. Roe v. Wade (1973)…….....

In 1857, Texas prohibited all abortions not essential to save the mother's life, following the trend of other state legislatures at that point in history. [64] More than a century later, in March of 1970, the ban became the object of a lawsuit filed in front of the Federal District Court in Dallas.

The lawyers of the case were two women, recent Texas Law School graduates, who had recruited three plaintiffs for their motion: Mary and John Doe, pseudonym of Marsha and David King, a married couple who wanted to avoid pregnancy for medical reasons, and Jane Roe, aka the pregnant 21-year-old Norma McCorvey, who had already given birth to two children she had later given up custody of. [65]

The three-judge District Court dismissed the Does case on the lack of interest and sufficiently concrete risk at stake. On the contrary, it unanimously

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[60] L. CASSELS*, Swing to Right Seen Among Catholics, Jews, op. cit.*, page 214.
[61] L. GREENHOUSE, R. SIEGEL*, Afterword,* a cura di L. GREENHOUSE, R. SIEGEL, *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 253 – 262.
[62] L. GREENHOUSE, R. SIEGEL*, Afterword, op. cit.*, 253 – 262.
[63] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.
[64] L. GREENHOUSE, R. SIEGEL, *Speaking to the court,* in L. GREENHOUSE, R. SIEGEL, *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 221 – 251.
[65] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.

agreed on the correctness of Jane Roe's request for a declaratory judgment on the unconstitutionality of the Texas criminal abortion statutes. [66] The Court assessed the law as overly broad and vague. It was unclear how to recognize the state's compelling interest as it was too ambiguous on defining where to draw the line to apply the exception of life-saving purposes without determining doctors' criminal liability. [67]

In October of the same year, the plaintiff's lawyers Sarah Weddington and Linda Coffee presented their appeal to the Supreme Court.

However, because another abortion case was already in front of the Justices, the Texas appeal was put aside. [68] More than a year later, oral arguments were heard by the Court.

Nonetheless, further complications arose and affected the decision of the case; only after the two new Justices Lewis Powell and William Rehnquist took their seats did the Court eventually decide the case, in January of 1973. [69]

Two years passed between the day the complaint was brought in front of the Court and the day the judgment was rendered, an unusually long time for the highest Court of appeal to set its ruling. Besides the technical issues, the delay was also affected by the Court's awareness of the emotional controversy of the issue at hand.

Nevertheless, the Justices made their ruling based on grounds that they believed would be widely accepted by the public, even though they were aware that there was no social consensus on the matter before the ruling, and no general agreement would be found after. [70]

1.2.1 The Supreme Court's Historical Recollection……..……

After stating the facts of the case, in Sections VI and VII of the decision the Supreme Court retraced the evolution of the approach towards abortion in American legislation. The intent was to demonstrate that the restrictive criminal abortion laws in effect at the time of the ruling did not have ancient roots but derived from a more recent current. [71]

After recalling archaic attitudes and the Hippocratic Oath, the Court indicated that, in the 19th century, abortion was not considered an offense before the previously mentioned quickening, and even post-quickening abortion was never established as a common-law crime. [72]

Then, a rapid recollection of England's abortion statutes followed, preceding the paragraph concerning 'The American Law'. Here the Court emphasized that the English common law was in effect in most States until legislation began to replace it after the American Civil War. In this instance, the reference to quickening gradually disappeared and in the 1950s most laws criminalized abortions with the sole exception of the preserving the mother's life. [73]

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[66] *Roe v. Wade*, 410 U.S. 113 (1973).
[67] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[68] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[69] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[70] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[71] *Roe v. Wade*, at 129.
[72] *Roe v. Wade*, at 135.
[73] *Roe v. Wade*, at 139.

As per the Court description, at the time of the ratification of the Constitution, a woman enjoyed a «substantially broader right to terminate a pregnancy» than she did in most States at the time of the judgment. [74]

The historical analysis then turned to describe the evolution of the American Medical Association's position, which was mentioned earlier in reference to therapeutic abortion, as well as the five standards adopted by the American Public Health Association, accentuating the need to reference medical opinions in the legal matter at hand. [75]

The influential relevance of including medical assessments in the opinion was perceived as necessary by both the Court and the appellants, who justly argued in their brief for the proceedings that the decision to allow abortion as an elective medical procedure was based on careful consideration of the risks involved, rather than only in cases of emergencies like it used to be in the second half of the 19th century. [76]

Section VII concluded the recollection by delineating the three reasons that the Court believed would explain the enactment of criminal abortion laws in the 1800s. One of the reasons identified was, in fact, the medical evolution of the procedure's safety. The majority's opinion stated that, though firstly a hazardous surgery with a great risk of infection, modern medical techniques had altered the situation, making the state's interest in banning abortion to preserve the women's life way less prominent.

Conversely, the Court described the second reason justifying restrictive measures on abortion as related to the state's interest in potential life, an interest identified by some as part of the state's general obligation to protect life.

Ultimately, the third reason listed argued that the laws were also a product «of a Victorian social concern to discourage illicit sexual conduct». [77]

1.2.2 The judgment……...

In January of 1973, Justice Harry Blackmun read a summary from the bench of the Supreme Court's rulings on both Roe v. Wade, the judgment here discussed, and Doe v. Bolton, a lawsuit concerning Georgia abortion statutes. The briefs, known as 'hand-downs' in the judicial system's parlance, were not

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[74] *Roe v. Wade*, at 140.

[75] *Roe v. Wade*, at 144 – 145. "The position of the American Public Health Association.
In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:
a. Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or non-profit organizations.
b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.
c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.
d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.
e. Contraception and/or sterilization should be discussed with each abortion patient."
Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

[76] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.

[77] *Roe v. Wade*, at 148.

considered formally as documents part of the Court's opinion but simply identified the core of the issue at stake accordingly to the author.

In his announcement from the bench, the Justice author of both opinions specified the Court's awareness of the little consensus as to when life commenced, and that the controversy of the issue would persevere even after the ruling. However, he described the duty of the Court as interpreting the Constitution based on the judges' perception of its principles. [78]

The content of Roe reflected the language and the approach current at the time of the ruling. The Court's position that the decision to terminate a pregnancy should be guided by medical criteria, as it attested to the right of the physician to «administer medical treatment according to his professional judgment», was coherent with a common framework at the time. [79] The abortion question had been reframed in the architecture of scientifically based conceptions rather than discussed in the legal context of ensuring the protection of women's rights.

The 1972 recommendations of the Rockefeller Commission emphasized the need for coaction between the woman and her physician to determine the choices for her reproduction, though partially recognizing the relevance of the individual concerned.

Of the same advice were two-thirds of Americans who, according to the assessments of public opinion presented by the Gallup polls that occurred in the summer of the same year, believed that abortion should be a matter of decision solely between a woman and her doctor. [80]

Evoking the content of the rulings and the basis of the decisions, Blackmun declared in his 'hand-down' that the Court had identified in the Constitution implicit protection of the right to personal privacy, which included the abortion decision. On such grounds, the Justice expressed the Court's hope to see reviews of States' abortion statutes under the constitutional requirements summarized in the judgment. [81]

In addition, the original draft included an accentuation on the fact that the Court was not identifying an absolute right to abortion. The reference to the term 'abortion on demand' was struck from the final paragraph, as the Justice was probably aware of the negative connotation that accompanied the expression during that time. On one side, the feminist movement had used the phrase in hopes of repealing abortion restrictions, giving full responsibility to the women for the competency of the decision; on the other, critics of the movement had reversed the original meaning of 'abortion on demand', fearing that the decriminalization of the procedure would encourage sexual indulgence, the abdication of maternal responsibility, and a general breakdown of self and social control. [82]

[78] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[79] *Roe v. Wade*, at 165.
[80] L. GREENHOUSE, R. SIEGEL*, Afterword, op. cit.*, 253 – 262.
[81] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[82] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.

1.2.2.1 The right to privacy and the right to abortion…..……..

The Court opened Section VIII of the opinion with a clear statement: «The Constitution does not explicitly mention any right of privacy». [83] Nonetheless, it then described how several precedents, including the previously quoted Griswold v. Connecticut, recognized the existence and protection of such right.

Whether founded in the penumbras of the Fourteenth Amendment's concept of personal liberty or the Ninth Amendment's reservation of rights to the people, the right to privacy was described in the majority's opinion as comprehensive enough to embrace a woman's decision whether or not to terminate her pregnancy. [84]

The argument developed out of the reasoning found in the appellant's brief written for the judicial review. The plea claimed that the fundamental rights involved in the case were entitled to constitutional protection, as the lack of mention of a 'right to privacy' as well as a 'right to seek abortion' in the Constitution text could not be considered as impediments for the existence of the rights themselves. The appellants contended that the Texas abortion law infringed on these rights without a compelling justification, needing, therefore, to be deemed unconstitutional. [85]

A persuasive commentary in the petitioner's brief conclusively synthesized that, since many women and couples who struggled with managing their reproductive capacity often encountered difficulties in maintaining control over crucial aspects of their lives and relationships, the fundamental notion of 'rights' had to encompass the freedom to choose when and under what conditions to conceive. [86]

1.2.2.2 The State's 'compelling interest'...…….....

While agreeing with the premise, the Court denied the appellants' argument for a recognition of the right to abortion as absolute and unrestrictable. The entitlement of the woman to «terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses» was not something the Court could agree on. [87]

Assuming as a given that the constitutional protection of an unenumerated right to privacy included the right to abortion, the majority's opinion stated that such a right had to be subjected to limitations, which were identified with the state's interest in protecting health, medical standards, and prenatal life. Consequently, at some point during the pregnancy, the compelling state interest would become dominant and restrict the woman's choice and right to get the procedure. [88]

To prove the presence of a compelling interest in the Texas Abortion Statute, the District Attorney of Dallas County included in the appellee's brief a thorough medical description of the development of the child, accompanied by photographs depicting fetal development taken by Swedish photographer

[83] *Roe v. Wade*, at 152.
[84] *Roe v. Wade*, at 153.
[85] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[86] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[87] *Roe v. Wade*, at 153.
[88] *Roe v. Wade*, at 156.

Lennart Nilsson and published in 'A Child Is Born: The Drama of Life before Birth'. [89] The goal of the review was to show that human life commenced in the womb and that the State had an interest in preventing the unjustifiable and arbitrary decision of destructing the unborn child, as it was to be considered a full human being. [90] Criminal District Attorney Henry Wade and the lawyers in the Attorney General's Office collaborating with him were very evidently referring to a belief that identified the beginning of a fetus's human identity with conception. Section IX of the ruling showed that the Court disagreed on such a 'theory of life'.

First, the Court argued that the 'person' that the Fourteenth Amendment referred to did not include the unborn, in an interpretation that was made according to the historical analysis presented earlier by the Court. The conclusion was consistent with the finding that throughout the 19th Century abortion practices were far freer than at the time of the ruling.

Secondly, the Court opposed the comparison of the privacy sought with abortion to the kind of privacy that concerned marital intimacy, bedroom possession of obscene material, marriage, procreation, or education. [91] The mother could not be considered isolated from her embryo, and therefore a balance needed to be found between her right to terminate the pregnancy and the state's interest in protecting life. According to the majority of the Justices, the Texas statute had failed to meet the burden of proving that the State's infringements were necessary to protect said interest.

In concluding the section, the Court touched on the question of the beginning of life, briefly recollecting different opinions and points of view. Among the disparate theories, examples provided by the Court included the Stoics' belief that life started at birth, the significance of quickening found in the common law provisions, and conclusively the more scientifically-based concept of viability, the fetus's potential ability to live outside the womb.

Nonetheless, the Justices' majority refused to endorse any theory of life, as had done the law up until then. [92]

1.2.2.3 The trimester framework……

The effort to balance the woman's right to privacy on one side and the state's interest to protect the potentiality of human life on the other culminated in the definition of a legal framework that would be subject to plenty of criticism.

The majority opinion decided to leave the abortion decision to the medical judgment of the woman's attending physician in the period coinciding with the first trimester. [93] In the early stage of the pregnancy, therefore, the Court thought it more suited that the woman's right to choose prevailed over any opposite state interest.

From the end of that initial period, however, the state interest could dominate as long as it was related to promoting the health of the mother and regulating the abortion procedure in the ways appropriate to ensure maternal

[89] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[90] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[91] *Roe v. Wade*, at 159.
[92] *Roe v. Wade*, at 160.
[93] *Roe v. Wade*, at 164.

well-being. [94] In this second trimester, then, a harmony between the two interests was accomplished by slightly introducing the state's weight on the scale but still tipping the balance towards the much more relevant woman's right to choose an abortion.

From and after viability, during which the fetus had a reasonable chance of independent life if it were born or removed from the mother, the Court allowed the State to choose how to regulate and even prohibit abortion. The sole exception still standing related to when preserving the mother's life or health was deemed necessary by medical judgment. [95] In the last trimester, the Court believed the state's interest in protecting a human life predominant compared to the woman's right to privacy, reversing the balances described in the two earlier stages.

1.2.2.4 The dissents…….....

Even though seven Justices joined the judgment, there were two dissenters, William Rehnquist and Byron White, who each argued their objection in an individual opinion.

Justice Rehnquist's first objection was premised on the lack of interest of the plaintiff, as Jane Roe had filed her complaint when pregnant but had presumably given birth before the ruling, which had happened long after 9 months had passed, converting the object of the lawsuit into a hypothetical concern. [96]

The Court's sphere of action was precisely limited by the specific facts to which the constitutional rule should be applied, and the dissent expressed concerns about the majority's opinion's attempt to broaden such borders.

Even if the identification of a plaintiff following such a requirement could be accomplished, Rehnquist could not agree with the majority's conclusion. Though complying with the premise that the protection of the rights found in the Constitution embraced penumbras of such rights, the dissent disputed the Court's invalidation of any restrictions on abortion during the first trimester as unjustifiable under the rationality test of the Fourteenth Amendment. [97]

Furthermore, Rehnquist opposed the recognition of the right to abortion as «so rooted in the traditions and conscience» of the American people that it could be classified as fundamental. If the majority of States had implemented restrictive legislature on abortion throughout the previous century it must have had some significance. [98]

Not surprisingly, the same argument would be used fifty years later by Justice Samuel Alito in reversing Roe. Writing for the Court's opinion, Alito will claim that the right to abortion does not fall under the category of rights not mentioned in the Constitution, as it is not a right «deeply rooted in this Nation's history and tradition» and «implicit in the concept of ordered liberty». [99]

Justice White echoed Rehnquist's arguments about the Court overstepping its authority but focused his dissent more on the moral question of when to allow abortions. Where the majority had found the women's concerns motivating the

[94] *Roe v. Wade*, at 164.
[95] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[96] *Roe v. Wade*, at 172.
[97] *Roe v. Wade*, at 173.
[98] *Roe v. Wade*, at 174.
[99] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. (2022).

practice's liberalization as constitutionally significant, White instead suggested that such protection exhibited surrender to women's whims and caprices. [100]

1.2.3 The outcome…….

Claims that the Roe v. Wade decision was the inauguration of the conflict over abortion followed in sequence throughout the years that followed the ruling. [101] The Supreme Court's decision to declare abortion to be a constitutionally protected right catalyzed the realignment of Republican and Democratic voters on the matter. The narratives encapsulated in the Roe backlash were bound together by the assumption that the ruling had single-handedly caused societal polarization and political readjustment. To put it quite simply, for the many denigrators of the decision, the Court had *caused* the abortion conflict.

Sure, the reasonings diverged: some accused Roe of nationalizing the conflict, while others glorified the Court's futuristic conclusion, too far ahead of the public opinion. Nonetheless, the premise was shared: bad judicial decision-making caused bad politics. The debate over abortion was just coming into existence when the constitutional ruling had crushed it from the top down. [102]

More often than not scholars would focus on how Roe had set back the abortion cause, undercutting in their opinion the progress that the pro-choice movement had made. This backlash argument criticized Roe and addressed the harm that judicial decisions could have on social-change movements. [103]

According to Michael Kalrman, a court «venturing too far in advance of public opinion [might] undermine the cause» advanced by social movement members, and, therefore, the Supreme Court's conduct in Roe, though inspired by pure intentions, by recognizing a right to abortion at a federal level before a consensus had been found between the States, had somewhat damaged the pro-choice cause. [104]

Furthermore, criticism of Roe went beyond the legal backlash narrative, as some scholars and activists argued that the 1973 decision had also determined broader political damage, given that promising state-by-state negotiation about the scope and rationale of abortion rights had been cut off as a consequence of the ruling. [105]

As much as logically coherent as it may appear at first, such recollection was deeply flawed. A Court-centered account of the abortion question was not qualified to offer a satisfactory recollection of the historically specific features that caused the polarization of the issue. Though it may seem redundant to point out,

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[100] L. GREENHOUSE, R. SIEGEL, *Speaking to the court, op. cit.*, 221 – 251.
[101] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.
[102] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.
[103] M. ZIEGLER, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, in *Washington and Lee Law Review*, Number 2, Volume 71, Spring 2014, page 971 ss.
[104] M. ZIEGLER, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, *op. cit.,* page 975.
[105] M. ZIEGLER, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, *op. cit.,* page 971 ss.

the escalating conflict was a normal response to increasing public support for change, on the subject of abortion but not only. [106]

Liberalization of access to abortion initially gained momentum as the authority of medical science started to build the first waves of public support. The public health argument that had served as grounds for the criminalization of the procedure to protect women now had been turned from the inside out, aiming instead to reduce the deadly consequences of illegal abortions. [107]

In addition, by the late 1960s, a new environment movement had premonished about the impact of a growing population living on earth's finite resources. The overpopulation argument challenged the idea that sex should only be for procreation and advocated for policies separating sex and reproduction for the public good. The unprecedented consideration of sex also stemmed from the new concept of sexual freedom expanding during these years.

Growing numbers of young people openly started to live together outside the sacred bond of marriage, and debates began to address the law's role in regulating adult, consensual, sexual relations. [108] Abortion was slowly beginning to be presented as «an inevitable piece of the full picture of human sexuality», meaning it had to be at least regulated, though not necessarily welcomed. [109]

In the early stages of Second Wave Feminism, the main objectives were equal access to education and fair opportunities in the workplace, converging in the enactment of social policies that would enable the combination of motherhood and career. Only towards the end of the 1960s feminists would identify the challenging of restrictive abortion statutes as essential for women's equality, and while «feminists wished to separate women's reproductive capacities and social obligation», pro-lifers often saw motherhood as women's natural role. [110]

According to this feminist ideology, many institutions were based on the assumption that caregivers were not actively involved in all spheres that citizenship attributed. Women therefore were requesting recognition of the ability to determine when (and if) to have children to equally participate in work, politics, and all other aspects of society. [111]

If all these different aspects intertwining in the society of the Sixties were pushing towards the decriminalization of abortion, equally strong counteraction was also ongoing.

First and foremost, the National Conference of Catholic bishops had founded in 1967 the National Right to Life Committee to oppose abortion reform at the state level. The growing public interest in decriminalizing abortion had to

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[106] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[107] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[108] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[109] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, page 276.

[110] M. ZIEGLER, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, *op. cit.,* page 982

[111] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

be challenged by a minority, but this minority cared passionately about the issue and had extensive resources to organize a structured opposition. [112]

Secondly, pro-life arguments about reproductive choice also emerged from the impact of abortion on women's mental health, as at the beginning of the 1960s some scholars started to assume that abortion caused psychiatric distress. Some legal academics dramatically outlined the damages done by abortion, stating that abortion could not be used to prevent mental illness, «for abortion is not a prophylactic against psychosis, but rather a precipitant». [113]

Thirdly, Republican strategists who had carried over Catholic voters from the Democratic party began to reframe abortion in terms that helped to change its social meaning, to further attract voters with conservative and traditionalist views. Emotional issues were far more engaging than fiscal conservatism or economic policies, traditionally issues at the core of the Republican position. The strategy of the New Right recognized the captivating persuasiveness of the symbol of abortion to incite political participation. [114]

In substance, many possible explanations could be found to illustrate why Roe became such a prominent decision. Though it is undeniable that the Supreme Court played a role, and rather a prominent one, in escalating the debate over the legalization of abortion, it must also be recognized that the features of the decision partially stemmed from an already ongoing conflict. [115]

1.3. Casey v. Planned Parenthood (1992).....

The harsh criticisms that would follow Roe were not only related to the extreme social polarization that came along with the ruling but also founded jurisprudential disapproval of legal figures who contested the scarcely convincing constitutional argument. [116]

One after the other, rulings decided in front of both lower courts and the highest court of appeal discussed and pondered on the weight of the 1973 landmark decision, raising doubts about its judicial persuasiveness. Alongside the uncertainty and confusion of judges, legislators started to enact statutes to confine the scope of the constitutional protection of the right to abortion. [117]

In addition, the implementation of the Republican strategy to obtain Catholic support commenced in the 1960s was far from over.

The conservatives were urging fundamentalist Christians to oppose the threat to traditional family and values posed by Roe. To counteract the judicial

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[112] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[113] M. ZIEGLER, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, *op. cit.,* page 986.

[114] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[115] L. GREENHOUSE, R. SIEGEL, *Before (and After) Roe v. Wade: New Questions About Backlash*, *op. cit.*, 263 – 317.

[116] L. FABIANO, *"To Be or Not to Be: This is the Question". L'Unborn Human Being nell'esperienza giuridica statunitense statale e federale prima e dopo il caso Dobbs v. Jackson Women's Health Organization*, in *Biolaw Journal* , Special issue 1, 2023, 291 – 317.

[117] L. FABIANO, *"To Be or Not to Be: This is the Question". L'Unborn Human Being nell'esperienza giuridica statunitense statale e federale prima e dopo il caso Dobbs v. Jackson Women's Health Organization*, *op. cit.,* 291 – 317.

overreaching, Republican-affiliated platforms began to support the appointment of judges who shared the Party's values, starting from the defense of the sanctity of innocent human life. [118]

By the late 1980s, the new Justices appointed by Republican Presidents Ronald Reagan and George W. Bush had shaped a different profile of the Supreme Court, supposedly ready to overturn the vulnerable Roe. And yet, in 1992 what looked like the perfect opportunity turned out to be a (partial) disappointment.

Casey v. Planned Parenthood narrowed the liberty found in the precedent but reaffirmed the essential principles of the ruling nevertheless. [119]

The case concerned five provisions of the Pennsylvania Abortion Control Act of 1982: §3205, which required that at least 24 hours prior an abortion the woman seeking the procedure had to receive certain information and give her informed consent; §3206, which dictated the necessity to obtain the informed consent of one parent in cases concerning minors seeking the abortion, though including an eluding procedure; §3209, which ordered that a married woman seeking an abortion must have signed a statement indicating that her husband had been notified of the occurrence, unless certain exceptions applied; §3203, which defined when a 'medical emergency' could excuse the compliance with the aforementioned requirements; and §§3207(b), 3214(a), and 3214(f), which imposed particular reporting requirements on facilities providing abortion services. [120]

As their chief legislative architect admitted, the amendments introduced in the Act, by also severely narrowing the pre-existing definition of 'medical emergency' situations, were explicitly and shamelessly designed to trigger a challenge to Roe v. Wade.[121] Before any of these provisions became effective, the petitioners filed this case seeking declaratory of unconstitutionality. The appeal eventually reached the Supreme Court where a lengthy decision was developed by the Justices.

1.3.1 The reaffirmation of Roe's essential holding ……..

The position of the Supreme Court in deciding this case was a tedious one: on one side, the judgment could conform to Roe and respect the stare decisis principle; on the other, an overturn could please the expanding animated opposition, and reinstate the power of deciding on the abortion matter in the hands of the States. As anticipated earlier, the Court's solution was an in-between resolution reaffirming Roe's holding, but not as a whole.

A recollection of the crucial precedents was first provided by the majority's opinion, to contextualize that the constitutional protection of a woman's decision to terminate her pregnancy derived from the Due Process Clause of the Fourteenth Amendment. [122] Coherently with the content of such an Amendment,

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[118] L. GREENHOUSE, R. SIEGEL*, Afterword, op. cit.*, 253 – 262.
[119] L. GREENHOUSE, R. SIEGEL*, Afterword, op. cit.*, 253 – 262.
[120] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), at 844 – 845
[121] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, *op. cit.*, 317 – 388.
[122] *Planned Parenthood of Southeastern Pa. v. Casey*, at 846.

the judges maintained that they were exercising «that same capacity which by tradition courts always have exercised: reasoned judgment». [123]

In exercising such power, the Court recognized the limits placed on it, as no possible formula for the abortion matter could ever determine absolute agreement on such an intimate and personal issue. After all, the Court had identified its duty as defining the liberty of all, not to mandate its moral code. [124]

But though the abortion decision could originate from a zone of personal conscience and beliefs, its consequences weren't restricted to the individual. The unique act, which would force the woman to live with the implications of her choice for the rest of her life, presented repercussions for others too: «for the persons who perform[ed] and assist[ed] in the procedure; for the spouse, family, and society which [had to] confront the knowledge that these procedures exist[ed], […] and, depending on one's beliefs, for the life or potential life that is aborted».[125]

In describing such a scenario, the Court was showing its acknowledgment of the complexity of the situation and the extent of the parties involved, which were not merely the woman, her physician, and the State at some point of the pregnancy, as the Justices in Roe had identified, but society as a whole.

This kind of reasoning was very clearly a result of the twenty years of conflict that had strongly unfolded, instead of quietening down, after Roe.

1.3.1.1 The stare decisis principle.....

The first and essential question that the Court had to answer to find a judicial rule to resolve the case at hand was whether to overrule the prior relevant case, meaning Roe v. Wade, or not. The argument that could serve such a purpose, though based on an unrealistic assumption, stated that, if abortion was to be considered a form of 'extreme' contraception for unplanned pregnancies resulting from unplanned sexual activity, reproductive planning could justify the restoration of the state authority to ban abortions. [126]

But the Court disputed that such interpretation would be based on denial of the fact that, for the last two decades, the American people had organized their intimate relationships relying *also* on the availability of abortion in case contraception had failed. [127] Not only that, the grounds on which the Roe decision had stemmed from had not been weakened by any evolution of legal principles or development of constitutional law. [128]

The majority's opinion leaned on the legal principle of stare decisis to uphold the fundamental tenets of Roe rather than discard them. The Justices concluded that the key decision of Roe, which had been grounded in factual evidence, had not lost its potency and had proven 'workable' during the nearly 20 years since its inception.[129]

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[123] *Planned Parenthood of Southeastern Pa. v. Casey,* at 849.
[124] *Planned Parenthood of Southeastern Pa. v. Casey,* at 850.
[125] *Planned Parenthood of Southeastern Pa. v. Casey,* at 852.
[126] *Planned Parenthood of Southeastern Pa. v. Casey,* at 856.
[127] *Planned Parenthood of Southeastern Pa. v. Casey,* at 856.
[128] *Planned Parenthood of Southeastern Pa. v. Casey,* at 857.
[129] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, *op. cit.*, 317 – 388.

The application of Roe had faulted in generating consensus, as it had stimulated disapproval instead, but, for the Court, that wasn't reason enough to consider its central holding eroded or inadequate. [130] Hypothesizing the eventuality of an overrule, the Court warned of the consequences that such a rescinding ruling with no legitimate judicial grounding could implicate. [131]

Firstly, frequent unjustifiable violations of the stare decisis principle would exceed the country's belief in the Court's good faith. As every overrule is usually perceived as an acknowledgment that the prior decision was wrong, making a habit of repeatedly issuing decisions overruling precedents would cause the legitimacy of the Court to fade rapidly.

Secondly, once the Court resolved intensely divisive controversies, such as the one posed in Roe, it called «the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution». [132] If after such trouble in choosing one of the two polarized positions the Court didn't counteract the inevitable efforts to overturn it, confidence in the judiciary would be lost. After all, if it was so effortless to obtain an overrule that only political pressure or unjustified repudiation could obtain it, then the Court's legitimacy had no real standing. [133]

Therefore, Section III of the decision concluded that the divisiveness on the issue at the time of the ruling was no less than at the time of the precedent, but a decision to overrule Roe's essential holding «would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law». [134]

1.3.1.2 Viability and undue burden as the new criteria…….

If the constitutional protection of the right to abortion, as a penumbra of the right to privacy grounded in the Fourteenth Amendment, was the essential holding of Roe to which the Supreme Court adhered, the trimester framework and the legitimacy of the State's intervention based on the existence of a compelling interest were the conclusions on which the Casey Justices disagreed.

The joint opinion issued by the Supreme Court in the landmark case of Casey v. Planned Parenthood brought about significant changes to the legal precedent set by Roe v. Wade. The standard of strict scrutiny adopted in Roe along with its trimester framework were rejected in favor of a more permissive "undue burden" standard. This shift in approach enabled the joint opinion authors to reexamine and rebalance the interests of the state and the pregnant woman, placing greater emphasis on the state's interest in protecting maternal health and potential fetal life. [135]

Part of the intense criticism that Roe had received was based on the specific rule given to differentiate the control over the mother's destiny and body depending on the stage of the pregnancy. The Court found that a better tool to

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[130] *Planned Parenthood of Southeastern Pa. v. Casey,* at 861.
[131] *Planned Parenthood of Southeastern Pa. v. Casey,* at 866.
[132] *Planned Parenthood of Southeastern Pa. v. Casey,* at 867.
[133] *Planned Parenthood of Southeastern Pa. v. Casey,* at 867.
[134] *Planned Parenthood of Southeastern Pa. v. Casey*, at 869.
[135] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, *op. cit.*, 317 – 388.

draw the line between the legality or criminalization of abortion was the concept of viability, meaning the moment at which «there is a realistic possibility of maintaining and nourishing a life outside the womb so that the independent existence of the second life can in reason and all fairness be the object of state protection». [136]

In the majority's opinion, the trimester framework, though surely conceived to ensure that the state's interest could not override the woman's choice, was deemed as particularly rigid and in truth unnecessary to accomplish such an aim. [137] The standard on which to rationally measure the legality of the restrictions imposed on the termination of pregnancies was instead identified by the Court as the 'undue burden'. If state abortion statutes had the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus, such statutes were to be considered invalid. [138]

The legitimate State interest that the Court would allow to be translated into restrictive statutes concerned the protection of potential life, not the obstruction of access to a medical procedure.

By applying such reformulated criteria to the case at hand, the Court ultimately upheld all the provisions of the Pennsylvania Statute except for the requirement of spousal notification: in applying the undue burden standard to the husband-notification provision, the majority had been immensely sensitive to the specific context in which such notification would operate. Through «connecting and understanding the interrelationship between domestic violence and women's reproductive rights autonomy», the Justices assessed thoroughly the severity and pervasiveness of domestic violence documented by the district court. [139]

Proof of the grave dangers that would be imposed on victims of domestic battering and marital rape had they been forced to notify their husbands of their abortion together with numerous independent social science studies led the majority of the Justices to agree on the characterization of the undue burden that the spousal notification represented.[140]

1.3.2 The dissenting opinions: on the edge of an overturn……..

The plurality opinion of the Court was conclusively written jointly by Justice Sandra Day O'Connor, Anthony Kennedy, and David Souter, partially concurred by Justice John P. Stevens and Harry Blackmun, who both wrote separately to voice their disagreement with the joint opinion's dismantling of the trimester framework and abandonment of strict scrutiny. [141]

On the other side, Chief Justice William Rehnquist and Justice Antonin Scalia, joined by Justices Byron White and Clarence Thomas, wrote separate personal opinions, dissenting in part, specifically with the choice of the majority

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[136] *Planned Parenthood of Southeastern Pa. v. Casey*, at 870.
[137] *Planned Parenthood of Southeastern Pa. v. Casey*, at 872.
[138] *Planned Parenthood of Southeastern Pa. v. Casey*, at 876 – 877.
[139] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, *op. cit.*, page 332.
[140] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, *op. cit.*, 317 – 388.
[141] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on PlannedParenthood v. Casey*, *op. cit.*, 317 – 388.

to not overturn Roe, and concurring in part, upholding the parental consent, informed consent, and waiting period laws. [142]

The scenario of the Justices' opinions, between those who had joined partially, dissented partially, or agreed wholly, was the embodiment of the complex scenario in which the Supreme Court was set, as the American society was likewise very divided on the abortion issue.

1.3.2.1 The unconstitutionality of all the provisions according to Justices Stevens and Justice Blackmun……..

Justice Stevens and Blackmun each wrote separately, partially dissenting with the majority's decision to leave behind the legal standard defined in Roe, but simultaneously expressing confidence that the new standard would ensure ultimately meaningful protection for a woman's right to choose abortion. [143]

More precisely, Justice Stevens' interpretation found unconstitutional the information requirements and the 24-hour waiting period, in addition to the spousal notification that the jointed opinion had deemed in violation of the legal standard, regardless of the application of the legal standard in the form of the newfound undue burden or under the strict scrutiny of Roe. [144]

The Justice also placed great emphasis on women's right to bodily authority, as he considered that the State's attempt to «persuade the woman to choose childbirth over abortion» was too coercive and violated the woman's decisional autonomy. [145]

Chief Justice Blackmun, author of Roe v. Wade, made a passionate case for maintaining Roe's trimester framework in place, but, recognizing the majority's different point of view, he settled with relief for the reaffirmation of the central holding of the 1973 landmark ruling, praising the authors of the Court's opinion for their «act of personal courage and constitutional principle». [146]

Blackmun believed the joint opinion had erred in failing to invalidate the other regulations of the Pennsylvania Act in question, but optimism shone through the cracks of his opinion, partially concurring and partially dissenting, as he admitted to being «confident that in the future evidence [would] be produced to show that in a large fraction of the cases in which these regulations are relevant, they operate as a substantial obstacle to a woman's choice to undergo an abortion». [147]

In his view, it was only a matter of time before the Supreme Court would get on board with his consideration of all the Act's provisions as undue burdens, but, unfortunately, he could have not been more wrong.

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[142] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, *op. cit.*, 317 – 388.
[143] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on PlannedParenthood v. Casey*, *op. cit.*, 317 – 388.
[144] *Planned Parenthood of Southeastern Pa. v. Casey,* at 920 – 22.
[145] *Planned Parenthood of Southeastern Pa. v. Casey,* at 916.
[146] L. J. WHARTON ET AL., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, *op. cit.*, page 341.
[147] *Planned Parenthood of Southeastern Pa. v. Casey,* at 926.

1.3.2.2 Justices Scalia and Rehnquist's disagreement on the Court's decision to uphold Roe……

Chief Justice Rehnquist and Justice Scalia each joined the majority's opinion of upholding the Pennsylvania provisions that regulated parental consent and informed consent and the ones prescribing waiting periods. Yet they both disagreed on the Court's decision to uphold Roe v. Wade, deeming such precedent as an incorrect ruling.

The pair, in each personal dissent, contested that the historical traditions of the American People could support the understanding of the right to abortion as fundamental. Chief Justice Rehnquist's brief historical recollection stated that, at the time of the adoption of the Fourteenth Amendment, «statutory prohibitions or restrictions on abortion were commonplace», and, though a liberalization trend had set in during the former century, «an overwhelming majority of the States [still] prohibited abortion unless necessary to preserve the life or health of the mother». [148]

Justice Scalia reiterated the same conclusion that the liberty of women's power to abort their unborn child had no protection in the Constitution of the United States. In his opinion, the constitutional text said absolutely nothing about such a right, and, in addition, the longstanding traditions of American society had permitted it to be legally forbidden. [149]

The Justices also both questioned the majority's arguments to ultimately adhere to the stare decisis principle.

Rehnquist's dissent claimed that the Court had failed to bring any real evidence to prove the factual reliance of the Nation on the belief that abortion had been accessible for the past almost 20 years. [150] Scalia went further and taunted the Court's choice to rely on the precedent of Roe but to apply the notion of stare decisis in its «new, keep-what-you-want-and-throw-away-the-rest version». [151]

The Justice continued that if the Supreme Court, instead of doing «essentially lawyer work», started to give pronouncements of Constitutional law basing them primarily on value judgments rather than through discernment of the society's traditional understanding of the Constitutional text, then free and intelligent people's attitude towards the Justices would necessarily become quite different. [152]

Conclusively, both the dissenting Justices negatively evaluated the plurality's choice to introduce the 'undue burden' as a legal standard on which to measure the legality of state abortion legislatures. Scalia's opinion recalled what the Chief Justice had pointed out, that is that such a standard was created largely «out of whole cloth by the authors of the joint opinion». [153] What was more, the clarification of the content of the 'undue burden' was nowhere to be found in the

[148] *Planned Parenthood of Southeastern Pa. v. Casey,* at 952.
[149] *Planned Parenthood of Southeastern Pa. v. Casey,* at 980.
[150] *Planned Parenthood of Southeastern Pa. v. Casey,* at 957.
[151] *Planned Parenthood of Southeastern Pa. v. Casey,* at 993.
[152] *Planned Parenthood of Southeastern Pa. v. Casey,* at 1000 -1001.
[153] *Planned Parenthood of Southeastern Pa. v. Casey,* at 987.

joint opinion analysis, [154] which meant its application was based «even more on a judge's subjective determinations than was the trimester framework». [155]

The risk of a variety of conflicting views guided only by the judge's personal opinions was deemed a certain consequence of implementing the new standard in future rulings.

The dissents were undoubtedly fierce, and at times almost aggressive, in expressing their opposition to endorsing Roe's 'essential holding' of recognizing a constitutional right of abortion. The divide was broad and attempts at alliances for the sake of a strong majority, like in Roe, were a distant memory.

The overwhelming 7-to-2 majority of the 1973 ruling had very little to share with the conflicted 5-to-4 barely reached majority of 1992. If a largely shared compromise could not be found between Justices, how could the ongoing conflict and debate in American society find alleviation?

In the end, Roe had been upheld, but at a rather great price, and future rulings would prove the costs.

[154] *Planned Parenthood of Southeastern Pa. v. Casey,* at 991.
[155] *Planned Parenthood of Southeastern Pa. v. Casey,* at 965.

CHAPTER TWO

THE CONTROVERSIAL PROTECTION OF REPRODUCTIVE RIGHTS

2.1. The Pro-Life movement's shift from left to right……..…….

The many implications, whether moral, religious, political, or philosophical, that surround abortion dictate the complexity of the issue and the even more difficult task of elaborating legislation on such a personal circumstance. To make matters worse, the regulations of the practice develop in a context of continuous change, and approaches and ideologies fluctuate, followed by crowds of people who identify with the values most familiar to them.

In this scenario, the importance of what happens in the background becomes as relevant as what happens on the stage, and if the aim is to truly understand why, today, the abortion issue is as relevant as it is, then a historical recollection that investigates the various aspects that shaped such development is imperative.

In any analysis that concerns the phenomenon of regulating abortion in the United States, the role of the religiously oriented Pro-Life Movement is usually recognized as common knowledge.

However, further investigations reveal unfamiliar and unrecognized information, such as the fact that the composition of the Movement shifted from the left to the right between the late 1960s and the 1980s. [156] Moreover, the Catholics were the religious group most deeply involved in the pro-life campaign at the time, but as Evangelical supporters became more determined to grow their conservative cause, the Catholics slowly lost relevance. [157]

2.1.1 The origins of the cause……...

As the 19th century was coming to an end, statutes against abortion and contraception were passed and Catholics were mostly satisfied with the concern for the human life that the social welfare state displayed. When, in the 1930s, laws started to steer away from the previous direction and enact more liberal abortion regulations, the Catholics' reaction was to initiate a campaign in the defense of human rights, rooted in the principles of New Deal liberalism.

The President at that time, Franklin Roosevelt, gave the impression of sharing the Church's concern for the less fortunate and the values of human dignity, and the majority of American Catholic voters kept their votes going toward Democratic presidential candidates.

In the post-World War II era, the idea of human rights became increasingly significant in American liberalism. During this period, Catholic leaders began

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[156] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause,* in *Religions,* Number 2, Volume 6, 2015, 451 – 475.

[157] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 453 ss.

utilizing the terminology of global human rights in their opposition to abortion, citing the 'right to life' of the unborn. [158]

According to Catholic doctrine, the concept of human rights did not stem from contemporary secular values, but rather from natural law. This unwritten set of principles could be discovered through rational contemplation on the intentions behind God's creation of human beings. Though many non-Catholics were not impressed with the natural law argument used by the Church, they were nonetheless sympathetic toward the initiative of protecting the rights of unborn children at a public level. [159]

The efforts of expanding the antiabortion movement unfolded throughout the decades, eventually culminating in the foundation of the National Right to Life Committee, created in 1967 when the National Conference of Catholic Bishops decided to initiate and coordinate a program of information on the wave of legislation from which abortion statutes were coming to life. The Catholic Church's long-standing policy of opposing legal abortion had commenced. [160]

To appeal to supporters of the cause outside of the faith community, Catholics attempted to demonstrate how opposition to abortion did not exclusively relate to the acceptance of the Christian doctrine but, rather, it was grounded in a concern for all human lives. [161] The plan of action took on two factors relating to the abortion issue.

On one side, persuasion based on secular language aimed to expand non-religious support for the anti-abortion cause. A pamphlet issued in the New Jersey Catholic Conference calling on the community to repel the attempt to nullify New Jersey's law criminalizing abortion exemplified this kind of strategy.

Speaking to all their fellow citizens, the religious leaders used legal references to support their statement that the unborn child's civil rights were being increasingly recognized by the law, such as the United Nations Declaration on the Rights of the Child. The letter warned: «Law is an educator. If it allows the destruction of unwanted life, it unavoidably teaches that life is cheap.» [162] Additionally, the New Jersey bishops signing the pamphlet urged cooperative efforts in other situations of human rights violations, such as racial discrimination, economic hardships, and birth defects to name a few, clearly striving to expand the issues to which non–Catholics would relate and empathize with. [163]

On the other side, the opposition worked toward forming alliances with several liberal politicians, especially Catholic ones, who would support the cause. But that approach became a fiasco when, in the Seventies, Democrats' new

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[158] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 453 ss.

[159] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 453 ss.

[160] R. N. KARRER, *The National Right To Life Committee: Its Founding, Its History, And The Emergence Of The Pro-Life Movement Prior To Roe v. Wade*, in *The Catholic Historical Review*, Number 3, Volume 97, 2011, 527 – 57.

[161] L. GREENHOUSE, R. SIEGEL*, Reaction - New Jersey Catholic Bishops' Letter, op. cit.*, pages 81 – 86.

[162] L. GREENHOUSE, R. SIEGEL*, Reaction - New Jersey Catholic Bishops' Letter, op. cit.*, page 83.

[163] L. GREENHOUSE, R. SIEGEL*, Reaction - New Jersey Catholic Bishops' Letter, op. cit.*, pages 81 – 86.

increasingly important cause concerned women's right to equality and bodily autonomy, creating a clear conflict of interests with the pro-lifers' advocacy of fetal rights. [164]

The pro-life movement's attempt to ground itself in a liberal, rights-based ideology ultimately proved unsuccessful, largely due to effective efforts by feminists, as well as the Supreme Court's recognition of the constitutional grounds of the right to abortion in 1973, a result supported and anticipated by Democrats. Therefore, much greater political support was found among Republican politicians rather than Democrats, and the switch of pro-life activism from left to right started in the late 1970s. [165]

To be fair, the transition wasn't smooth. Republican Ronald Reagan had signed one of the first pieces of legislation liberalizing abortion, endorsed in California in the late 1960s, and even though he then followed the Party strategy to change position on the abortion issue to attract Christian voters to the Republican polls, the arguments he sustained weren't unconditionally in tune with Christian principles. The Republican perspective was focused more on abortion as a matter connected to the bigger issue of maintaining traditional family values and Reagen rarely agreed with the Catholic bishops on any item besides abortion. [166]

But by the end of the 20th century, a stable and solid alliance between Republicans and the pro-life movement had been forged, and the National Right to Life Committee had fixated on the abortion issue, leaving behind earlier concerns about poverty and war. The new foundations for the anti-abortion argument weren't stemming from liberal rhetoric anymore, but, rather, the campaign was framed in the context of protecting family values against the immoral government. [167]

2.1.2 The Evangelical's concern and conservative shift on abortion…….

The first great change of the pro-life movement had happened outside of it, as new political support had been found in conservative, rather than liberal, justifications. Now it was time for the second change, concerning the composition happening inside the Movement itself. The Movement's origins were purely Catholic, and, despite their attempt to make common cause with Protestants, an overwhelming majority of the components were Catholics until the late 1970s. [168]

But, by 1980, a Gallup Poll reported that Evangelical Protestants were more likely to oppose abortion than either Catholics or Protestants. Most of the Evangelical believers who joined the Movement were political conservatives, and

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[164] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 458 ss.

[165] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 453 ss.

[166] L. GREENHOUSE, R. SIEGEL*, Afterword,* a cura di L. GREENHOUSE, R. SIEGEL,*Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, 253 – 262.

[167] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 458 ss.

[168] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 458 ss.

therefore, their joining of the campaign was coherent with the recent switch of anti-abortion supporters toward the politics of the right. [169]

A movement labeled the 'Religious Right' emerged in the 1970s among white American evangelicals and fundamentalists, as many theologically conservative Protestants began to organize specifically around their religious concerns because they believed the Nation had been founded in a deep relationship with God, but because the American society was now being corrupted, it was only a matter of time before God would judge America and its people. [170]

At the beginning of the Seventies decade, most Evangelicals' position was still not as extreme as the Catholic's rigid approach, with a great majority of them favoring access to abortion when it was necessary to preserve a woman's health or in cases of rape and incest. Biblical passages were cited to display the differential view of the value of the fetus and the value of an adult woman, such as Exodus 21 in verses 22-25. [171]

By the end of the same decade, the realization of how much the abortion issue weighed on the spreading of moral misconduct in American society imposed a more solid approach to the controversy. Those who had been ambivalent or maintained a shiftable position had to reconsider their stance. Of course, that also meant finding new biblical passages to argue abortion opposition, such as Psalm 139, which appeared to treat the fetus as a person in the eye of God. [172]

In this panorama, the 1973 ruling was deemed as a decision that made it «legal to terminate a pregnancy for a not better reason than personal convenience or sociological consideration» by the National Association of Evangelicals. [173]

By the end of the twentieth century, the pro-life movement had been completely revolutionized, from a liberal Catholic anatomy to a conservative Evangelical composition, becoming more consistent with today's perception.

Furthermore, eventually Catholics rejoined the antiabortion campaign by also supporting the Republican Party, not because they necessarily agreed with their perspective, but because the New Right was the only political body that

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[169] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 458 ss.

[170] J.D. HARDER, *"Heal their Land": Evangelical Political Theology from the Great Awakening to the Moral Majority*, dissertation for The University of Nebraska, 2014.

[171] Exodus 21:22–25, *New Revised Standard Version Bible*, 1989, National Council of the Churches of Christ in the United States of America.

«When men strive together, and hurt a woman with child so that there is a miscarriage, and yet no harm follows, the one who hurt her shall be fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine. If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.»

[172] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 461 ss.

[173] J.D. HARDER, *"Heal their Land": Evangelical Political Theology from the Great Awakening to the Moral Majority*, *op. cit.,* page 127.

seemed to care about protecting the unborn. [174] The majority of Christian citizens supporting the anti-abortion campaign became more likely to vote red than blue.

On the one side, both the public support for the decriminalization of abortion and the religious and moral opposition to the procedure were growing steadily, but on the other side, though the law had followed swiftly behind the social openness on abortion rights, the pro-choice movement struggled to find authority to shape abortion law.

In the years preceding Roe, the debate over abortion took hold in legislatures and courtrooms throughout the country. In these discussions, public policy arguments started to evolve into constitutional claims, because the advocates for decriminalization appealed to public health, population control, and equality between poor and wealthy women, as access to abortion was greatly different depending on the social and economic status of the women wanting the procedure. [175]

2.1.3 The methods of the movement……...

In the decade following Roe, pro-life activists had presented legislative efforts to overturn its dictum, but the discording view within the movement, over ideological, methodological, and theological issues, slowed and weakened the probability of success. These internal differences displayed an evident lack of coordination when pro-lifers failed to endorse the Hatch Amendment in 1983. The Amendment sought to revise the constitutional text by adding a ten-word statement prescribing that «A right to abortion is not secured by this Constitution», but its endorsement was defeated by the opposing votes of 50 Senators, against 49 in favor of the alteration. [176]

Though at first many anti-abortion groups denounced the violent attacks that some extremist pro-lifers were launching, as even John Wilke, president at the time of the National Right to Life Committee, criticized such extreme attitudes, by 1984 it was undeniable that a growing number of individuals supporting the anti-abortion cause were becoming more aggressive. [177]

From the 1990s onward, the abortion debate became a most inflamed and polarized one, as the newly transformed pro-life movement began to suggest the overturn of Roe through the restructuring of the judiciary rather than via legislative reforms. In other words, the three vacancies in the Supreme Court that President Reagan would have to fill in his term could determine the appointments of anti-abortion Justices and a greater chance of renouncing the precedent. [178]

While awaiting the revision of the Supreme Court's components, pro-life tactics were becoming more combative, bordering and oftentimes exceeding into

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[174] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 466 ss.

[175] L. GREENHOUSE, R. SIEGEL *Conflict Constitutionalized: The Years Before Roe,* a cura di L. GREENHOUSE, R. SIEGEL, *Before Roe v. Wade: Voices that shaped the abortion debate before the Supreme Court's ruling*, Yale Law School, page 120.

[176] R.P. PRUITT, *Randall Terry and Operation Rescue: a study of the rhetoric of agitation*, dissertation for Bowling Green State University, 1994.

[177] R.P. PRUITT, *Randall Terry and Operation Rescue: a study of the rhetoric of agitation*, *op. cit.* page 62.

[178] R.P. PRUITT, *Randall Terry and Operation Rescue: a study of the rhetoric of agitation*, *op. cit.* page 63.

violence. By the 20th century, the abortion matter had turned into an incendiary subject like never before and the tactics of the opposition to promulgate the protection of the unborn ranged from peaceful marches to homicides of abortion providers.

2.1.3.1 Mass demonstrations: the 'March for Life'.....

A significant protest against abortion took place in September of 1972, as several hundreds of young liberal pro-lifers marched toward the Washington Mall and tore up their birth certificates, objecting to the law's recognition that life commenced at birth rather than at conception. [179] At the time, it was Democrats who were defenders of the right to life of the unborn, or 'preborn', as anti-abortion activist Nellie Gray referred to it. Gray, who founded the March for Life two years later in 1974, was also credited by the New York Times as the one who popularized the term 'pro-life'. [180]

From then onwards, the rally took place annually on or around the anniversary of the landmark ruling of Roe v. Wade, but quickly changed its connotations, following the anti-abortion movement's switch towards conservatism. As the tradition was carried out each year, the March for Life became a globally recognized symbol for the anti-abortion cause. The Washington Post described the manifestation as «a carnival, bazaar, religious crusade, and professional conference rolled into one». [181] The focus had shifted during the years, from the changes and evolution of the movement to a precise focus on overturning Roe.

But, according to author Ari Armstrong, behind the 'for life' motto, was hiding an anti-life quest, because those who advocated for abortion bans based on religious dogma sought to sacrifice the actual person, a pregnant woman who wished to get an abortion, in favor of the potential person, an embryo or fetus.

The unreasonableness of the anti-choice position related to the fact that a right should be considered a moral principle defining and sanctioning a person's freedom of action in the social context. Therefore only a woman should be entitled to the protection of rights, as she would be a person who can think and act freely to live while the fetus, being a whole dependant entity, could not know or interact with the world outside the womb in a meaningful way. [182]

The arguments of pro and anti-abortion sides stemmed from unapologetically different premises, because for the conservatives the key was that a fetus represented a human being, «not a partial or potential one, but a full-fledged, actualized human life» [183], and therefore abortion would be considered as killing an innocent human being. With time, pro-lifers recognized the

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[179] D.K. WILLIAMS, *The partisan trajectory of the American pro-life movement: How a liberal Catholic Campaign became a conservative evangelical cause, op. cit.*, page 451 ss.
[180] W. SAFIRE, *On Language,* in *The New York Times*, March 18, 1979.
[181] J. MCDANIEL, C. KITCHENER, M. BOORSTEIN, *With Roe dead, a very different March for Life returns to Washington*, in *The Washington Post*, January 20, 2023.
[182] A. ARMSTRONG, *Anti-Abortion Crusade is Anti-Life, Anti-Rights, Anti-Reason*, *in The Objective Standard*, Number 1, Volume 8, Spring 2013, 96 – 98.
[183] R. WERTHEIMER, *Understanding the Abortion Argument*, in *Philosophy & Public Affairs*, Number 1, Volume 1, Autumn, 1971, page 70.

relevance of this reasoning by also implementing a rhetoric calling on the respect of fetuses' personhood and asking legislators to recognize fetuses' rights. [184]

Liberals, on the other hand, didn't know how to respond to the argument because they could not make sense of that premise. [185] This explains why a conservative majority had to be put in place in the Supreme Court to pronounce the Dobbs decision.

With the 2022 ruling, the goal of the March for Life to grow support for the overturn of Roe had finally achieved success. [186]

2.1.3.2 Operation Rescue and the 'Summer of Mercy' of 1991……

The fervor and intensity that surrounded the pro-life movement found perfectly suited manifestation in the pursuits of Operation Rescue, a militant anti-abortion organization founded by Randall Terry in 1986.

Terry's rhetoric of agitation that fomented thousands of supporters for the cause came from a fundamental rejection of the values he had grown up with. [187] Surrounded by «matriarchial, progressive and iconoclastic» ideals throughout his childhood and adolescence, in a family of women fighting for the implementation of reproductive rights, as all of his sisters had an unplanned pregnancy and he himself was the result of one, Randall Terry set out for California at 16, looking to make a name for himself in music, but instead returned home with a newfound theological calling. [188]

In 1983, inspired by biblical passages and led by divine guidance, his 'vision' for stopping abortion became clear, a 'three-point plan' involving blockades of clinics, counseling women against the procedure, and providing homes for unwed mothers. [189] In March of 1986, while serving his first jail sentence, Terry conceived Operation Rescue, inspired, among other biblical verses, by Proverbs 24, verse 11, which proclaimed: «Rescue those who are being taken away to death; hold back those who are stumbling to the slaughter». [190] In his vision, those who needed rescue were the multitude of unborns, unjustifiably taken to death by their mothers and, more importantly, by abortion practitioners.

In the following years, the first clinic blockades, and the consequential arrests of pro-lifers, took place, and in 1988, the protests in Atlanta gave the movement the media attention needed to increase public awareness and resulted in approximately 1,200 arrests. [191]

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[184] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape, op. cit.,* page 252 ss.
[185] R. WERTHEIMER, *Understanding the Abortion Argument*, *op. cit.,* page 73.
[186] J. MCDANIEL, C. KITCHENER, M. BOORSTEIN, *With Roe dead, a very different March for Life returns to Washington*, *op. cit.*
[187] S. FALUDI, *The antiabortion crusade of Randy Terry*, in *The Washington Post*, December 23, 1989.
[188] S. FALUDI, *The antiabortion crusade of Randy Terry, op. cit.*
[189] S. FALUDI, *The antiabortion crusade of Randy Terry, op. cit.*
[190] Proverbs, 24:11, *New Revised Standard Version Bible*, 1989, National Council of the Churches of Christ in the United States of America.
[191] R.P. PRUITT, *Randall Terry and Operation Rescue: a study of the rhetoric of agitation*, *op. cit.,* page 79.

In 1991 Operation Rescue's efforts escalated into what was labeled the 'Summer of Mercy', during which a 42-day blockade took place in Wichita, Kansas, successfully preventing 29 abortions. [192] Expressing what would later become the slogan of the anti-abortion group, the Operation's founder declared: «If you believe abortion is murder, you must act like it's murder». [193]

When state marshals were called to enforce the federal injunction against Randall Terry and other national rescue leaders issued by Judge Patrick Kelly, many considered the federal judge had abused his discretion.

The legal dispute centered around whether courts had jurisdiction to grant injunctive relief under Section 1985(3) in the context of abortion clinic blockades. Enacted in 1871, the Section provided «relief against private conspiracies designed to deprive any person or class of persons from equal protection under the laws», and it had originally attempted to protect black citizens from conspirational Ku Klux Clan activities. [194]

Judge Kelly was now finding its application relevant to the impossibility of accessing abortion clinics provoked by Operation Rescue's blockades, as no direct relief could be found under common law to protect women's power to exercise their constitutionally protected right to choose abortion. [195]

Eventually, after jail time and a tumultuous turn of events, protest leaders negotiated with Kelly for release and left the city. [196] Though Operation Rescue's ventures continued through the following years, no other endeavor became as memorable as the 1991 events. Nonetheless, the influential impact of such extreme attitudes toward the abortion matter didn't help with the growingly aggressive pattern of pro-life activism.

2.1.3.3 The violence……..

Even before Operation Rescue was founded, pro-lifers who had self-acknowledged themselves as 'rescuers' would stand between the killer, meaning the abortion clinic, and his intended victim, aka the fetus and therefore the pregnant woman, either by locking themselves in the abortion procedure rooms, by filling up waiting rooms, or via physically blocking the access to the facilities with their bodies. Of course, the magnitude of such physical barriers became worryingly more efficient with the organization of Randall Terry's association.[197]

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[192] G.M. SULLIAN, *Protection of Constitutional Guarantees under 42 U.S.C. Section 1985(3): Operation Rescue's Summer of Mercy,* in *Washington and Lee Law Review*, Number 1, Volume 49, Winter 1992, 237 – 262.

[193] R.P. PRUITT, *Randall Terry and Operation Rescue: a study of the rhetoric of agitation*, *op. cit.* page 43.

[194] G.M. SULLIAN, *Protection of Constitutional Guarantees under 42 U.S.C. Section 1985(3): Operation Rescue's Summer of Mercy, op. cit.*, page 242.

[195] G.M. SULLIAN, *Protection of Constitutional Guarantees under 42 U.S.C. Section 1985(3): Operation Rescue's Summer of Mercy, op. cit.*, page 237 ss.

[196] R.P. PRUITT, *Randall Terry and Operation Rescue: a study of the rhetoric of agitation*,*op. cit.,* page 89.

[197] R.P. PRUITT, *Randall Terry and Operation Rescue: a study of the rhetoric of agitation*, *op. cit.,* pages 7 – 8.

But, though not explicitly condoned by the movement, supporters of the anti-abortion cause also resorted to violence, as clinics became subjected to arson, bombing or bomb threats, invasions, and vandalism. [198]

The aggression escalated when Terry recognized that the weak links of the abortion-access chain were the abortion providers, and attacks, oftentimes resulting in homicides, followed rapidly, starting with Dr. David Gunn, shot and killed outside his clinic only a few days after Terry's statement. [199]

Abortion providers had become increasingly isolated from mainstream medicine: in 1973, after Roe recognized constitutional protection of the right to abortion, hospitals made up 80 percent of the country's abortion facilities, but as the screams of disapproval kept echoing regardless of the ruling, 90 percent of abortions were performed at clinics by the 1990s.

On the other side of the blockades, inside the clinics, some physicians tried to counterattack and provide safe access to the procedure while attempting to reverse the marginalization. [200] One of them was Dr. George R. Tiller, who had terminated roughly 50 million pregnancies since Roe, undefeated in his mission despite the anti-abortion movement's efforts to drive him out of business. [201]

Tiller's sense of responsibility grew stronger whilst Wichita's three other abortion clinics started to close under the pressure of protesters. As death threats increased, also because the Kansas doctor willingly offered to perform late-term abortions and had executed about 4,800 of them, so did security measures, from bulletproof glass to security cameras. Yet, as an article from the New York Times pointed out, «what thousands could not achieve in three decades of relentless effort, a gunman accomplished on May, 31 [of 2009] when he shot Dr. Tiller in the head at point-blank range while the doctor was ushering at church». [202]

His death, though more symbolic and pivotal for the aims of the right-to-life movement, wasn't an exception, but as the acts of violence subsided after peaking in the mid-1990s, the aggressive turn that the pro-lifers had taken would mark the history of the abortion debate.

2.2. The States' elusive legislations……..

The aftermath of Roe v. Wade had far-reaching effects across all levels of the United States government.

The Supreme Court and lower courts faced challenges in upholding the ruling's fundamental principles, with the possibility of a reversal always looming.

From the late 1980s, the executive had to contend with police interventions to manage escalating blockades of clinics and pro-life rallies.

At the same time, several States tried to circumvent the constitutional restrictions imposed in 1973 and modified in 1992, seeking greater autonomy in regulating and legislating abortion. Some of the Machiavellian and elusive forms of legislation are described below.

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[198] S. FALUDI, *The antiabortion crusade of Randy Terry, op. cit*

[199] E. BAZELON, *The New Abortion Providers,* in *The New York Times*, July 14, 2010.

[200] E. BAZELON, *The New Abortion Providers, op. cit.*

[201] D. BARSTOW, *An Abortion Battle, Fought to the Death*, in *The New York Times*, July 25, 2009.

[202] D. BARSTOW, *An Abortion Battle, Fought to the Death*, *op. cit.*

2.2.1 Trigger laws and the Constitution……

Trigger laws are a legal anomaly and a phenomenon that increased in the years following the Roe decision. They are two-part statutes that contain both substantive provisions and a 'trigger' condition, which is used to express the State's disapproval of the Supreme Court's interpretation of the Constitution.

The trigger clause in some abortion laws stated that the substantive provisions could not be enforced until a change in constitutional law would allow them to be upheld by the courts. [203] This meant that the substantive provisions would be considered unconstitutional if challenged in Court. As a result, the legality of these laws was highly questionable because no constitutional challenge could be brought against them until they were 'triggered'. [204]

Despite trigger laws having been enacted with more frequency during the first decades of the 21st century, these peculiar state legislations have been passed ever since Roe was decided, as many States hostilely greeted the constitutional recognition of the right to terminate a pregnancy. Although each trigger provision is uniquely developed in the texts of singular States' statutes, they share the common characteristic of identifying the execution of abortion as a felony applicable only to parties other than the mother. [205] For instance, both South and North Dakota have passed a trigger law, the first in 2005 and the second one in 2007, in which they prohibited the access to termination of pregnancy from «the date that the States are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy». [206]

Moreover, Illinois also introduced a trigger law in its legislation, as the State Abortion Act of 1975 prohibited abortion except when the woman's health would be at risk and the procedure would be necessary according to a physician. Section I of the Act specified that the reinstatement of the abortion ban with the only exception included for the preservation of the mother's life would be accomplished if the «decisions of the Supreme Court [were] ever reversed or modified or the United States Constitution [was] amended to allow protection of the unborn». [207]

More recently, Kentucky, Georgia, Tennessee, Oklahoma, South Carolina, Alabama, Washington, Texas, and Indiana all introduced bills during the 2019 legislative session, that, if passed, would outlaw abortion. To quote a couple of these trigger laws' dispositions, Arkansas' Act 180 «urgently plead[ed] with the United States Supreme Court to do the right thing, as they did in one of their greatest cases, Brown v. Board of Education, which overturned a fifty-eight-year-old precedent of the United States, and reverse, cancel, overturn, and annul Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey», while Kentucky's trigger law, the sixth one passed in the United States, read that no person may

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[203] M. BERNS, *Trigger Laws*, in *Georgetown Law Journal*, Number 6, Volume 97, August 2009, page 1641.
[204] H.S. ALEXANDER, *The theoretic and democratic implications of anti-abortion trigger laws*, in *Rutgers Law Review*, Volume 61, 381 – 407.
[205] M. BERNS, *Trigger Laws*, *op. cit.*, page 1642.
[206] H.S. ALEXANDER, *The theoretic and democratic implications of anti-abortion trigger laws*, *op. cit.,* pages 385 – 386.
[207] H.S. ALEXANDER, *The theoretic and democratic implications of anti-abortion trigger laws*, *op. cit.,* page 387.

«administer to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being». [208]

Though the bans introduced by five of the States mentioned could not be technically recognized as trigger laws, because they lacked the explicit condition that they would be enforced only once Roe was overturned, they still would be deemed ineffective through a full repeal or a handful of small anti-abortion-rights decisions. The state of Georgia, for example, had implemented a ban on the procedure, and while it did not meet the definition of a trigger law, it carried severe consequences for healthcare providers who perform abortions. Physicians who violated the ban could face a prison sentence of up to 100 years, as well as a financial penalty of up to $100,000. [209] In 2020, the US District Court for the Northern District of Georgia annulled the law. [210]

Though there is a doctrinal recognition that non-judicial actors have tools to influence the Court's interpretation of the Constitution, there are historical and structural reasons that challenge the idea that state legislatures can have a role as constitutional interpreters or can influence the Supreme Court's understanding, because they «lack institutional expertise and the capacity to persuade other government officials of their positions, are too numerous to contribute to a stable equilibrium in constitutional meaning, and are hindered by local biases contrary to national interests». [211]

More evidently, trigger laws cut against foundational American notions of «present will and democratic governance», and therefore violate the U.S. Constitution. Firstly, trigger laws violated the separation of powers doctrine, because the legislatures delegated to the Supreme Court the discretion to decide whether the provisions triggered by the statute would ever become law. [212]

Secondly, because trigger laws employed an irrational means to an irrational end, as they triggered a prohibition on abortion that, at the time of enactment, violated one's constitutional right to choose an abortion, a consequence of trigger laws was also the violation of the Fourteenth Amendment through discrimination against an individual ability to exercise a constitutional right. [213]

Thirdly, trigger laws were at odds with the republican form of government in place in the United States because the goal of the laws was to set rules, which were at the time illegitimate, for future citizens: «By anticipating the invalidation of a precedential legal principle relied upon by the current majority, the legislature

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[208] K. SMITH, *Abortion would automatically be illegal in these states if Roe v. Wade is overturned*, in *CBS NEWS*, April 22, 2019.
[209] K. SMITH, *Abortion would automatically be illegal in these states if Roe v. Wade is overturned*, *op. cit.*
[210] L. BUSATTA, M. TOMASI, S. GABRIELE, *Dossier Abortion Rights negli Stati Uniti*, in *Biodiritto,* published March 13, 2013, updated August 28, 2023.
[211] M. BERNS, *Trigger Laws*, *op. cit.*, page 1657.
[212] H.S. ALEXANDER, *The theoretic and democratic implications of anti-abortion trigger laws*, *op. cit.,* page 399 ss.
[213] H.S. ALEXANDER, *The theoretic and democratic implications of anti-abortion trigger laws*, *op. cit.,* page 402.

[sought] to force their current desires on future citizens, therefore usurping the future majority's right to govern itself».[214]

In addition, because trigger laws were immune to judicial review, they did not allow for a conversation to take place between non-judicial actors in front of a court. Adversely, these laws represented a way of enacting preferred legislation without engaging in a dialogue with the Court to discuss constitutional meaning. [215] The conclusion is that trigger laws were not efficient nor valid in the context of the American constitutional framework, and the anti-abortion statutes thus created not only did not benefit from the support of the majority of the State's citizens but were also in violation of citizens' liberties.

2.2.2 The relevance of TRAP laws in limiting women's safe access to abortion…….

After the Casey decision of 1992, as the efforts to overturn Roe seemed inadequate for the time being, abortion opponents started to rethink their tactics and undertook a legislative approach that chipped away at abortion indirectly, through restrictions targeting providers and facilities in which the procedure was performed. [216]

These laws, known as Targeted Regulation of Abortion Providers' laws (TRAP laws), seemingly focused on ensuring abortion's safety and its related public health concerns, but, in truth, abortion providers were targeted with burdensome, unnecessary, and deceptive laws. TRAP laws could alternatively require abortion facilities to meet special licensing requirements, with the threat of 'surprise' inspections, or require that the same regulatory standards as the ones imposed to ambulatory surgical centers must be met by abortion facilities, or, over more, require physicians to enter into transfer arrangements (i.e. obtaining privileges) and special agreements with local hospitals. [217]

Such requisites were problematic because, without directly impacting women's right to choose, they nonetheless limit women's access to the procedure, by imposing on abortion providers «medically unnecessary and burdensome physical plant and personnel requirements». [218] Though doctors who supported some of the measures introduced with TRAP laws, such as the admitting privilege requirement, could make some compelling arguments emphasizing the safer environment for abortion that the provisions (seem to) aim for, the American Medical Association rebuttal explained that «continuity of care is achieved through communication and collaboration between specialized health

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[214] H.S. ALEXANDER, *The theoretic and democratic implications of anti-abortion trigger laws*, *op. cit.,* page 403.
[215] M. BERNS, *Trigger Laws*, *op. cit.*, page 1668.
[216] K. REEDY, *The TRAP: Limiting Women's Access to Abortion through Strategic*, *State-level Legislation*, Senior Theses, Trinity College, Hartford, 2014.
[217] K. REEDY, *The TRAP: Limiting Women's Access to Abortion through Strategic*, *State-level Legislation*, *op. cit.,* page 29 ss.
[218] M.H. MEDOFF, C. DENNIS, *TRAP abortion laws and partisan political party control of state government*, in *American Journal of Economics and Sociology*, Volume 7, Number 4, October 2011, page 955.

care providers, which does not depend on those providers having hospital privileges». [219]

Even if formally legitimate, the true objective of placing obstacles in the way of physicians hidden behind the on-paper goal of ensuring a specific quality of care raised doubts about the justness and legal admissibility of TRAP laws.

In 2011, Missouri enacted legislation that required abortion providers to be located within 30 miles of a hospital, have procedure rooms at least 12 feet long and 12 feet wide, with the ceiling at least 9 feet high and doors at least 44 inches wide, while South Carolina introduced limitations on the outside areas of abortion provider facilities, as they needed to be kept free of rubbish, grass and weed, and in the inside of the building as well because the rooms' temperature had to be maintained between 72 and 76 degrees Fahrenheit. [220]

As efforts to use clinic regulations to limit access to abortion gained momentum, by 2023 a total of eighteen States had passed TRAP laws where specific requirements for procedure rooms and corridors were introduced, as well as obligations for facilities to be near and have relationships with local hospitals. [221] Today, almost half of the 50 American States[222] have laws or policies that extensively regulate abortion providers and go beyond what is necessary to ensure patient safety, serve no legitimate health purpose besides driving out-of-business abortionists, and make it more costly and difficult for abortion services to be supplied. [223]

To that end, a consistently helpful hand in the passage of the regulations has been given by the American United for Life Association, whose legal team authored the template on which legislators could base their project of legislation aiming to protect women's health and the lives of the unborn, without setting off the alarm bell of violating the principles set in Casey and Roe. [224] Naturally, such helpful intervention became less relevant as the Dobbs decision returned to the States the ability to regulate, and ban, abortion.

Nonetheless, before the Supreme Court rendered the 2022 landmark decision denying constitutional protection of the right to abortion, in 2016 it struck down some of the most burdensome of these restrictions that had been enacted in Texas, a ruling which would have paved the way to challenge other states' overly burdensome regulations that target abortion providers if the right to access the termination of a pregnancy hadn't been voided shortly after. [225]

2.2.1.1. Texas House Bill 2 and Senator Davis' filibuster……

The undeniable success of TRAP laws in restricting access to the abortion procedure is exemplified in the Texas evolution of the legal discipline of abortion.

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[219] K. REEDY, *The TRAP: Limiting Women's Access to Abortion through Strategic*, *State-level Legislation*, *op. cit.*, page 61.
[220] M.H. MEDOFF, C. DENNIS, *TRAP abortion laws and partisan political party control of state government*, *op. cit.*, page 955 ss.
[221] *Targeted Regulation of Abortion Providers*, in *Guttmacher Institute*, August 31, 2023.
[222] *Targeted Regulation of Abortion Providers*, *op. cit.*
[223] M.H. MEDOFF, C. DENNIS, *TRAP abortion laws and partisan political party control of state government*, *op. cit.*, page 955 ss.
[224] K. REEDY, *The TRAP: Limiting Women's Access to Abortion through Strategic*, *State level Legislation*, *op. cit.,* page 43.
[225] *Targeted Regulation of Abortion Providers*, *op. cit.*

Ever since the decision of Roe, the abortion issue has remained a highly politicized and contentious topic and the State's 20th-century legislation imposed restrictions not only on the women requesting to undergo the procedure but on the abortion providers as well. To name a few, women who were looking for an abortion had to receive directed counseling, parental consent if they were a minor and a mandatory ultrasound as the provider described to them what the image showed before the surgery.

The adoption of such dispositions reflected a total decline in abortion: despite being the second most populous state, only 6.9 percent of all abortions taking place in the United States would happen on Texas soil in 2014. [226]

Amongst the various pieces of Texas legislation regulating abortion, was also a bill that, by mandating that all physicians conducting abortions have hospital admitting privileges within 30 miles of the clinic where the termination was being performed, would effectively lead to the closure of all but 5 clinics in Texas. House Bill 2 also imposed the banning of abortions after 20 weeks of pregnancy and of medical abortions after 7 weeks, required that abortion clinics meet with the same standards imposed on surgical centers, and demanded that women visit the clinic once for a sonogram, twice for doses of a drug and once for a follow-up. [227]

The supporters of the bill envisioned that its enactment would have protected women's health and held clinics to high standards, but opponents believed instead that the costly renovations and equipment needed to meet the requirements would have caused the closing of the great majority of the 42 existing clinics. [228]

On June 25, 2013, Senator Wendy Davis held a nearly 11 hours filibuster, as she stood on the floor of the Senate prolonging the debate to run out the clock before lawmakers could vote on the bill. Even though the bill eventually passed in a second special legislative session, the obstructive action quickly 'went viral', targeting media attention on the «raw abuse of power» of the bill's essence, as Ms. Davis described it. [229]

Furthermore, three months after the House Bill had become law, the District Court of Austin, in front of which the bill had been challenged by Planned Parenthood of Greater Texas, blocked the enactment of the law, considering that «the act's admitting-privileges provision [was] without a rational basis and [placed] a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus». [230] The Court of Appeal of New Orleans, famous for its more conservative holdings, reversed the decision because it considered that the law did not pose an 'undue burden' on women's rights. [231]

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[226] K. REEDY, *The TRAP: Limiting Women's Access to Abortion through Strategic*, *State-level Legislation*, *op. cit.,* page 47.
[227] K. REEDY, *The TRAP: Limiting Women's Access to Abortion through Strategic*, *State-level Legislation*, *op. cit.,* page 49 ss.
[228] M. FERNANDEZ, *Filibuster in Texas Senate Tries to Halt Abortion Bill*, in *The New York Times*, June 25, 2013.
[229] M. FERNANDEZ, *Filibuster in Texas Senate Tries to Halt Abortion Bill*, *op. cit.*
[230] K. REEDY, *The TRAP: Limiting Women's Access to Abortion through Strategic*, *State-level Legislation*, *op. cit.*, page 52.
[231] K. REEDY, *The TRAP: Limiting Women's Access to Abortion through Strategic*, *State-level Legislation*, *op. cit.,* page 49 ss.

At the time, Texas' TRAP law, and many more like it, could go on to actively restrict women's access to abortion, even if the right had been recognized as constitutionally protected because the provisions directly attacked those who could offer such service and the targeting of women was indirect.

Roe hadn't been overturned (yet), but its concrete application and the implementation of its principles were slowly but consistently deteriorating.

2.2.1.2. June Medical Services, LLC v. Russo……

In 2016, the Supreme Court reviewed two pre-viability regulations of Texas House Bill 2, the TRAP law aforementioned, determining, in the Whole Woman's Health v. Hellerstedt decision, that «the regulation requiring hospital admitting privileges within thirty miles was illogical, considering that most procedure and particularly medication-abortions, [had] little to no complications», and, even if complications did arise, they would usually happen hours or days after the procedure, in which case the patient was more likely to go a hospital near their residence. [232]

Three years later, the Court had to rely on Hellerstdet when it decided to grant certiorari, meaning it accepted to hear the case, for June Medical Services v. Russo, a lawsuit challenging the exact same regulation object of the Hellerstedt case, aka the hospital admitting privileges requirement. [233]

Louisiana's Unsafe Abortion Protection Act, or Act 620, required that all Louisiana abortion providers obtained admitting privileges at a hospital within thirty miles of the location where they performed abortions, and, just like in Hellerstdet, the District Court found that the enforcement of the act imposed an undue burden on Louisiana women, as it would have left only one abortion provider and clinic to serve the needs of the roughly 10,000 abortion that are sought annually in the State. [234]

In contrast, the Fifth Circuit judged in favor of the State of Louisiana, finding that requiring admitting privileges would not burden access to abortion, and, in 2020, the Supreme Court reversed once again the decision, judging in compliance with the District Court that Act 620 «burdened abortion providers by forcing them to stop providing abortion services, and conferred no benefits and did nothing to further the State's purported interests in maternal health and safety». [235]

Justice Stephen Breyer, who wrote the plurality opinion, followed in the footsteps of the Hellerstdet precedent and deemed the Louisiana law as imposing an undue burden on abortion access, disclosing that TRAP laws could not inflict restrictions on clinics without boundaries. Even if the laws weren't explicitly

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[232] B. WINKLER, *What about the Rule of Law? Deviation from the Principles of Stare Decisis in Abortion Jurisprudence, and an Analysis of June Medical Services L.L.C. v. Russo Oral Arguments,* in *UCLA Law Review Discourse,* Number 1, Volume 68, 2020, page 20.

[233] B. WINKLER, *What about the Rule of Law? Deviation from the Principles of Stare Decisis in Abortion Jurisprudence, and an Analysis of June Medical Services L.L.C. v. Russo Oral Arguments, op. cit.,* 14 – 38.

[234] C. REIDER, *June Medical Services L.L.C. v. Russo: Analyzing the Negative Impact of Maintaining the Status Quo on Abortion*, in *UIC Law Review*, Number 1, Volume 55, Spring 2022, 120 – 175.

[235] C. REIDER, *June Medical Services L.L.C. v. Russo: Analyzing the Negative Impact of Maintaining the Status Quo on Abortion*, *op. cit.,* page 139.

banning abortion, the undue burden still applied to the protection of the right to termination of pregnancy. [236]

Nonetheless, the decision was met with much dissent by Justices Thomas, Alito, Gorsuch, and Kavanaugh, the Justices who, coincidentally, would sign on the majority's opinion for the Dobbs' decision to overrule Roe and Casey.

2.2.3 Zombie laws' resurrection…….....

Somewhat similar to trigger laws are 'zombie' laws, which were enacted in the late 1800s and early 1900s and prescribed the criminalization of abortion under most circumstances, but were never repealed after Roe and Casey constitutionally recognized the protection of the right to end unwanted pregnancies. Such zombie laws may regulate various legal matters, but the most relevant ones concern abortion, and, as put quite harshly by Professor of Law at the Florida International University College Howard M. Wasserman, «their constitutional invalidity is plain to all but the plainly incompetent». [237]

The goal of keeping these invalid laws impressed in the book is the same one that trigger laws go after, meaning ensuring that abortion would be regulated according to the restrictive provisions of the unconstitutional laws in the event that the Roe precedent is overturned. This particular inconsistency is possible according to the doctrine of the separation of powers because Courts can invalidate laws but it is only the legislative's power that can remove the censored law from the books, through a separate and explicit legislative act. [238]

Envisioning a newly aligned Supreme Court close to repealing the 1973 precedent, in the last decades States have been enacting laws prohibiting pre-viability abortions, which was deemed unconstitutional under the Casey rulings, seeking to create litigation through which the Court could restore the States' power to limit reproductive freedom. [239]

The 2022 Dobbs decision did precisely that, as the Court concluded that the reasonings used in the precedents were incorrect and that nowhere in the constitutional text protection for the right to abortion could be found. Therefore, Justice Alito, writing for the majority, established that the «authority to regulate abortion [had been] returned to the people and their elected representatives» thanks to the ruling's reversal of Roe. [240]

Yet, with the resurrections of zombie laws that had been patiently waiting for this event to occur, no democratic discussion or debate took place. Current legislators, instead of willingly engaging in ethically and medically complex public conversation necessary to ground reasonable policies in the majority's consensus, aware of the controversy that these debates still spark, cowardly

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[236] C. REIDER, *June Medical Services L.L.C. v. Russo: Analyzing the Negative Impact of Maintaining the Status Quo on Abortion*, *op. cit.,* page 131.
[237] H.M. WASSERMAN, *Zombie Laws*, in *Lewis & Clark Law Review*, Number 4, Volume 25, 2022, page 1065.
[238] L.M. FLECK, *Abortion and "Zombie" Laws: Who Is Accountable?*, in *Cambridge Quarterly of Healthcare Ethics,* Number 3, Volume 32, 2023, page 307.
[239] H.M. WASSERMAN, *Zombie Laws*, *op.cit.*, page 1064.
[240] L.M. FLECK, *Abortion and "Zombie" Laws: Who Is Accountable?*, in *Cambridge Quarterly of Healthcare Ethics, op. cit.,* page 307.

relied on an «unaccountable dead hand reaching from the past and governing [the] medical and political life [of] today». [241]

Legislators owe their citizens the respect and duty that come with their position and should not hide behind statutes developed decades ago, in a context where women's voices were barely audible. If by 2022 women still won't be heard by their representatives, then when will it happen?

2.3. The politicization of the Supreme Court……..

When the Constitution was being drafted, the Framers decided to designate a uniquely independent Supreme Court to safeguard the Constitution, fearing that political influences could turn the public against the Court and eventually break the strict constitutional boundaries that defined the separation of powers. [242]

Nonetheless, politicians have for long played into the Framers' fear, politicizing not only the decisions that the Court delivered but the composition that formed the Court too. Based on the aim to 'save the Constitution from the Court and the Court from itself', the originally apolitical judicial institution's reputation has become another reason for Americans to not trust the federal government.

Congress and the President, whether Democratic or Republican-oriented, have belittled the Court in public statements, deriding their 'unelected' nature, whereas Justices' lack of defenses has made them unable to counterattack, as public and televised responses would put at risk their credibility. But the greater risk concerns the credibility of the Supreme Court as a whole rather than of the single Justices, because «if the Court loses the authority to check political power and make unpopular decisions, it cannot enforce the Constitution with the same effectiveness.» [243]

The issue of abortion and the legal decisions that have shaped it over time pose a significant concern, making it essential to comprehend the circumstances that led to the overruling of Roe in 2022. Rather than a sterile retelling of the Justices' appointments that led to the court's politicization, the next paragraphs aim to fill in with pertinent and compelling content the background from which the Dobbs decision stemmed, to illustrate how an extremely intricated structure of factors have had a role in the play. To casually dismiss the overrule as a predictable outcome is to inadequately disregard the weight of such an ending.

2.3.1 The rejection of Judge Bork's nomination……..

Between 1986 and 1987, President Reagan nominated Justice William H. Rehnquist to be Chief Justice and Justice Antonin Scalia to fill Rehnquist's seat.

During the Chief Justice's nomination hearings, senators thoroughly questioned his view on civil rights, commitment to racial justice, and concern for women and minorities; Associate Justice Scalia, adversely, had a much easier time at his hearing, but senators feared his evasiveness in answering their questions. [244]

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[241] L.M. FLECK, *Abortion and "Zombie" Laws: Who Is Accountable?, op. cit.*, page 307.
[242] E. HAMILTON, *Politicizing the Supreme Court*, in *Stan. L. Rev. Online*, Volume 65, August 30, 2012, 35 – 40.
[243] E. HAMILTON, *Politicizing the Supreme Court*, *op, cit.*, page 39.
[244] M. GRIFFIN, *Politics and the Supreme Court: The Case of the Bork Nomination*, in *Journal of Law & Politics*, Volume 5, Number 3, Spring 1989, 551 – 604.

Scalia's appointment was unanimous, whereas only 65 senators voted in favor of Rehnquist's nomination. Invoking his effort to reshape the federal judiciary through the appointments of judges who would be hard on crime, during the 1986 congressional elections Reagan unsuccessfully attempted to call for Republican support. The 100th session of Congress displayed a Democratic majority, and Senator Biden became Chairman of the Judiciary Committee, reconstituted with an 8-6 Democratic majority as well. [245]

When Justice Lewis F. Powell's 'swing vote' in many 5-4 decisions disappeared from future hearings together with his decision to retire, the Reagan administration thought it suited to seize the opportunity to make the Court more conservative and hopefully overturn Roe v. Wade. The choice fell on the nomination of Judge Robert Bork. [246]

The debate that arose from the nomination hearings and Bork's judicial restraint and conservative approach ended in a Senate rejection that would become so famous that the term 'get borked' was introduced in the American dictionary, with the meaning of «attacking or defeating (a nominee or candidate for public office) unfairly through an organized campaign of harsh public criticism or vilification». [247]

Undoubtedly, the defeat of a Supreme Court nominee by the largest margin in history had been caused by various factors.

Firstly, the American Bar Association's Standing Committee on the Federal Judiciary did not vote unanimously to give Bork the highest rating, determining a setback in the qualifications that the judge possessed; [248] secondly, he never refused to answer questions and preposterous allegations, such as the ones accusing him of ordering the sterilization of women sustained by a campaign of misinformation ran against him; [249] thirdly, he unapologetically negatively judged previous decisions of the Supreme Court that he deemed incorrect, for example calling the Roe ruling unconstitutional because, in his opinion, nobody could believe that the Constitution allowed, much less demanded, the recognition of protection at a constitutional level for the right to abortion. [250]

Nonetheless, these arguments only partially explained the rejection of Bork's nomination, and not even the purely partisan argument that the adjudication failure was caused by his republican views in a Senate controlled by the opposite party was convincing: Justice Kennedy's following unanimous

[245] M. GRIFFIN, *Politics and the Supreme Court: The Case of the Bork Nomination, op. cit.*, 551 – 604.

[246] M. GRIFFIN, *Politics and the Supreme Court: The Case of the Bork Nomination, op. cit.*, 551 – 604.

[247] "Bork." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/bork.

[248] M. GRIFFIN, *Politics and the Supreme Court: The Case of the Bork Nomination, op. cit.*, 551 – 604.

[249] A. AUSTIN, *Battle For Justice: How the Bork Nomination Shook America*, in *BYU Law Review*, Volume 4, 1989, 1277 – 1285.

[250] M. GRIFFIN, *Politics and the Supreme Court: The Case of the Bork Nomination, op. cit.*, 551 – 604.

confirmation in front of the same Democratic-controlled Senate excluded the correctness of such opinion. [251]

Rather, the evidence overwhelmingly pointed to his legal philosophy being too far removed from the expectations of society as the primary reason for his defeat. His originalism view adhered to strict, self-encased rules, and Republican President Reagan identified him as one of the «judges who believe the courts should interpret the law, not make it», [252] in clear contrast to the liberal interpretation of the Constitution as a living document that evolves with the changes of society. [253]

Throughout Bork's nomination process, the discussion revolved around his «lengthy history of controversial and conservative academic writing», rather than his qualifications, which transformed the appointment of Supreme Court Justices into a contentious political arena. Senator Dole's comment suggesting that he would «lay low until nominated» if he was ever selected to become a Justice, was going to become more significant than he had anticipated. [254] Eventually, having learned from past mistakes, President Reagan announced the nomination of Justice Anthony M. Kennedy which, as mentioned above, was met with unanimous consensus, and the judge was sworn in at the beginning of 1988. [255]

2.3.2 Justice Thomas' sexual assault accusations and attack of character……..

In 1991, President Bush nominated Clarence Thomas to replace Thurgood Marshall as the Court's African-American Justice, promptly engendering questions about his conservative political views and his qualifications, having less than one and a half years of experience on the appeals court and minimally qualified rating by the American Bar Association. [256] With the ghost of Bork's defeat caused by his strong positions, Thomas disavowed most questions that could entertain doubts about his ideology and would put his impartiality at stake. Yet, in retrospect, his assertion under oath of abandoning his former positions to develop judicially neutral positions turned out to be deceptive. [257]

During the nomination hearings, liberal members of the Judiciary Committee, still guided by Senator Biden, had their hands tied, as any question of Thomas's abilities could determine accusations of racism. Because the hearings were widely televised and watched closely by American citizens, Thomas used this racist rhetoric to its advantage, calling on the all-white

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[251] M. GRIFFIN, *Politics and the Supreme Court: The Case of the Bork Nomination, op. cit.*, 551 – 604.
[252] M. GRIFFIN, *Politics and the Supreme Court: The Case of the Bork Nomination, op. cit.*, page 565.
[253] A. AUSTIN, *Battle For Justice: How the Bork Nomination Shook America*, *op. cit.*, 1277 – 1285.
[254] A. AUSTIN, *Battle For Justice: How the Bork Nomination Shook America*, *op. cit.*, 1277 – 1285.
[255] M. GRIFFIN, *Politics and the Supreme Court: The Case of the Bork Nomination, op. cit.*, 551 – 604.
[256] M. LIEF PALLEY, H.A. PALLEY, *The Thomas Appointment: Defeats and Victories for Women*, in *PS: Political Science and Politics*, September 1992, Volume 25, Number 3, 473 – 477.
[257] M. LIEF PALLEY, H.A. PALLEY, *The Thomas Appointment: Defeats and Victories for Women, op. cit.*, 473 – 477.

Committee for allowing a «high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas». [258]

Nonetheless, his political conservatism and lack of qualifications left the stage when the central focus shifted to the sexual harassment accusations made by his former assistant Anita Hill. [259]

Professor Hill was an African-American woman who worked under Thomas at the Department of Education and the Equal Employment Opportunity Commission. In front of the Committee and, thanks to television broadcasting, in front of the whole Nation as well, she testified on the multiple advances she had received, regardless of her rejections, and the explicit and vivid descriptions of pornography involving women with large breasts, women having sex with animals, group sex and rape scenes, that she had to endure during her time working with Thomas. [260]

In response, Republicans' vindictiveness attacked her credibility, as Senator Hatch suggested she may have taken inspiration for some of the episodes she had testified about from movies or other federal cases, as well as her mental stability, given the statement of Senator Simpson that «if a person suffers from a delusional disorder he or she may [still] pass a polygraph test». [261] Most importantly, there was a general absence of concern about the fairness of the tactics being used to support the validity of Hill's statements, as the Senate had allowed her personal life to be explored while excluding the same level of intimate investigation in the life of Judge Thomas. [262]

During the hearings, no concrete evidence was presented, resulting in a situation where it was one person's word against another. According to public opinion polls, most African-American women did not believe Hill's testimony. On the other side, some people felt that the hearings highlighted the unique challenges faced by black females who belong to two minority groups in American society. [263]

Whatever the case was, Thomas' appointment was approved on October 15, 1991, by a vote of 52 to 48. [264] Though President Bush had found approval for the nomination presented, shortly after the confirmation he signed into law the Civil Rights Act, whose intent was in direct opposition to Thomas's positions. Probably in an attempt to redeem himself in the eyes of the more moderate elements of the Republican Party who questioned the judicial nomination, Bush authorized legislation that could restore «affirmative action rights for women and

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[258] J. JACOBS, *Anita Hill's Testimony and Other Key Moments From the Clarence Thomas Hearings*, in *The New York Times*, Sept. 20, 2018.
[259] J. JACOBS, *Anita Hill's Testimony and Other Key Moments From the Clarence Thomas Hearings*, *op. cit.*
[260] J. JACOBS, *Anita Hill's Testimony and Other Key Moments From the Clarence Thomas Hearings*, *op. cit.*
[261] J. JACOBS, *Anita Hill's Testimony and Other Key Moments From the Clarence Thomas Hearings*, *op. cit.*
[262] M. LIEF PALLEY, H.A. PALLEY, *The Thomas Appointment: Defeats and Victories for Women, op. cit.*, 473 – 477.
[263] R. CHAPMAN, *Anita Hill,* in R. CHAPMAN, J. CIMENT, *Culture Wars in America: An Encyclopedia of Issues Viewpoints and Voices*. 2014, 305 – 306.
[264] M. LIEF PALLEY, H.A. PALLEY, *The Thomas Appointment: Defeats and Victories for Women, op. cit.*, 473 – 477.

nonwhites which had been undermined in a series of 1989 Supreme Court decisions». [265]

In substance, conscious of the politically conservative Justice he had chosen, the President made an effort to restore political balance through the advancement of more liberal legislation. The awareness of how politically oriented the Supreme Court's appointments had become was now rather evident.

2.3.3 The route to sexual equality in Justice Ginsburg's legal work……...

The first woman to be both nominated and appointed Justice in the Supreme Court was Sandra Day O'Connor, selected by President Ronald Reagan in 1981, though, at first, she had been offered nothing but secretarial jobs after graduating top of her class in Standford University's law school. More than ten years later, President Clinton announced Judge Ruth Bader Ginsberg, who had started her law career as one of the nine women in the 552-students-class of Harward Law School and transferred to Columbia University to complete her degree, as his Supreme Court nomination. [266]

At her confirmation hearing, she presented her judicial performance as driven by principles of collegiality, moderation, and respect for tradition rather than ideology, as she stated: «My approach, I believe, is neither 'liberal' nor 'conservative.' Rather, it is rooted in the place of the judiciary – of judges – in our democratic society». [267] Such an approach proved popular among senators who saw in Ginsburg a range of values well suited for the Court, and the appointment collected an overwhelming 96-3 confirmation vote. [268]

Before sitting among Justices, Ginsburg had already stepped inside the Supreme Court's courtroom presenting six cases and winning five of them, with a clear goal on her mind: persuade the Court that the 14th Amendment's guarantee of equal protection applied not only to racial discrimination but to sex discrimination as well. [269]

Aware of the Justices'lack of comprehension of the different treatment of men and women in legal contexts as well as any other burdensome situations, Ginsburg's course of action meant selecting cases regarding laws based on stereotyped notions of male and female abilities and needs, which were disadvantaging men and women alike. [270]

In her quest for equality, not favoritism, for both genders, economic and social opportunity had to be equal for women and for men, an aspiration which she emphasized in her concurring opinion on the Bennis v. Michigan case. In the decision, the petitioner jointly owned an automobile in which her husband had engaged in sexual activity with a prostitute, and that the state of Michigan had,

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[265] M. LIEF PALLEY, H.A. PALLEY, *The Thomas Appointment: Defeats and Victories for Women, op. cit.*, page 475.
[266] L. GREENHOUSE, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, in *The New York Times*, published Sept. 18, 2020, updated Sept. 24, 2020.
[267] L. KRUGMAN RAY, *Justice Ginsburg and the Middle Way*, in *Brooklyn Law Review,* Volume 68, Number 3, 2003, page 630.
[268] L. KRUGMAN RAY, *Justice Ginsburg and the Middle Way*, *op. cit.*, page 629 ss.
[269] L. GREENHOUSE, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87, op. cit.*
[270] L. GREENHOUSE, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87, op. cit.*

for that reason, forfeited. In spite of those who reprimanded her for making «a woman pay for her husband's sins», Ginsburg considered that «all property owners who voluntarily entrust their property to others risk forfeiture if the other uses the property for illegal activities» and, from a constitutional perspective, wives were no different from husbands in such cases. [271]

In Linda Greenhouse's words, an American legal journalist and the Supreme Court correspondent for the New York Times, Ginsburg's project, which had started long before her appointment at the highest court, was «to free both sexes, men as well as women, from the roles that society had assigned them and to harness the Constitution to break down the structures by which the state maintained and enforced those separate spheres». [272]

Her judicial model precluding bold or dramatic decision-making stayed consistent as she wrote majority, concurring, and dissenting opinions for the Supreme Court. Her best-known majority opinion in the United States v. Virginia case of 1996, challenging single-sex education in the Virginia Military Institute where the all-male admissions policy was found unconstitutional, gathered the consensus of all the Justices besides Scalia, who wrote a dissenting opinion that Ginsburg suggested saw «fire where there [was] no flame». [273]

According to Justice Ginsburg, instead, the Equal Protection Clause guaranteed full citizenship stature to women and men, and State actors controlling gates to opportunities could not exclude «qualified individuals based on fixed notions concerning the roles and abilities of males and females». [274] It did not matter that most women, like most men, had no interest in VMI's hostile methods of instructions: as long as some women, no matter how few, who met all the institute's admissions standards and were capable of following its rigorous program, wanted to attend the military school, Virginia could not categorically exclude those women without taking into consideration their individual merit. [275]

During her last years of work, as the Supreme Court had turned notably more conservative during her last years of work, her opinions became somewhat more powerful, though never polarized.

A dissenting opinion in the ruling of Ledbetter v. Goodyear Tire and Rubber Company calling on Congress to clarify the meaning of the provision object of the case contained in the Civil Rights Act, magnified by the unusual step of reading the dissent from the bench, made such an impact that two years later, in 2009, President Obama overturned the Court's parsimonious reading of the Civil Rights

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[271] D. JONES MERRITT, D. M. LIEBERMAN, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality,* in *Columbia Law Review*, Number 1, Volume 104, January 2004, page 44.

[272] L. GREENHOUSE, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87, op. cit.*

[273] L. KRUGMAN RAY, *Justice Ginsburg and the Middle Way*, *op. cit.,* page 643.

[274] D. JONES MERRITT, D. M. LIEBERMAN, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality,* in *Columbia Law Review*, Number 1, Volume 104, January 2004, page 42.

[275] D. JONES MERRITT, D. M. LIEBERMAN, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality,* in *Columbia Law Review*, Number 1, Volume 104, January 2004, page 42.

Act and signed into law an Act in the name of the case's plaintiff, the Lilly Ledbetter Fair Pay Act. [276]

Justice Ginsburg's approach toward the issue of abortion followed the same pattern as her legal opinions: her support of the cause was unequivocal, but her initial moderate methodology made her critical of Roe, as the boldness of the decision, in her view, «cut off change through the political process and provoked precisely the kind of backlash that undermines both the Court and its holdings».[277] In Stenberg v. Carhart, Ginsburg concurred with the majority decision of striking down Nebraska's Partial Abortion Act, stating that the statute did not seek to protect the health of women but, rather, sought to «chip away at the private choice shielded by Roe v. Wade, even as modified by Casey». [278]

But when the Supreme Court's conservative view began to threaten the constitutional protection of the right to abortion in the twentieth century, her growingly impactful critics found good ground in her dissent for Gonzales v. Carhart, as she depicted the majority's way of thinking as reflective of ancient notions about women's place in the family and under the Constitution. [279]

The Justice also sided with the majority in the Hellerstdet decision, making her a protagonist of quite a fair amount of decisions regarding abortion, which she always cared to protect. Her concurrence of the 2016 ruling highlighted how it was «beyond rational belief» that H.B.2 could be interpreted as legislation genuinely seeking the protection of women when it did «little or nothing for health but rather strew[ed] impediments for abortion».

Ginsburg's fight for sexual equality started early in her legal career, and in the last years of her life, she became a model for younger women who looked up to her influence, dignity, and embodiment of an empowered future, so much so that the nickname 'Notorious R.B.G' became a viral sensation, depicting the admiration she had gained all over the United States.

Ruth Ginsburg died in 2020 of lung cancer, after beating colon cancer and early-stage pancreatic cancer in the years before. [280]

Although the Trump administration replaced her with another female Justice, the new appointment would soon reveal that her approach followed a much more polarized path, abandoning Ginsburg's moderate traditions.

2.3.4 The questionable appointments of President Trump……..

During his only term, Republican President Donald Trump managed to nominate and appoint three Justices to the Supreme Court, completely reshaping its composition and dangerously tipping the balance of the Court toward explicit conservatism, rather than designing a fairly balanced forum.

In reality, the true mastermind hiding behind such successful results was Senator Mitch McConnell, who had devoted his life to the creation of a right-

[276] L. GREENHOUSE, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87, op. cit.*
[277] L. KRUGMAN RAY, *Justice Ginsburg and the Middle Way*, *op. cit.,* page 636.
[278] *Stenberg v. Carhart*, 530 U.S. 914 (2000), Ginsburg,J., concurring at 951 – 952.
[279] L. GREENHOUSE, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87, op. cit.*
[280] L. GREENHOUSE, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87, op. cit.*

oriented Court and finally saw his dreams come true with the last Trump appointment of Justice Amy Coney Barrett. Presidents come and go, and the American people's votes can easily swing from left to right throughout the years, but, as the high court's judges are appointed for life, McConnell's lifelong work was to ensure a conservative dominance in the Supreme Court for generations to come. [281]

His endeavor had started long before Trump's election, as he threatened Democrats of using the same tactics they had used at the rejection of Bork's nomination in 1987. When, in 2016, news broke that Justice Scalia had been found dead in his bed, McConnell knew that all his efforts of the past four decades could finally turn into success, as he understood the political implications of the judge's death. [282]

2.3.4.1 McConnell's strategic inaction and the subsequent appointment of Justice Gorsuch……..

Mere hours after Justice Scalia had died, on February 13, 2016, Mitch McConnell, Senate Major Leader, promptly stated that any replacement Justice that President Obama could propose would not be taken into consideration. The argument for such a course of action, according to McConnell, relied upon the unfairness of a President at the end of his term to be able to nominate a successor, as «the American people should have [had] a voice in the selection of their next Supreme Court Justice». [283]

The plan had three components: firstly, if Obama submitted a nomination, the Senate would revisit the matter only after the presidential election, withholding its consent. According to McConnell the debates concerning the presidential candidates were already taking the stage, and American voters were casting ballots with this issue in mind, so it was only fair to let citizens decide who would nominate the next Justice.

Second, the Judiciary Committee would not hold hearings on any Supreme Court nominee until after the next President would be sworn in. In substance, the Committee had to pretend that a vacancy did not exist and that a filling was not needed, at least until the end of Obama's second presidential term.

Third, Republicans declined to hold even traditional courtesy meetings with any Obama nominee. The overall practice of actively obstructing the start of a nomination process, though not unconstitutional, was a clear abuse of power and represented a major degeneration of the already dysfunctional confirmation process. [284]

In addition, such conduct was not consistent with any historical precedent. It was argued that the denied nomination stemmed from popularity concerns, as McConnell declared that the Senate «was not giving a lifetime appointment to this

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[281] M. KIRK, ET AL., *SUPREME REVENGE: Battle for the Court*, in *FRONTLINE,* Season 2019, Episode 10.
[282] M. KIRK, ET AL., *SUPREME REVENGE: Battle for the Court*, *op. cit.*
[283] J. S. CLARK, *President-Shopping for a New Scalia: The Illegitimacy of McConnell Majorities in Supreme Court Decision-Making*, in *Albany Law Review*, Volume 80, Number 2, 2016-2017, page 745.
[284] J. S. CLARK, *President-Shopping for a New Scalia: The Illegitimacy of McConnell Majorities in Supreme Court Decision-Making*, *op. cit.,* page 745 ss.

president on the way out the door to change the Supreme Court for the next 25 or 30 years». [285] But when President Trump, just a week into his presidency, nominated Justice Neil Gorsuch for the Scalia vacancy, his approval rating was already significantly lower than Obama's had been when he had attempted to nominate Merrick Garland for the same opening. [286]

The consequences of this tactic reflected harshly on the Supreme Court as a whole, as its stability came into question. After this, the public most likely became unable to trust that, however conflicting the confirmation debate, the political parties' intention remained to form a credited and qualified assembly of Justices. In addition, the legitimacy of the Court had been eroded by the process by which members come to acquire seats, rather than just by the adherence to the stare decisis principle. [287]

2.3.4.2 The defeat of the allegations against Justice Kavanaugh shows history repeating itself……...

A quarter of a century ago, Anita Hill had accused Justice nominee Clarence Thomas of sexual harassment during her time working with him. In 2018, the already controversial fight on President Trump's second nomination erupted in scandal as sexual misconduct allegations were made against Bret Kavanaough from former college classmate, and now Professor of Psychology, Christine Balsey Ford. [288]

History was repeating itself, not only because the Justice was eventually appointed regardless of the allegations, just like Thomas, but also because Kavanaugh's nomination and adjudication process was so bitter and partisan that it reminded levels of investment and anger only reached during the debates concerning the attempted appointment of Judge Bork. [289]

Some of the controversy stemmed from Kavanaugh's work at the White House during the Bush presidency, as well as his opinion that it was the Congress's duty to manage any investigative process that touched on the presidency, an interpretation that could indubitably be linked to bias against the ongoing investigation of President Trump by private associations. [290]

Yet what truly sparked an already incandescent debate were Doctor Ford's claims that, at a party during the college years, Brett Kavanaugh had pushed her into a bedroom and forced her down on a bed, attempting to take her clothes off with the help of another teenager, while holding his hand on her mouth. Ford had eventually managed to escape and lock herself in the bathroom, putting an end to the unfortunate episode. [291]

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[285] M. KIRK, ET AL., *SUPREME REVENGE: Battle for the Court*, *op. cit.*

[286] J. S. CLARK, *President-Shopping for a New Scalia: The Illegitimacy of McConnell Majorities in Supreme Court Decision-Making*, *op. cit.,* page 790.

[287] J. S. CLARK, *President-Shopping for a New Scalia: The Illegitimacy of McConnell Majorities in Supreme Court Decision-Making*, *op. cit.,* page 793 ss.

[288] J. NOVKOV, *The Troubled Confirmation of Justice Brett Kavanaugh*, in D. KLEIN, M. MARIETTA, *SCOTUS 2018, Major Decisions and Developments of the US Supreme Court*, 125 – 141.

[289] J. NOVKOV, *The Troubled Confirmation of Justice Brett Kavanaugh*, *op. cit.*, 125 – 141.

[290] J. NOVKOV, *The Troubled Confirmation of Justice Brett Kavanaugh*, *op. cit.*, 125 – 141.

[291] R. POGREBIN, K. KELLY, *Brett Kavanaugh Fit In With the Privileged Kids. She Did Not.*, in *The New York Times*, Sept. 14, 2019.

When the hearing took place, the University professor testified first, giving a detailed personal account of the assault and its impact upon her life deemed by many as sympathetic and credible; Kavanaugh's rebuttal, rather than presenting a well-argued confutation, attacked the confirmation process, describing it as «a national disgrace» in which Democrats had destroyed his family and his name. [292]

Like Thomas, while the victim had to go through a painful recollection of the abuse, the alleged perpetrator wouldn't even defend himself but rather directed his hits at the Senate components who, he believed, were wishing for his downfall through a tactical scheme.

Like Thomas, other witnesses who could have been called to testify were never introduced in the one-on-one confrontation.

Like Thomas, Kavanaugh was ultimately confirmed, with a vote of 50-48, representing a sure conservative addition to the Court. [293]

2.3.4.3 The legality of Justice Coney Barrett's confirmation during an election year……..

With Kavanaugh's confirmation, McConnell had moved the court further to the right. But it was the last of Trump's nominations for the Supreme Court that truly closed the deal on the configuration of a conservative majority of Justices.

As anticipated, Justice Ginsburg died on September 18, 2020, only two months away from the presidential elections. But the death of the Supreme Court's most prominent liberal and longest-serving woman on the Court so close to the end of his term did not deter President Trump from nominating a new Justice. [294]

Scheming in the shadows of the Republican President's choice was, again, none other than Mitch McConnell, ready to see the Supreme Court of his dreams come to life. The obvious remarks of hypocrisy, as only four years earlier McConnell had opposed the filling of a vacancy in the last year of Obama's presidency, did not faze McConnell in the slightest. [295]

Democrat Senator Durbin described the nomination and adjudication process as being done in a hurry-up fashion, as the routine steps of investigations of opinions, speeches, and writings didn't even occur. It was more a confirmation hearing (all Republicans would vote yes and all Democrats would vote no) rather than a real discussion or debate. [296] Just a week before the presidential election, the Judge was sworn in.

The process of adjudication for the Supreme Court had become so partisan that political maneuvers had invalidated the judiciary's legitimacy. The Court was now split solidly in a 6-3 conservative majority and every American law on critical issues such as health care, gun control, and abortion rights could now be possibly

[292] J. NOVKOV, *The Troubled Confirmation of Justice Brett Kavanaugh*, *op. cit.*, page 136.
[293] J. NOVKOV, *The Troubled Confirmation of Justice Brett Kavanaugh*, *op. cit.*, 125 – 141.
[294] R. KRUTZ, *Filling a Supreme Court Vacancy: The Legality of Confirming Amy Coney Barrett during an Election Year*, in *Saint Louis University Law Journal Online*, October 2020.
[295] M. KIRK, ET AL., *SUPREME REVENGE: Battle for the Court*, *op. cit.*
[296] M. KIRK, ET AL., *SUPREME REVENGE: Battle for the Court*, *op. cit.*

reshaped in a traditional trajectory, without even the chance of putting up a fight. [297]

It is worth mentioning that a big role in Barrett's confirmation developed around her motherhood, as the President introduced her as a «profoundly devoted mother» in addition to being a «stellar scholar and judge.» [298]

In 2022, with Roe reversed, it wasn't surprising for the first mother of school-aged children serving on the U.S. Supreme Court, as Trump had described her, to agree with the conservative majority opinion. More importantly, during the oral arguments for the Dobbs decision, Justice Barrett, identifying adoption as an alternative to abortion, shifted the focus to 'Safe-Haven' Laws rather than on statutes decriminalizing abortion.

In the words of Barret: «Pregnancy itself might impose a temporary burden on the mother, but if you could relinquish the baby you could avoid the burden of parenthood». [299] The argument stemmed from a politicized motherhood view that, to be fair, had little to do with any legal reasoning and, rather, called on emotional involvement.

2.4. The role of science…….

In a debate such as the one that revolves around abortion, the enactment of legal restrictions and policies can find scientific claims that either oppose or confirm the legitimacy of the regulations. The bioethical settings underlying the scientific support for either side of the abortion discussion have become increasingly relevant as medical and technological progress has developed and evolved. Abortion law is a relevant context in which it can be examined how legal institutions develop procedures for resolving differences in scientific approaches and determining the relevance that such scientific descriptions might have in justifying which policy to adopt. [300]

The pivotal question posed at the beginning of this thesis, '*When does life begin?*', has a univocal scientific answer: the fetus is individual, living, and human. What remains unanswered is, therefore, a different, yet similar, more precise non-scientific question: does the biological status also coincidentally confer to the fetus the moral and legal rights distinctive of a human person? [301]

In Roe v. Wade, the Supreme Court allowed States to protect fetuses after viability, but in no way did this concession for restriction on late abortions grant fetuses a constitutional status as persons. [302] When it was decided, the 1973 ruling divided the nation over the issue of abortion but also conflicted the legal

[297] R. KRUTZ, *Filling a Supreme Court Vacancy: The Legality of Confirming Amy Coney Barrett during an Election Year*, *op. cit.*
[298] H.H. WILLIAMS, *Just Mothering: Amy Coney Barrett and the racial politics of American motherhood*, in *Laws*, Volume 10, Number 2, 2021.
[299] M. TALBOT, *Amy Coney Barrett's Long Game,* in *The New York Times*, February 7, 2022.
[300] J.A. ROBERTSON, *Science Disputes in Abortion Law*, in *Texas Law Review*, Number 7, Volume 93, June 2015, 1849 – 1884.
[301] J.A. ROBERTSON, *Science Disputes in Abortion Law*, *op. cit.*, page 1849.
[302] J.A. ROBERTSON, *Science Disputes in Abortion Law*, *op. cit.*, page 1849.

community over the methodology for establishing fundamental rights, and reproductive rights to be more precise. [303]

In Planned Parenthood v. Casey, the lack of recognition of identity between fetus and person persisted, but the focus shifted to the greater possibility for States to enact restrictive measures. [304]

The questions that have been raised on reproductive rights have grown in number consistently with the expanding medical practices for procreation such as in vitro fertilization (IVF), preimplantation genetic diagnosis (PIGD), prenatal testing, and genetic modification of the embryo or the fetus. [305]

Ranging between issues of abortion, contraception, and sterilization, the test to recognize a constitutional meaning of the medical techniques has always been enacted by looking to American history and tradition in order to establish the presence of fundamental rights protected by the procedures. [306] It is the conformity to this test that has allowed Roe to recognize the constitutional protection of the right to abortion and, somehow, it is the same test that has also allowed for the overturn of the precedent in Dobbs.

Nevertheless, instead of focusing narrowly on whether traditions specifically include advanced and recent reproductive technologies (of course they don't), the question should shift to searching for continuity in the approach regarding reproduction. Therefore, depending on whether the Court finds that efforts to influence reproduction have occurred throughout the history of the United States, various advanced reproductive technologies can be found as constitutionally protected. [307]

The complexity of the Court's role is that, though the questions may present a remarkable scientific connotation, the tribunal cannot simply act as a 'science' court, but has to answer specific legal questions raised by the case. Most often than not «law drives science more than science drives law», meaning that justifications based on scientifically collected data can be used in legal settings dealing with bioethical questions only as much as the law allows them to be relevant. [308]

2.4.1 In lawmaking: the Partial-Birth Abortion Ban Act (2003)…….

After Casey had been decided, States took on different paths to find a way around the (less) restrictive limitations imposed by the ruling and one of the ways to spread support for the pro-life campaign related to the language of fetal

[303] S.M. SUTER, *The Repugnance Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, in *George Washington Law Review*, Number 6, Volume 76, September 2008, 1514 – 1598.
[304] J.A. ROBERTSON, *Science Disputes in Abortion Law*, *op. cit.*, page 1849.
[305] S.M. SUTER, *The Repugnance Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies, op. cit.*, page 1515.
[306] S.M. SUTER, *The Repugnance Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies, op. cit.*, page 1541.
[307] S.M. SUTER, *The Repugnance Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies, op. cit.*, page 1540 ss.
[308] J.A. ROBERTSON, *Science Disputes in Abortion Law*, *op. cit.*, page 1850.

personhood in both the approach towards the public and, eventually, as an implementation in the state legislations. [309]

Firstly, a systematic campaign to persuade the general public that abortion terminated the life of a baby, a human being, merged with the principled commitment to the recognition of fetal personhood. The National Right to Life Committee would emphasize that the choices being made concerning abortion would come from predators and providers rather than well-informed and thoughtful women. The pro-choice movement was deemed as falsely advertising an antagonism between a woman and her fetus, whereas pro-lifers would characterize the relationship between woman and fetus as an intimate connection. In addition, the lasting effects of abortion on women were described as ranging from post-abortion syndrome to sexual dysfunction, substance abuse, and suicide ideations. [310]

Eventually, such rhetorical discourses took over the legislative initiatives, as several States started to ban procedures used in second-trimester abortions, involving aborting a fetus and keeping it intact (dilation and extraction – D&X), or dismembering it first, and aborting through a more common dilation and evacuation procedure (D&E). Because Republicans gained control of Congress in 1995, rather than calling the procedures by their medical names, they reframed the medical process as a 'partial-birth abortion', with all the emotional implications that such a name would summon.

2.4.1.1 At the State level: the case of Nebraska.....

Nebraska was one of the thirty-one States that enacted a Partial-Birth Abortion Ban Act by 2000. [311] Because 'partial-birth abortion' was not a recognized medical term, Nebraska Legislative Bill 23, which was signed into law in June 1997, defined it as «An abortion procedure in which the person performing the abortion partially delivers a vaginally a living unborn child before killing the unborn child and completing the delivery». [312]

The statute further precised how the ban referred to the practice of abortion in which a doctor pulled the fetal body through the cervix, removed the contents of the fetal skull and performed delivery of a dead but intact fetus. [313]

Like the majority of the other state legislations enacting such provisions, the Nevada statute was struck in the federal courts, representing one of the «few

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[309] G.A. HALVA-NEUBAUER, S.L. ZEIGLER, *Promoting fetal personhood: The rhetorical and legislative strategies of the pro-life movement after planned parenthood v. Casey*, in *Feminist Formations,* 2010, 101 – 123.

[310] G.A. HALVA-NEUBAUER, S.L. ZEIGLER, *Promoting fetal personhood: The rhetorical and legislative strategies of the pro-life movement after planned parenthood v. Casey*, *op. cit.,* page 110.

[311] G.A. HALVA-NEUBAUER, S.L. ZEIGLER, *Promoting fetal personhood: The rhetorical and legislative strategies of the pro-life movement after planned parenthood v. Casey*, *op. cit.,* page 114.

[312] J. F. BERKOWITZ, *Stenberg v. Carhart: Women Retain Their Right to Choose*, in *Journal of Criminal Law and Criminology*, Number 2, Volume 91, Winter 2001, page 347.

[313] F.T. KUSHNIR, *It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003*, in *Loyola University Chicago Law Journal,* Number 4, Volume 35, Summer 2004, 1117 – 1188.

states-related abortion regulations to be consistently nullified by the federal courts after Casey». [314]

Dr. Carhart, a medical doctor licensed to practice medicine in eight states and who performed abortions from three weeks of gestation until fetal viability, challenged the constitutionality of the statute by bringing a lawsuit in front of the Federal District Court and seeking a preliminary injunction for the enforcement of the bill. When the case reached the Supreme Court in the case Stenberg v. Carhart, a five-member majority held the unconstitutionality of the ban for two reasons.

Firstly, Nebraska's argument that the lack of a health exception because of the rarity with which women used the procedure was deemed by the Court as baseless, as the State could not legislate against a treatment based on the frequency with which people request it. The State also called for the testimonies of the American Model Association and American College of Obstetricians and Gynecologists claiming that the D&X procedure in no circumstance would be considered the only appropriate medical abortion procedure. The Court, in an effort to comply with scientific opinions, stated that, in reality, various conflicting medical opinions on the issue co-existed. [315]

Furthermore, the Court argued that «the division of medical opinion about the matter [meant], at most, uncertainty – a factor that signal[ed] the presence of risk, not its absence»: because a significant amount of medical opinion, supported by valid medical reasons, stated that a procedure could expose some patients to unnecessary risk, the presence of a different view in itself did not prove the contrary. [316] Therefore, the complete absence of a clause formulating an exception in cases where the health of the women was at stake, creating an unnecessary risk of tragic consequences, was unconstitutional, and the statute had to contain such an exception. [317]

Secondly, the language of the law applied to both the D&E and the D&X procedures, which posed an undue burden on a woman's right to choose the first over the second. [318] The Court noted that, even if the statute's basic aim was to ban the D&X procedure only, the formulation of the text was broad enough to include in the scope of application of Bill 23 the D&E procedure as well. [319]

In addition, the statutory words' «partial delivery» were claimed by proponents of the statute as excluding the D&E procedure because the introduction of merely a limb into the vagina did not involve the delivery of the fetus. The Court argued, instead, that obstetric textbooks and even dictionaries

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[314] G.A. HALVA-NEUBAUER, S.L. ZEIGLER, *Promoting fetal personhood: The rhetorical and legislative strategies of the pro-life movement after planned parenthood v. Casey*, *op. cit.,* page 114.

[315] F.T. KUSHNIR, *It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003*, *op.cit.*, page 1141 ss.

[316] J. F. BERKOWITZ, *Stenberg v. Carhart: Women Retain Their Right to Choose*, *op. cit.,* page 361.

[317] J. F. BERKOWITZ, *Stenberg v. Carhart: Women Retain Their Right to Choose*, *op. cit.*, page 357 ss.

[318] F.T. KUSHNIR, *It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003*, *op.cit.*, page 1141 ss.

[319] J. F. BERKOWITZ, *Stenberg v. Carhart: Women Retain Their Right to Choose*, *op. cit.*, page 357 ss.

commonly referred to the term ‘delivery’ as to describe any facilitated removal of tissue from the uterus, and not only the removal of an intact fetus. [320]

The majority’s opinion, delivered by Justice Stephen Breyer, was joined by Justice David Souter and Justice John Paul Stevens, who wrote a concurrent opinion stating that the State had «no legitimate interest in requiring the physician performing the abortion to follow any procedure other than the one the physician believ[ed] in the best interests of the mother». [321] Justice Ruth Bader Ginsburg and Justice Sandra Day O’Connor also joined the majority and both of them wrote their own concurrences, emphasizing that the ban on partial-birth abortions aimed to chip away at the private choices shielded by Roe and Casey and reiterating the obligation for the statute to provide a health exception clause. [322]

2.4.1.2 At the federal level……..

The Supreme Court’s ruling did not deter Congress from following in the steps of the States, and in 2003 President Bush signed into law the Partial-Birth Abortion Act. [323]

According to the Act, «any physician who, in or affecting interstate commerce, knowingly performs a partial-birth abortion, and thereby kills a human fetus, shall be fined, imprisoned for not more than two years, or both». [324] The only exception provided concerned the case in which a danger deriving from a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused or arising from the pregnancy itself, would put at risk the life of the mother. [325] What seemed ironic was that such public law did not refer to any medically recognized procedure, as only an interpretation from the description of the procedure in the Act could identify that, most likely, its sphere of application concerned the D&X and D&E procedures. [326] At an age where medicine and law would often intertwine, the complete disregard of the Senate for the technical name of the procedure spoke volumes about the social perception, of the public and the Senators as well, regarding the procedure.

In addition, the Act referred to the Supreme Court’s case on the virtually identical Nebraska Statute, but it openly disregarded its finding, stating that «substantial evidence presented at the Stenberg trial and overwhelming evidence presented and compiled at extensive congressional hearings, much of which was compiled after the district court hearing in Stenberg, and thus not included in the Stenberg trial record, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a

[320] J. F. BERKOWITZ, *Stenberg v. Carhart: Women Retain Their Right to Choose*, *op. cit.*, page 357 ss.
[321] J. F. BERKOWITZ, *Stenberg v. Carhart: Women Retain Their Right to Choose*, *op. cit.*, page 362.
[322] J. F. BERKOWITZ, *Stenberg v. Carhart: Women Retain Their Right to Choose*, *op. cit.*, pages 363 – 364.
[323] A. GORDON, *The Partial-Birth Abortion Ban Act of 2003*, in *Harvard Journal on Legislation*, Number 2, Volume 41, Summer 2004, 501 – 516.
[324] A. GORDON, *The Partial-Birth Abortion Ban Act of 2003*, *op. cit.*, page 502.
[325] A. GORDON, *The Partial-Birth Abortion Ban Act of 2003*, *op. cit.*, 501 – 516.
[326] A. GORDON, *The Partial-Birth Abortion Ban Act of 2003*, *op. cit.*, 501 – 516.

woman upon whom the procedure is performed and is outside the standard of medical care».[327]

Three years after the enactment, just like the Nebraska Statute, the Act reached the Supreme Court, but the composition of the highest court of appeal had changed significantly since Carhart, and it showed: this time the Court upheld the congressional act on partial-birth abortion. The Gonzales v. Carhart case weakened the undue burden test, by banning a procedure of abortion even before viability and with no health exception, and broadened the range of state interests that could justify restrictions on reproductive choices. [328]

The majority's paternalistic efforts to protect women drew an unprecedented connection between abortion regulations and moral concerns and protecting the sensibilities of the community, undermining an equality-based conception of reproductive rights. [329] The bodily autonomy of women seemed to somehow have lost relevance in comparison with the impact of their personal and individual choices on the sentiments of their surrounding community.

More importantly, Justice Kennedy's opinion for the majority highlighted great disappointment in the medical profession, as he believed that physicians had abused «their delegated decisionmaking authority, using it more for political ends than based on medical expertise». [330] The deference to the medical profession's opinions was now completely absent, but Kennedy failed to engage with the considerable evidence that, at a minimum, a consistent portion of the medical community believed that the partial-birth procedure was medically necessary in some cases. [331]

2.4.2 In Judging: Whole Woman's Health v. Hellerstedt (2016)…….....

The role of science, besides finding relevance in the legislations enacted both at the federal and the state level, also came into play in some of the judgements delivered by the Supreme Court, holding more or less power depending on the composition of the Court.

As it has been anticipated earlier, in 2013 Texas adopted a TRAP law denominated House Bill 2 during a second special session, after the failure of its enactment during the first special session because of Senator Davis' filibuster.

Among its provisions, the Bill required that doctors performing abortions needed to have admitting privileges in a hospital within thirty miles and that abortion clinics needed to meet the standards imposed for ambulatory surgical centers (ASCs). [332] These requirements unfairly singled out women's health care providers, determining an undue burden on women attempting to access the

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[327] *Partial-Birth Abortion Ban Act of 2003*, Public Law (United States) 108–105, 117 Stat. 1201, enacted November 5, 2003, 18 U.S.C. § 1531, PBA Ban.

[328] S.M. SUTER, *The Repugnance Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies, op. cit.*, page 1566 ss.

[329] S.M. SUTER, *The Repugnance Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies, op. cit.*, page 1566 ss.

[330] S.M. SUTER, *The Repugnance Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies, op. cit.*, page 1571.

[331] S.M. SUTER, *The Repugnance Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies, op. cit.*, page 1571.

[332] J.A. ROBERTSON, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, in *UC Irvine Law Review*, Number 3, Volume 7, December 2017, 623 – 652.

procedure, and did not apply to other comparable medical procedures or practices. The aim was only to «drive reputable, experienced reproductive health care providers out of practice», rather than imposing regulations that worked towards ensuring the best possible health care that could be offered. [333]

The Bill became the object of judicial challenge, as several abortion providers and clinics believed that the admitting privilege and ASCs requirements of H.B.2 were facially unconstitutional. [334]

In 2016 the case reached the Supreme Court, and the key issue developed into giving substance to the undue burden test elaborated in Planned Parenthood v. Casey. Two were the possible interpretations.

On one hand, as long as no substantial impact on access occurred, a rational basis for the legislature would be enough to not contradict the undue burden standard. The U.S. Court of Appeals for the Fifth Circuit followed this approach, which reversed the previous judgment that had granted a declaration of facial unconstitutionality of the admitting privilege requirement. [335]

On the other hand, balancing burdens and benefits was deemed essential to determine whether the burden imposed by the regulation was undue. This interpretation allowed courts to assess the importance of the health interest, instead of considering that the resolution of an issue on which medical uncertainty existed was only for legislatures and not the courts. [336]

In Whole Woman's Health v. Hellerstedt, a ruling that handed a major setback for the pro-life movement, the Supreme Court found that the Court of Appeal's approach did not match the standard laid by Casey, as «both the admitting privileges and the surgical-center requirements place[d] a substantial obstacle in the path of women seeking a pre-viability abortion, constitute[d] an undue burden on abortion access, and thus violate[d] the Constitution». [337]

Justice Stephen Breyer, in writing the opinion of the Court, underlined the risks consequent to undue burden restrictions, noting how women are 14 times more likely to die by carrying a pregnancy to term than by having an abortion. [338]

In evidence of that, referencing the requirement of admitting privileges, the Justice recalled how, during oral arguments, when asked whether it knew of a «single instance in which the new requirement would have helped even one woman obtain better treatment», Texas admitted that no evidence could be provided for such a case. [339]

Concerning the surgical center requirement, Justice Breyer highlighted how, had the provision gone into effect, the number of women of reproductive age living would have seen significant distances from an abortion provider increased, as «2 million women [would] live more than 50 miles from an abortion provider;

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[333] *Whole Woman's Health v. Hellerstedt Backgrounder*, in *Center for Reproductive Rights*, September 17, 2019.

[334] J.A. ROBERTSON, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, *op. cit.,* page 628 ss.

[335] J.A. ROBERTSON, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, *op. cit.,* page 628 ss.

[336] J.A. ROBERTSON, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, *op. cit.,* page 628 ss.

[337] *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), Opinion of the Court, at 3.

[338] *Whole Woman's Health v. Hellerstedt*, Opinion of the Court, at 30.

[339] *Whole Woman's Health v. Hellerstedt*, Opinion of the Court, at 23.

1.3 million [would] live more than 100 miles from an abortion provider; 900,000 [would] live more than 150 miles from an abortion provider; and 750,000 more than 200 miles from an abortion provider». [340]

Justice Breyer's opinion, joined by Justice Anthony Kennedy, Justice Sonia Sotomayor, Justice Elena Kagan, and Justice Ruth Bader Ginsburg, concluded by agreeing with the findings of the District Court and its consideration of the fact that both the surgical center and the admitting privileges requirements, provided few, if any, health benefits for women seeking abortions. The requirements introduced by H.B.2 constituted an undue burden on women's access to termination of pregnancy granted by the Constitution according to Roe and Casey. [341]

Justice Ginsburg concurred in a two-page opinion only to specify how many medical procedures are far more dangerous to patients, yet are not subject to the requirements introduced by the Texas Bill on abortion, which rarely determines dangerous complications. The Justice pointed out threatening consequences would come out of this regulation, considering how, when a State limited access to safe and legal procedures, «women in desperate circumstances could resort to unlicensed rogue practitioners». [342]

On the other hand, dissenting Justices Thomas and Alito deemed, each in their dissent, that the decision created an abortion exception, bending the ordinary rules of abortion regulation, and ignoring compelling arguments presented by the State of Texas. [343]

While Gonzales had struck harshly on abortion rights, as it seemingly rejected claims of facial attacks while only allowing individual, as-applied challenges, the Hellerstedt decision upheld a facial challenge to H.B. 2 even though only a small number of women were affected overall, as there was no medical justification for the burden imposed on them. [344]

Nonetheless, the Hellerstedt decision represented a major win for the pro-abortion side, especially with reference to its application of restrictive legislation. TRAP laws and their aim of only marginally protecting women's health, had made it rather difficult for women to access abortion care, but would be finally recognized as creating undue burden at the expense of women's health. [345]

Unfortunately, the true impact of the decision had to deal with the makeup of the Court, and the Trump administration was going to turn the tables. [346]

The frame of reference that was coming to life in the time preceding the Dobbs decision was a complex one, as the role of science in rulings had changed great significance from one ruling to another in the span of only ten years.

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[340] *Whole Woman's Health v. Hellerstedt*, Opinion of the Court, at 6.
[341] *Whole Woman's Health v. Hellerstedt*, Opinion of the Court, at 36.
[342] *Whole Woman's Health v. Hellerstedt*, Ginsburg, J., concurring at 1 – 2.
[343] *Whole Woman's Health v. Hellerstedt*, Thomas, J., dissenting at 1.
[344] J.A. ROBERTSON, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, *op. cit.,* 623 – 652.
[345] J.A. ROBERTSON, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, *op. cit.,* 623 – 652.
[346] J.A. ROBERTSON, *Whole Woman's Health v. Hellerstedt and the Future of Abortion Regulation*, *op. cit.,* 623 – 652.

CHAPTER THREE

THE OVERRULE AND ITS CONSEQUENCES

3.1. Dobbs v. Jackson Women's Health Organization (2022)…….

In 2018, the Mississippi Republican-dominated legislature enacted the Gestational Age Act, which never went into effect because of the immediate submission of legal challenge concerning the law's provision that deemed abortions illegal after 15 weeks of pregnancy. The excessively restraining piece of legislature was in contrast with the generally accepted medical estimate, which ascertains fetal viability at 24 weeks, and, most importantly, with the landmark ruling Roe v. Wade that identified the State's interest in restricting abortion legitimate only from the second trimester onwards. [347] Casey v. Planned Parenthood had stirred away from the standard of review established in Roe, but what both rulings substantially held was that abortion could be regulated, not banned, before viability, and the 15-week ban, therefore, directly challenged the central holding of the abortion precedents. [348]

In addition, the only exception the law allowed involved «a medical emergency», meaning a condition on which an abortion is necessary to preserve the life of a pregnant woman, or «the case of a severe fetal abnormality». [349] No exemptions were included regarding cases of rape or incest.

In front of a Federal Appellate Court, the Jackson Women's Health Organization, the sole abortion clinic in the State, presented evidence to show that fetal viability was impossible at 15 weeks, while Mississippi contested that, by that stage of the pregnancy, the fetus had already made important physiological developments. [350]

The Appeal Court found that the State had not shown any medical data that could corroborate its argument, and confirmed the ruling of the lower court. The appeal to the Supreme Court sat on the docket until the fall of 2020, about one month after the trifecta of conservative Justices nominated by Trump had finally fallen into place with the appointment of Justice Barrett. [351]

Remarkably, when Mississippi had first petitioned the Court, in the early summer of 2020, it acknowledged that to rule on the petition the Court did not have to overturn Roe v. Wade. [352]

To accept a case, the Supreme Court follows a procedure known as 'granting certiorari', and it takes the approval votes of only four Justices to bring the case in front of the highest court of appeal. When Justice Kavanaugh had

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[347] A. HASSAN, *What to Know About the Mississippi Abortion Law Challenging Roe v. Wade*, in *The New York Times*, May 6, 2022.
[348] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, in *Journal of the American Academy of Matrimonial Lawyers*, Number 1, Volume 35, 2022, 235 – 284.
[349] *Gestational Age Act*, in 2019 Mississippi Code, Title 41 - Public Health, Chapter 41 - Surgical or Medical Procedures.
[350] A. HASSAN, *What to Know About the Mississippi Abortion Law Challenging Roe v. Wade*, *op. cit.*
[351] A. HASSAN, *What to Know About the Mississippi Abortion Law Challenging Roe v. Wade*, *op. cit.*
[352] M. TALBOT, *Amy Coney Barrett's Long Game*, in *The New York Times*, February 7, 2022.

been appointed, the conservative votes were presumably enough, but the waiting period for Barrett's appointment concerned, rather than her vote for cert, her joining of the other conservative judges to ensure the outcome would be an overturn of pivotal cases, such as the ones concerning abortion. [353]

Henceforth, when, in May 2021 the Court and its recent 6-3 conservative majority agreed to hear the Mississippi abortion case, Mississippi decided to 'go all out' and defend its law on the basis that the Court should «overrule Roe and Casey and once again allow States to regulate abortion as its citizens wish». [354]

On December 1st, 2021, the oral arguments for a case where an explicit petition of overturn had been presented to the Justices for the first time in thirty years occurred in front of the Supreme Court. The tension was palpable, as both reproductive-rights supporters and anti-abortion protesters rallied in front of the Supreme Court's building in Washington D.C. [355]

In May 2022, a draft of Alito's opinion for the majority appeared in the magazine 'Politico', and pre-existing fears of an overturn became a harsh reality, as the leak read that the majority held «that Roe and Casey must be overruled». [356] The day after the leak, Chief Justice Roberts condemned the breach, announcing that the Marshal of the Supreme Court had been tasked with the investigation needed to find the source of the leak and confirm the draft's authenticity. Though skepticism hovered on the chance of finding the culprit, several Republicans suggested that the leak had come from someone on the left, but be as it may, the greatly intense reaction that came after the content of the draft had been released did not ultimately change the substance of the text. [357]

On June 24, 2022, the Supreme Court ruled on the Dobbs v. Jackson Women's Health Organization case. The Court decided that the constitutional text contains no explicit mention of a right to abortion, and there is no justification for protecting such a right based on the Nation's tradition and history. Consequently, the Court overturned the long-debated Roe precedent, which had been endorsed for half a century. [358]

3.1.1 The majority's opinion and the violation of the stare decisis principle…….

Aware of the eventful consequences that an overturn and deviation from the stare decisis principle would provoke, the majority's opinion took it upon itself to conduct a five-step analysis that would corroborate its findings.

The rule of recognizing authority to a precedent case that concerns similar legal questions, or practice of stare decisis, is a Common Law instrument elaborated to «preserve the integrity of the Court and protect reliance and predictability of legal rights». [359]

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[353] M. TALBOT, *Amy Coney Barrett's Long Game*, *op. cit.*

[354] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. (2022), Opinion of the Court at 4.

[355] M. TALBOT, *Amy Coney Barrett's Long Game*, *op. cit.*

[356] S. D. GERBER, *The Leak of the Dobbs Draft*, in M. MARIETTA, *SCOTUS 2022, Major Decisions and Developments of the US Supreme Court*, page 201.

[357] S. D. GERBER, *The Leak of the Dobbs Draft*, *op. cit.,* 201 – 208.

[358] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 235.

Through this analysis, Justices were endorsing that following a precedent did not compel unending adherence but, rather, that the practice of stare decisis needed to be questioned, especially in cases of alleged abuse of judicial authority. [360]

The first step of the five-factor test on abortion jurisprudence required the nature of the error of the Roe and Casey's precedent decisions to be examined by the Court. In the words of Alito, Roe was «egregiously wrong and deeply damaging» as its «constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed». [361] Casey, it followed, also perpetuated in error by declaring a winning side between the debating positions of the national controversy unfolding, short-circuiting the democratic process. [362]

Secondly, the Court found that the quality of Roe's reasoning was wrong and «stood on exceptionally weak grounds». [363] No reference in the Constitutional text, no grounding in any precedent, and no convincing historical founding, as the Court deemed Roe's historical narrative erroneous, could be retrieved in the 1973 landmark decision. The majority described the trimester framework and the viability standard as a set of rules much like those «that one might find in a statute or regulation». [364]

Casey's attempt to reaffirm Roe's central holding through the introduction of a new legal test based on the 'undue burden' was also described by the Dobbs majority as obscure, a result of the application of an exceptional version of the stare decisis principle. [365]

Therefore, the third aspect that the Court discussed regarded the workability of the Casey precedent, meaning its propensity to be applied in a consistent and predictable matter. The 'undue burden' had proven, according to the majority, unworkable, because of the impossibility of precisely drawing a line between permissible and unconstitutional restrictions. [366] Some of the disagreements that had stemmed from the uncertainty originating from the undue burden standard were enumerated by the Court, such as disputes on the legality of parental notification rules, bans on certain dilation and evacuation procedures (like in Whole Woman's Health v. Hellerstedt), arguments on when an increase in the time needed to reach a clinic constituted an undue burden, and divergencies on whether a State may regulate abortions performed because of the fetus's race, sex, or disability. [367]

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[359] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 240.
[360] M. ZIEGLER, *Dobbs v. Jackson Women's Health Organization on Abortion*, in M. MARIETTA, *SCOTUS 2022 Major Decisions and Developments of the US Supreme Court*, 29 – 37.
[361] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 44.
[362] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 44.
[363] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 45.
[364] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 46.
[365] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 47.
[366] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 241.
[367] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 60 – 61.

Fourth, the Roe and Casey decisions were assessed as having negatively impacted other areas of law. [368] As stated by Alito, citing fellow conservative Kavanaugh's dissent on a ruling on the Sixth Amendment, Roe and Casey had «led to the distortion of many important but unrelated legal doctrines, and that effect provide[d] further support for overruling those decisions». [369]

Finally, according to the Court's fifth step of the analysis, the overrule of Roe would not upend the type of 'concrete' dependence interests engaged like other types of sentences involving property or intellectual rights. [370] According to the Court, the form of reliance on which Casey depended regarded an empirical question (*What are the effects of abortion rights on society and the lives of women?*) that was particularly hard to assess, especially for a Court. [371]

The extensive research of social science quantifying the impact of abortion access on women's financial and educational attainment, [372] and the foreseeable prospect that illegal abortions would most likely disproportionately impact women of color and poor backgrounds, [373] apparently had no pertinence in showing that the right to abortion was not an intangible form of reliance, as the majority's opinion believed.

Of the same advice was the dissent, which stated that the interests women have in Roe and Casey were «perfectly, viscerally concrete». [374] These landmark rulings had allowed millions of women to control their bodies and their lives, and the majority could not escape its obligation to count the costs of its decision by simply hiding behind the conflicting arguments of conflicting sides. [375] Furthermore, the majority had expressed no regard for the cases in which the State may prevent a woman from obtaining an abortion when she and her doctor had determined it was a needed medical treatment, let alone a life-saving one. [376]

Though the five-step analysis had proven convincing for the five Justices of the majority, [377] the three dissenting Justices articulated that neither legal nor factual development could be brought forward by the majority to support their decision to deviate from the principle of stare decisis: «Nothing that has happened in this country or the world in recent decades undermines the core insight of Roe and Casey». [378]

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[368] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 241.
[369] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 62.
[370] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 241.
[371] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 65.
[372] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 242.
[373] M. TALBOT, *Amy Coney Barrett's Long Game*, *op. cit.*
[374] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 53.
[375] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 53.
[376] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 22.
[377] Chief Justice Roberts only concurred in the judgment.
[378] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 43.

What the liberal Justices believed had stayed consistent, instead, was the fact that the choice regarding the burdens of pregnancy, childbirth, and parenting belonged to women, with the constraints identified in the decisions cited, rather than to the State. [379] This was true, especially considering that withdrawing a woman's right to choose whether to terminate or continue a pregnancy did not mean that no choice would be made. The difference was that, while before the choice was taken by women, in the after-Dobbs landscape the State had exerted control over one of the most personal and intimate choices a woman may make, monumentally affecting the rest of her life. [380]

3.1.1.1 Justice Alito's rational basis argument and the rights 'deeply rooted' in the Nation's history and tradition……

Justice Alito's opening for the Opinion of the Court stated: «Abortion presents a profound moral issue on which Americans hold sharply conflicting views». [381]

This was the guiding principle that allowed the numerous critics of the majority's opinion to dispute the legality of its argument. Abortion has always been (and will probably always be) a moral issue, but it has also been a political, religious, ethical, and philosophical issue. The Court's role was to define its borders as a legal matter, and, as Linda Greenhouse[382] mercilessly pointed out in an interview with 'The American Prospect', framing abortion as a moral issue was appropriate in Alito's view and the view of his church, but that was not the view of many people. In a harshly disapproving description, she called his judicial opinion «a religious tract, dressed up to look like 60 pages of so-called law». [383]

To be precise, the opinion developed through three different portions, and the five-step test used to determine whether to adhere to the stare decisis principle was the conclusive step.

Alito's first concern was whether the right to abortion could find guaranteed federal protection in the provisions of the Constitution. The Justice stated that a Constitutional analysis had to begin from the language of the instrument, a method of interpretation that would offer a «fixed standard for ascertaining what [the] founding document mean[t]», and from which it was evident that the Constitutional text made no express reference to the right to abortion. Therefore, he inferred, those who believed that the Constitution did, instead, protect said right, had to show that it was somehow implicit in the Constitutional text. [384]

Reflecting on Roe's consideration of various options for protecting the right to abortion, Alito remembered that the Court had suggested the Ninth Amendment's reservation of rights to people or a combination of the First, Fourth,

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[379] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 43.
[380] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 52.
[381] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 1.
[382] Linda Greenhouse is an American legal journalist and the Supreme Court correspondent for the New York Times, cfr. Chapter 2 – The controversial protection of reproductive rights, paragraph 2.3.3 – The route to sexual equality in Justice Ginsburg's legal work.
[383] G. GURLEY, *Q&A: Justice on the Brink*, in *The American Prospect*, December 8, 2022.
[384] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 9.

and Fifth Amendments. However, the majority ultimately felt that the most fitting provision was the Fourteenth Amendment and its principle of liberty. [385]

The Amendment, titled 'Equal protection and other rights', reads that « All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws». [386]

However, regardless of whether he looked at the Amendment's Due Process Clause or its Privileges or Immunities Clause, the Justice concluded that «the clear answer» was that the Amendment did not protect the right to an abortion. [387]

Secondly, given the lack of explicit mention in the constitutional text, the Court examined whether the right to obtain an abortion could be considered as rooted in the Nation's history and tradition. Introducing yet again a historical recollection, deemed by Alito as a necessary analysis to «set the record straight», given that «Roe either ignored or misstated this history, and Casey declined to reconsider Roe's faulty historical analysis», [388] the core of abortion's history was discerned in the events that had happened in the 19th century, around the time that the Fourteenth Amendment had been ratified, and when abortion was seen as a crime in most states. [389] For Alito, therefore, the inescapable conclusion was that, once again, a right to abortion could not find protection from the Supreme Court, as it couldn't even be reconnected to the Nation's history or its traditions. [390]

Ending, as it was described earlier, with his analysis on whether the obligation to respect the stare decisis principle was applicable in this case, Alito strongly condemned the Supreme Court's past decision, maintaining that «Roe was egregiously wrong from the start», a statement that complicatedly added up with the characterization of his previous jurisprudence as cautious and respectful of precedent. [391] His emboldening did not falter even after the leak of the drafted opinion, and the strong opposition that came with it, as he very humbly considered himself the author of «the only Supreme Court decision in the history of that institution that has been lambasted by a whole string of foreign leaders», as he declared during a speech he gave in Rome a month after the overrule. [392]

In a New York Times article on Justice Alito, criminal defense and civil-rights lawyer Lawrence S. Lustberg regretfully remembered his description of the

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[385] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 10.
[386] U.S. Constitution, Amendment XIV, § 1.
[387] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 15.
[388] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 16.
[389] M. ZIEGLER, *Dobbs v. Jackson Women's Health Organization on Abortion*, *op. cit.,* 29 – 37.
[390] *Dobbs v. Jackson Women's Health Organization*, Opinion of the Court at 25.
[391] M. TALBOT, *Supreme Court Justice Alito's Crusade Against a Secular America Isn't Over*, in *The New York Times*, August 28, 2022.
[392] M. TALBOT, *Supreme Court Justice Alito's Crusade Against a Secular America Isn't Over*, *op. cit.*

Justice as «totally capable, brilliant and nice» before his jurisprudence had turned out to be «angry, dark, retrogressive, and historically damaging». [393]

Over the years that he had sat on the Supreme Court bench, Justice Alito's jurisprudence had shifted from being competent and fair to becoming rigid and intolerant. According to those who had either worked with him or knew him personally the change in his behavior had to be attributed to frustration, as they thought that he felt that the world was changing into a place where he no longer belonged, which made him feel disrespected.

Neil Siegel, a Duke University law professor, told Margot Talbot, the New York Times author of the article, that he thought Alito felt frustrated because, deep down, he knew he was « fundamentally dissenting from American culture and where it [was] ineluctably heading—a society […] increasingly diverse and secular». [394] If that were to be true, some might say that Alito had failed at the primary duty of any judge, and of a Justice even more, of at least attempting to be impartial, nonpartisan, and independent.

The three Justices dissenting also seemed to notice such loneliness and feeling of exclusion, as they underlined that Mississippi's claims that the United States was an «extreme outlier when it came to abortion regulation» were far from the truth. [395] Rather, as the global trend had been increasing efforts in guaranteeing access to legal and safe abortion care, the American States' approach had become an abnormality only after the Dobbs decision. [396]

3.1.1.2 Justice Thomas' favor to reconsider past decisions in future judgments……..

While Justice Alito unhesitatingly specified that the effects of such a pivotal overturn were confined to the borders of the subject of abortion, reassuring readers that the demise of Roe would not require the elimination of other substantive due process rights, Justice Thomas displayed no agreement on such belief. [397]

In his concurrence, Thomas explained that, in his view, the substantive due process clause was an oxymoron that lacked any basis in the Constitution. [398]

For such reason, he considered that the solution of the Dobbs case was obvious: «because the Due Process Clause [did] not secure any substantive rights», not only it did not protect a right to abortion, but it meant that the Court should feel obliged, in future cases, to reconsider *all* of the precedents in which the clause had motivated the ruling. [399] In his perspective, past rulings on rights recognized as a penumbra of the right to privacy resulted from the Court's

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[393] M. TALBOT, *Supreme Court Justice Alito's Crusade Against a Secular America Isn't Over*, *op. cit.*

[394] M. TALBOT, *Supreme Court Justice Alito's Crusade Against a Secular America Isn't Over*, *op. cit.*

[395] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 42.

[396] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 42.

[397] M. ZIEGLER, *Dobbs v. Jackson Women's Health Organization on Abortion*, *op. cit.,* 29 – 37.

[398] *Dobbs v. Jackson Women's Health Organization*, Thomas, J., concurring at 2.

[399] *Dobbs v. Jackson Women's Health Organization*, Thomas, J., concurring at 3.

approach to identifying fundamental rights through policymaking rather than via neutral legal analysis. [400]

In the same way that the majority had found no constitutional rationale or deep connection to the Nation's history and traditions for the right to abortion, the same could be said for the right of married people to obtain contraceptives found in Griswold, the right to engage in private, consensual sexual acts of Lawrence, and the right to same-sex marriages held in Obergefell. [401]

The dissent pointed out that, regardless of the sincerity of the majority in reassuring that the Dobbs decision would not threaten any number of other constitutional rights, the law often had «a way of evolving without regard to original intentions», and the undermining of the substantive clause was now more real than ever, especially since Justice Thomas had unequivocally put that option on the table. [402] In their opinion, the three Justices who had come together to write a unanimous dissatisfaction with the majority's conclusion firmly stated how the Court had «vindicated the principle over and over that there [was] a realm of personal liberty which the government may not enter, especially relating to bodily integrity and family life», and the Dobbs decision had explicitly overturned Roe but implicitly denied the correctness of all other connected precedents. [403]

3.1.1.3 The neutrality of the Constitution according to Justice Kavanaugh…

Justice Kavanaugh also separately concurred, and his opinion tied connections with both Alito's and Thomas' views.

Firstly, Kavanaugh anticipated that the issue at hand was not the policy or, as Alito had presented it in his opinion, the morality of abortion, but, rather, it concerned what the Constitutional text conveyed about abortion. [404] It was his understanding that the Constitution was scrupulously neutral on the question of terminating a pregnancy, neither pro-life nor pro-choice, and it left the issue for the people and «their elected representatives to resolve through the democratic process in the State or Congress». [405]

Evidently, the Justice did not think it relevant to touch on the fact that 'zombie laws', meaning statutes that had outlawed abortion in the 1800s and had waited to be resurrected when Roe was overturned, would come into effect with no trace of democratic discourse to ground their enactment.

Kavanaugh continued that, because of the neutrality of the Constitution, neutral should also be the approach of the Court, condemning Roe on one side, for having unilaterally decreed the legality of abortion throughout the States, but also negating the correctness of those who claimed the Court should outlaw abortion as a whole, somehow surprisingly disagreeing with the pursuit of fetal rights' legal recognition put forward by the Republican party. In substance, the

[400] *Dobbs v. Jackson Women's Health Organization*, Thomas, J., concurring at 4.
[401] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 244.
[402] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 28.
[403] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 19.
[404] *Dobbs v. Jackson Women's Health Organization*, Kavanaugh, J., concurring at 2.
[405] *Dobbs v. Jackson Women's Health Organization*, Kavanaugh, J., concurring at 3.

Court did not possess «the authority either to declare a constitutional right to abortion or to declare a constitutional prohibition of abortion». [406]

The dissenting opinion of the three liberal Justices condemned Kavanaugh's description of his interpretation of the Constitution as neutral, as, in their opinion, his argument was very unambiguously siding with the position of the States that wanted to bar women from exercising the right to abortion. The dissent harshly faulted Kavanaugh for obscuring his partisan perspective through a rhetoric of even-handedness. [407]

In his concurrence, Kavanaugh then made a second point clear by disagreeing openly with Thomas' position, reiterating that other rights connected to constitutional privacy interests, such as those involving same-sex marriage or birth control, were not at risk, specifying that «overruling Roe [did] not mean the overruling of those precedents, and [did] not threaten or cast doubt on those precedents». [408]

Justice Kavanaugh concluded by paying his respects to the Justices, past and present, who had grappled with the divisive issue of abortion, somehow attempting to show deference to the legitimacy of the Court as an institution, rather than just depending on what judges were sitting on it.

In the words of Trump's former chief of staff Mark Meadows, a hard-line conservative, Brett Kavanaugh was «an establishment-friendly nominee» who had appeared 'weak' ever since his emotional and tearful confirmation hearing. [409] His attempt to present a neutral angle of the issue rather than full-throatily siding with Alito's irreverence was a further corroboration of said alleged weakness.

3.1.1.4 The Adoption Route of Justice Barrett……

Justice Amy Coney Barrett, the latest addition to the Supreme Court, was appointed by President Trump due to her conservative ideology and strict interpretation of the Constitution. In her decisions, she interpreted the legal framework by analyzing its linguistic components and arrangement to deduce its plain meaning, without relying on previous legislative records, and this methodology aligned impeccably with the objective of the Republican President and his party of reversing Roe. [410]

During the oral arguments for the Dobbs decision, though, Barrett seemed to deviate from a strictly jurisprudential line of questioning as she went off on a tangent regarding Safe Haven laws, provisions that allow a person who has given birth to leave the baby at a fire station, or other designated spots, completely anonymously, so that adoption can subsequently take place. Rather than focusing on the issue at stake, meaning abortion and its constitutional protection,

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[406] *Dobbs v. Jackson Women's Health Organization*, Kavanaugh, J., concurring at 5.
[407] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 20 – 21.
[408] *Dobbs v. Jackson Women's Health Organization*, Kavanaugh, J., concurring at 10.
[409] M. TALBOT, *Amy Coney Barrett's Long Game*, *op. cit.*
[410] K. M. BURCH, *Justice Amy Coney Barrett's First Years on the Court*, in M. MARIETTA, *SCOTUS 2022, Major Decisions and Developments of the US Supreme Court*, 183 – 190.

Barrett implied that such laws represented a reasonable alternative to the choice of terminating a pregnancy. [411]

The Baby Moses Law was the first Safe Haven legislation to be introduced and it had been enacted in 1999 by Republican, anti-abortion supporter, and then-Governor of Texas George W. Bush. The clear reference to Moses' rescue's biblical episode exhibited how pro-life advocacy and values consistent with Catholic ideologies were at the core of designing Safe Haven laws. [412]

Given Amy Coney Barrett's education at Notre Dame Law School, a conservative Christian-oriented institution, and her open expression of strong religious beliefs, it was not unexpected that she would establish a connection during oral discussions. Notably, Barrett has been vocal in her support of Safe Haven laws and adoption, having personally adopted two children with her husband from an orphanage in Haiti. [413]

This background of religious roots, added to her originalism devotion which developed as she clerked for Justice Scalia, the originalism's chief architect, in 1998, plus her refusal to comment on the Roe decision at her nomination hearings even though she had openly voiced her anti-abortion position in other public contexts, gave an overall feeling that, at least during the oral arguments, Barrett was not manifestly ready to overturn the precedent. [414]

Her reference to adoption as a solution that would impose a temporary burden on the mother but would also allow her to avoid the burden of parenthood, excessively simplified the issue of abortion, disregarding the fact that pregnancy and childbirth sometimes pose more health dangers to women than the termination of pregnancy does. [415] Nonetheless, when the time came for Barrett to truly focus on the abortion issue, she sided with the conservative judges, complying with what she had been appointed to do, which was to complete the 6-3 majority determining the overrule of Roe.

3.1.2 Chief Justice Roberts' concurrence and 'more measured course'……...

Chief Justice Roberts' approach relied upon the principle expressed in his concurrence that «if it is not necessary to decide more to dispose of a case, then it is necessary not to decide more». [416] In substance, he agreed with the majority that the Roe and Casey viability standard should be disregarded, relying on a brief historical recollection once again, but he clarified that none of that, in his opinion, also required the Court to take the «dramatic step of altogether eliminating the abortion right». [417]

Roberts recalled how the State of Mississippi, when it first petitioned the judicial review, had asked the Court to clarify whether the abortion prohibition before viability was to be always considered unconstitutional, but specifying that it did not ask the Court to repudiate entirely the right to choose to terminate a

[411] M. TALBOT, *Amy Coney Barrett's Long Game*, *op. cit.*
[412] L. OAKS, *Safe Haven Laws and Anti-Abortion Politics*, in *Bill of Health*, May 10, 2022.
[413] M. TALBOT, *Amy Coney Barrett's Long Game*, *op. cit.*
[414] M. TALBOT, *Amy Coney Barrett's Long Game*, *op. cit.*
[415] M. TALBOT, *Amy Coney Barrett's Long Game*, *op. cit.*
[416] *Dobbs v. Jackson Women's Health Organization*, Roberts, C. J., concurring in judgment at 2.
[417] *Dobbs v. Jackson Women's Health Organization*, Roberts, C. J., concurring in judgment at 5.

pregnancy. Yet, once certiorari had been granted, Mississippi changed direction and bluntly asked the Court to overrule Roe and Casey. [418] As has been anticipated, given that Justice Barrett had been recently appointed, a conservative majority was now sitting at the Supreme Court bench, and Mississippi had redacted his course of action, deeming it appropriate to request an overturn, because it was confident that the conservative Justices would have agreed with its demand.

But for Chief Justice Roberts, that had no relevance. His 'more measured course' approach would have upheld the Mississippi 15-weel pre-viability ban, but left for another day whether to reject any right to abortion at all, by swapping out the 'undue burden text' with a 'reasonable opportunity test'. [419]

Chief Justice Roberts' opinion solidified «his role on the Court as a moderate incrementalist guided by the fundamental principle of judicial restraint». [420]

Alito, who had acted as Roberts' right hand in the few first years as a Justice, had now claimed the role of the embodiment of conservatism's views on the Supreme Court. That was also the reason why the opinion of the Court had been written by the Justice and not the Chief: if Roberts had had the majority, he could have assigned the opinion to some other Justice more moderate, or to himself as well, probably producing a text less derogatory of the authority of the Justices who had crafted the Roe decision. [421]

But because the Chief Justice, in this case, was not in the majority, or, to be more precise, he agreed with it but was coming from a substantially different argument to reach the same conclusion, Justice Thomas, the most senior Justice in the winning bloc, assigned the opinion to Justice Alito. [422]

3.1.3 The united front of the liberal dissents…….

In a lecture presented by Honorable Ruth Bader Ginsburg in 2010 on the role of dissenting Opinions, the Justice recollected how, in the earliest days of the Supreme Court's existence, each Justice would issue seriatim opinions, in a 'each-for-himself' practice. The practice of issuing a single opinion for the Court that incorporated different approaches to pronouncing judgment eventually became customary in the U.S. However, each member of the Court still had the option to write a separate opinion.. [423]

According to Chief Justice Roberts' statement given during his confirmation hearings, «the U.S. Supreme Court may attract greater deference, and provide clearer guidance when it speaks with one voice», which underlined how each Justice contemplating whether to public a separate writing should always ask himself if the concurrence is truly necessary. Nonetheless, Justice Ginsburg

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[418] *Dobbs v. Jackson Women's Health Organization*, Roberts, C. J., concurring in judgment at 6.
[419] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 245.
[420] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 245.
[421] M. TALBOT, *Supreme Court Justice Alito's Crusade Against a Secular America Isn't Over*, *op. cit.*
[422] M. TALBOT, *Supreme Court Justice Alito's Crusade Against a Secular America Isn't Over*, *op. cit.*
[423] R. B. GINSBURG, *The Role of Dissenting Opinions*, in *Minnesota Law Review*, Number 1, Volume 95, November 2010, 1 – 8.

concluded that, though she appreciated the value of unanimous opinions, dissents should be presented when important matters are at stake. [424]

The lecture concluded by considering that some dissenting opinions could be of significant value when they drew public attention and brought legislative changes, as well as when they appealed to the «intelligence of a future day», as Chief Justice Hughes had put it. [425] The Dobbs dissent and its comprehensive effort to write a joint opinion would have surely belonged to Ginsburg's genre of noteworthy dissents. Dissenting Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor came together to write a powerful criticism of the Dobbs decision, instead of signing on the opinion authored by one of them as it usually occurs, showing the determination in presenting the liberal viewpoint in a united, solid bloc, and even though some of the disapproval points of the dissent have already been mentioned, considering that a great part of it addressed the majority and the concurring opinions to break them down piece by piece, an overall recollection of the exceptional joint dissent is mandatory.

The dissent presented its version of historical recollection, as all the other opinions had done, but instead of reminiscing of common law principles, pre and post-quickening abortion, and the trend of criminalization of the procedure in most States, as Justice Alito had done in his majority opinion, the like-minded Justices directed their attention on considerations never before unveiled, not in Casey nor Roe, applying a sex-equality lens on the historical facts.

As the majority reviewed the abortion legality all the way through the 13th century, much to the dissenters' feeling of absurdness[426], the liberal minority pointed out that such an approach had not been applied in other cases, like the New York State Rifle & Pistol Assn., Inc. v. Bruen case concerning the Second Amendment, in which the majority played down the importance of historical events. [427] In addition, regardless of what amount of importance the Court decided to give in one case or the other, the dissent pointed out mockingly that early law provided some support for abortion rights, as common law authorities only criminalized terminations of pregnancies happening post-quickening, therefore proving the exact opposite point put forward by the majority. [428]

The majority's main concern was to determine whether in 1868, the year the Fourteenth Amendment had been ratified, reproductive rights such as the one recognized in Roe and Casey existed, and the liberal minority agreed that the answer was no. What the dissent made evident, though, was the fact that the 'people' who ratified the Amendment were all men. Therefore, it could not be «surprising that the ratifiers were not perfectly attuned to the importance of

[424] R. B. GINSBURG*, The Role of Dissenting Opinions, op. cit.,* 1 – 8.
[425] R. B. GINSBURG, *The Role of Dissenting Opinions*, *op. cit*., 1 – 8.
[426] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor, and Justice Kagan, dissenting at 13: «Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century.»
[427] M. ZIEGLER, *Dobbs v. Jackson Women's Health Organization on Abortion*, *op. cit.,* 183 – 190.
[428] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 13.

reproductive rights for women's liberty, or for their capacity to participate as equal members for [the] Nation». [429]

What the ratifiers were attuned to was, instead, the legal definition of rights conceived in general terms, to permit future evolution in their scope and meaning, as the Supreme Court had proved over and over again by identifying protection for unnamed rights under the penumbra of constitutionally named rights. [430]

In the Roe decision of 1973, the Court held that individual decision-making related to «marriage, procreation, contraception, family relationship, and child-rearing and education» was founded «in the XIV Amendment's concept of personal liberty». [431] Recognition of individual rights was not absolute, as the State's opposing interest also held value in the eyes of the Court. The Court aimed to strike a balance between the two. In 1992, Casey upheld the fundamental principles, this time. According to the dissent, while a sense of equilibrium between the antagonist positions had been the goal for Roe and Casey, for the Dobbs majority «balance [was] a dirty rod, as moderation a foreign concept». [432]

The core legal concepts that had shaped the American identity included individual freedom and the equal rights of citizens, encapsulated in the greater notion that the government should not control the private choices of people who are deemed free, [433] and the Supreme Court had for long endorsed that there were «realms of personal liberty which the government may not enter» [434] but the latest Court's intervention had implied that there was no constitutional significance attached to a woman's control of her body and the path of her life. [435]

On one side, therefore, for the Dobbs majority, no liberty interest was present in the case at stake, because the law offered no protection for the right of abortion more than a century and a half ago. On the other side, the majority took pride in not expressing a view about the status of the fetus and stated that the state's interest in protecting fetal life played no part in the analysis. [436]

In conclusion, the majority had not strived for a balance because, in its opinion, the scale had been left empty on both plates, as no right to bodily integrity could be recognized over women and no interest in protecting fetal rights had been assigned to the State.

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[429] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 14.
[430] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 16.
[431] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 7.
[432] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 12.
[433] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 7.
[434] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 19.
[435] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 12.
[436] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 26.

The main argument of the Dobbs decision had been a constitutional interpretation that limited the rights of women to those identified by the men who wrote the Fourteenth Amendment in 1868, at a time when women could not vote, and the dissent rebuked how the Court had consigned women to 'second-class citizenship'. [437]

3.2. The impact of the decision and the question of legitimacy ……...

Until 1925, the Supreme Court did not have the power to select the cases it wanted to decide, just like it still happens today in the federal circuits of appeals where the judges resolve disputes as they come along. When such power was appointed by Congress and expanded further with time, the Court became a law-giver, rather than a dispute-solver, pushing its own agenda. [438]

A tacit understanding was then reached between the Court and the American people, in which the first would have a rather vast power and the second would in return receive predictability and stability. [439]

As previously examined, the Bork nomination marked a significant disruption to the balance, and it was not until Justice Kennedy's appointment that progressives felt reassured that constitutional interpretation would not be confined to 18th-century beliefs. However, defeating Bork did not necessarily mean defeating the notion of reshaping the constitutional story. Rather, the battle simply shifted out of the public eye. [440]

Legal methodology and political ideology are not easy to disentangle and originalism and conservatism have been going hand in hand for a while. Not all conservatives are originalists and the other way around is not true either, but regardless of the way these legal scholars and jurists may think of it, the originalist's approach is still an act of interpretation, in which there's faithfulness to the literal meaning of a legal text and a presumed constraint from imposing personal preferences. Because originalists maintain that a right to abortion can't be inferred from the Constitution, the goals of an originalist and an opponent of legal abortion often fit together conveniently. [441]

In the Dobbs ruling, the Supreme Court interpreted the Constitution in an originalist manner. They found that the right to abortion was not protected by the Constitution because it was not explicitly mentioned in the constitutional text or Amendments. This decision demonstrated that, despite the defeat of the originalist movement with Robert Bork's nomination in 1987, the counterattacks against it had been successful in winning the war by 2022. But what looked like a triumph for conservatives turned out to be a costly loss for the Supreme Court's legitimacy and the public's perception, possibly past redemption.

Particularly regarding the Dobbs decision, on the eve of the decision public confidence in the Supreme Court reached a historic low, with just 25% of

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[437] M. ZIEGLER, *Dobbs v. Jackson Women's Health Organization on Abortion*, *op. cit.,* 183 – 190.

[438] L. GREENHOUSE, *What in the world happened to the Supreme Court?,* in *The Atlantic*, November 14, 2022.

[439] L. GREENHOUSE, *What in the world happened to the Supreme Court?, op. cit.*

[440] L. GREENHOUSE, *What in the world happened to the Supreme Court?, op. cit.*

[441] M. TALBOT, *Amy Coney Barrett's Long Game*, *op. cit.*

Americans expressing confidence in the judicial institution. [442] Other polls conducted while the ruling was pending showed that almost one in every two Americans wanted to retain a right to abortion, and such a right prevailed in all the five States where the question was explicitly on the ballot. [443]

More generally, the fear that Justice Kagan expressed that if the Court lost connection with the public and the public sentiment it would become a danger to democracy [444] could be more tangible than the majority's opinion made it out to be when it explained that its decisions could not be «affected by any extraneous influence such as concern about the public's reaction to [its] work». [445]

In a survey conducted a year before the delivery of the decision by Quinnipiac University, a highly regarded public opinion research institution that evaluates the sentiments of American voters on critical public policy matters and elections, 61% of Americans were found to believe that the Supreme Court was primarily driven by partisan politics. Notably, this perspective was held by members of both political parties, with 67% of Democrats and 56% of Republicans sharing the same viewpoint. [446]

Furthermore, the plunge of the Court's approval rating only had a further decline after the Dobbs decision, but it had already decreased due to «the speed with which the newly Republican-appointed justices made decisions in high-profile cases», including weakening the Voting Rights Act, labor unions' rights, and COVID lockdown orders. [447]

The public perception of the highest court of appeal as a political body, whose decisions are driven by ideology rather than legal analysis and judicial restraint, might today be irreparably consolidated. [448] The Court has broken the connection and tacit compromise it had made with Americans decades ago, but it appears that the Court is not fully aware of the extent of the power it has exerted in changing the law for abortion. [449]

It is reasonable to question how such a situation could arise, given that the Court's credibility has long been based on the principle of diffuse legitimacy. This principle holds that the Court's rulings are deemed legitimate and safeguarded even when they are contentious, as the Court tends to conform to the collective agreement on significant matters over time. [450]

However, now the premise is missing: the basic pattern of behavior required for the operation of democracy has been shattered by the appointments of three Justices with the narrowest margin for confirmation and as a result of the

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[442] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.,* page 246.
[443] L. GREENHOUSE, *What in the world happened to the Supreme Court?, op. cit.*
[444] L. GREENHOUSE, *What in the world happened to the Supreme Court?, op. cit.*
[445] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.,* page 246.
[446] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.,* page 246.
[447] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.,* page 248.
[448] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.,* pages 247 – 248.
[449] L. GREENHOUSE, *What in the world happened to the Supreme Court?, op. cit.*
[450] L. GREENHOUSE, *What in the world happened to the Supreme Court?, op. cit.*

nomination of a president who had lost popular consensus. The theory, therefore, no longer holds, and the circumstances from which the supermajority standing in the Supreme Court has come to be are rather problematic. It is not a surprise that the decisions they adopt are problematic as well. [451]

3.2.1 The Post-Roe Legal Landscape……..

The problems of legitimacy and constitutional consequences that the Supreme Court's improper deployment of power may have been hard to foresee now. What, instead, is already within reach is the recollection of the impact that the Dobbs decision has had on the legal, and medical, framework of abortion.

What must be understood is that abortion being illegal does not stop people from seeking the termination, but, instead, it only divides those who can afford to have access to a safe procedure from those who attempt illegal abortions with various rates of success, and greater degree of risks.

The repercussions of the Dobbs decision portray a multifaceted framework, impacting a multitude of fields including the legal sphere, as the state-by-state patchwork that results from the lack of a uniform national right will determine inter-jurisdictional wars and conflicts across state lines, and the medical aspects of the procedure as well. [452]

Because the right to terminate a pregnancy has always been at risk, the practice itself has been evolving with medical and scientific advancement, and the rise of telehealth for medication abortion, by allowing access to the termination solely with pills, can fly over borders and presumably bypass the state, and country, limitations. The legal issue here concerns the uncertainty that comes with the struggle of establishing jurisdiction over out-of-state and out-of-country providers, and consequent attempts of prosecutions. [453]

Even though Justice Bret Kavanaugh had cared to specify in his concurrent opinion that no State could bar its residents from traveling to another State to obtain an abortion because it would be a violation of the constitutional right to interstate travel, the material consequences of the Dobbs decision had also affected the freedom of movement. [454] Just to offer a couple of examples of how wrong Justice Kavanaugh's prediction was, the National Right to Life Committee has authored a model law precisely to ban assisting a minor across state lines to get an abortion without parental consent and regardless of where the illegal abortion occurs, while a sanctuary city in Texas has banned abortion for city residents regardless of where the termination would take place. [455]

Just the first exemplifications of many to come, the dispute that comes with the antiabortion states' attempt to punish extraterritorial abortion on one side, and the underdeveloped constitutional defenses for the prohibition of state restrictions

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[451] L. GREENHOUSE, *What in the world happened to the Supreme Court?, op. cit.*
[452] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, in *Columbia Law Review*, Number 1, Volume 123, January 2023, 1 – 100.
[453] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* 1 – 100.
[454] *Dobbs v. Jackson Women's Health Organization*, Kavanaugh, J., concurring at 10.
[455] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 2 ss.

on interstate travel on the other, will certainly be a complex issue, that most likely will fall in the hands of Courts as the ultimate arbiters. [456]

Above all, without a constitutional right and because of how such unrecognition has been reached, through an illegitimate abuse of power of the Court, the fracture in the country's principles is expanding and slowly coming to the surface, endangering the federalist system of government. [457] Yet, because of the unprecedented settings in which access to abortion is now emerging, unprecedented and innovative are also the solutions offered to guarantee protection not bound by constitutional rights.

3.2.1.1 Old and New Restrictions……..

Because the heterogeneity that characterized the regulation of abortion is now a thing of the past, it is necessary to analyze the myriad of ways through which States have either banned, protected, or anything in between, access to the termination of a pregnancy. Without explicitly listing the regulations that have been enacted in each State one by one, some legislatures will be mentioned to exemplify the tendencies most popular in the after-Dobbs landscape.

Starting from the most controversial category of States that have banned the procedure in all, or almost all, circumstances, which, according to 'The New York Times', up until November 7th of the current year, are twentyone in total, [458] the impact of such a restrictive prohibition will mainly target women of color and poor or low-income people, left with no funding to make up for the costs associated with the burdens of travel. [459] Furthermore, Alabama, Arkansas, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, and West Virginia have adopted policies that ban abortion altogether, embodying an 'abortion desert' throughout the South area. [460]

Interestingly enough, in the State where the core of the abortion history lies, where the Roe v. Wade case was tried and where laws have been passed back-to-back throughout the years to restrict access to abortion, the illegality of the procedure yields an exceptional derogation when the life of the mother is at stake. More specifically, the Texas trigger law that came into effect on August 25th, two months after the Dobbs decision, criminalizes «performing an abortion from the moment of fertilization unless the pregnant patient is facing a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy». [461]

Other conservative States have enacted trigger statutes, laws that were put in place before Dobbs, and TRAP laws as well. Most pre-viability gestational bans place a time limit on when a woman can receive an abortion based on either her last menstrual cycle or fertilization, taking into consideration such a short time

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[456] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 2 ss.
[457] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 2 ss.
[458] A. MCCANN ET. AL., *Tracking Abortion Bans Across the Country,* by *The New York Times*, Updated November 7, 2023.
[459] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 14 ss.
[460] A. MCCANN ET. AL., *Tracking Abortion Bans Across the Country, op. cit.*
[461] E. KLIBANOFF, *Texans who perform abortions now face up to life in prison, $100,000 fine*, in *The Texas Tribune*, August 5, 2022.

that women may not even know they are pregnant. Additionally, laws lay undue burdens on women attempting to access the procedure through the introduction of mandatory waiting periods, restrictions for underage women who must provide documentation of a parent or a guardian's consent before the termination, and so on. [462]

While conservative States are enforcing trigger bans or TRAP laws to restrict abortion, legal chaos is unraveling in the Nation, as «no one really knows what laws are applicable federally, across other state lines, and even in their own respective states, [with] confusion at almost every turn». [463]

Some States have taken the ban to its furthest, not only prohibiting the procedure but effectively criminalizing abortion, like in Arkansas and Idaho, [464] while other States have enacted anti-abortion legislation but the bans have been temporarily blocked by the Courts, leaving confusion on which provisions are in effect, as happened in Ohio and Montana. [465]

3.2.1.2 The counterattacks of abortion-supportive States……

The other side of America is represented by those States that, even after Dobbs, have kept in place provisions that allow abortion, through various degrees of strictness that encompass from the viability standard to the notwithstanding of any gestational limit, nonetheless guaranteeing access to the procedure regardless of constitutional federal protection of the right. [466]

Particularly in the Northeast and on the West Coast, States have expanded access to care within their own borders to mitigate the restrictive measures adopted by other States, neighboring or further away.

The effort comes from singular States, like Connecticut, where a law enacted days after the Dobbs decision «prohibits any covered entity from disclosing any communications or information related to a patient's reproductive health care in any civil action unless the patient consents in writing to such disclosure», [467] but also through joint action, as the multi-state allegiance of the governors of California, Oregon, and Washington committing to the protection of abortion access on the West Coast demonstrates. [468]

Additionally, California has enshrined the right to contraception and abortion within its State Constitution in November 2022, Oregon has passed the most comprehensive reproductive health legislation of the United States and

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[462] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, Senior Theses and Projects, Trinity College, Hartford, 2023, 1 – 83.

[463] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit.,* page 15.

[464] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit*., pages 15 – 16.

[465] A. MCCANN ET. AL., *Tracking Abortion Bans Across the Country, op. cit.*

[466] A. MCCANN ET. AL., *Tracking Abortion Bans Across the Country, op. cit.*

[467] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 270.

[468] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit*., page 56.

Washington also signed into law the Reproductive Party Act. Other liberal States have implemented similar laws and initiatives like their West Coast allies, by codifying abortion into state law or by expanding access to abortion before viability or throughout the entire pregnancy. [469]

Another nonpartisan coalition of twenty governors was also created, the Reproductive Freedom Alliance, which proposed an offensive rather than merely defensive strategy to ambitiously improve access to abortion and reproductive healthcare. [470] In addition to the liberal States' efforts, notable pro-choice groups like the Center for Reproductive Rights and Planned Parenthood have exhausted their legal resources to file in state courts hundreds of cases questioning the legality of abortion bans. [471]

Because in the after-Dobbs landscape, «the average resident is expected to experience a 249-mile increase in travel distance» to achieve legal access to the procedure, the clinics that remain open in those States where abortion remains legal will be most likely inundated with out-of-state patients, compromising the care of in- and out-of-state patients alike. [472] Hence, the effort of liberal States to retaliate against the threatening conservative measures that will impact women is an indispensable implement to decrease the downsides of the Dobbs decision.

3.2.1.3 Federal action to protect abortion……..

The endeavors of both sides of the abortion debate in the territory of each singular State also transfigure into a discussion at the federal level.

On one side, even though the Supreme Court cared to specify that its interpretation did not consider prenatal life as having rights or legally cognizable interests, abortion could be banned across the Nation if fetal personhood is passed at the federal level, whether through federal legislation or a Constitutional Amendment. Fetal personhood laws recognize fetuses as 'persons' and grant them rights from the moment of fertilization, [473] and, according to this belief system, not only abortion would be outlawed under any circumstance, equating to murder, but would restrict the pregnant woman's right to bodily autonomy, overruling her choice for maternal care necessities. [474]

The most persistent strategy of abortion opponents of the first decades of the 21st century has been enforcing abortion restrictions against providers and

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[469] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit*., page 58.

[470] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit*., page 60.

[471] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit*., page 61.

[472] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* pages 11 – 12.

[473] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape, op. cit.,* page 252 ss.

[474] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit.,* page 21.

those who aid and abet abortion, like many TRAP laws encompassed before and after Dobbs. But now, with a conservative majority on the highest court of appeals, pro-lifers' newfound confidence seems to be accompanied by a new argument for prosecuting not only abortion providers but also women who obtain abortions. [475]

On the other side, pro-choice activists also moved their game plan to the broader federal level, proposing different approaches. As soon as the Dobbs draft had been leaked, some Democrats called on President Biden to temporarily remove the filibuster's sixty-vote threshold to pass the Women's Health Protection Act of 2021, which would codify the central holding of Roe that States may regulate but not ban abortion. However, even if Biden complied, it is unlikely that Democrats could achieve the number of votes necessary. [476]

A different alternative, given Biden's administration commitments to reproductive rights, relies on the notion that the supremacy of federal laws could chip away at state abortion laws. The Food and Drugs Administration (FDA) has exercised authority over medication abortion since it was approved in 2000, suggesting that FDA regulation could potentially grant a right to medical abortion in all 50 States. [477] Texas and Louisiana have made it a crime to mail the two-drug regimen that can safely and effectively terminate a pregnancy up to ten weeks gestation, and other States could follow in their footsteps, but arguments are being advanced that «FDA regulation in this area constitutes federal preemption and states cannot advance competing or stricter laws because federal law preempts state regulation with respect to FDA labeling». [478]

Other proposals to protect abortion rights through federal action include drafting bills to codify the right to access reproductive healthcare, such as the Emergency Medical Treatment and Labor Act (EMTALA), the guideline issued by the Department of Health and Human Services under the Biden administration. [479] It is a federal statute that « requires all hospitals participating in Medicare with an emergency room to both screen patients for medical emergencies and provide stabilizing treatment when emergencies exist» and would therefore preempt state abortion bans that do not include life-saving and health exceptions for pregnant women. [480]

Lastly, some scholars have even proposed to declare a public health emergency, or to use executive orders that could make abortion available on federal lands in States where it is outlawed, or, furthermore, to fight fire with fire, and nominate Justices to the Supreme Court that would weaken the conservative

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[475] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape, op. cit.,* page 252 ss.
[476] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape, op. cit.,* page 263 ss.
[477] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground, op. cit.,* page 53 ss.
[478] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape, op. cit.,* page 267.
[479] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape, op. cit.,* page 263 ss.
[480] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground, op. cit.,* page 72.

majority, though such solution would take some time, and in the meantime, pregnant women's health would be at risk. [481]

Nonetheless, there is no shortage of ideas, and a strong agenda to defend the reproductive rights and health of women who will not be able to access the procedure of abortion in their State is being pushed forward at the federal level as well.

3.2.2 Telemedicine services and self-managed medical abortions……

In the aftermath of the overturn of Roe, a multitude of events all deeply intertwined together started to unfold, and at times it is challenging to draw sharp lines dividing causes and effects. As it was previously mentioned, one of the branches that have been affected by the Dobbs decision is the expansion of the use of abortion pills, which is also entangled with the issues of national state legislatures on abortion, the restrictions posed on the right to travel and on the aid of telehealth, which is all accompanied by the confusion as whether federal protections can be applicable on this peculiar form of termination of pregnancy. Keeping in mind that this is an inextricable scenario, the scope of this paragraph is to attempt to shine a light precisely only on the quick, but inadequate, fix that telehealth models offer.

Abortion outside formal healthcare settings, known as self-managed abortion, can be achieved through various methods. However, there has been a significant surge in the use of abortion pills due to the ease of obtaining them online and the increased availability of such options in recent years. [482]

The practice, known as medical abortion, involves taking two drugs, Mifepristone first and Misoprostol 24 to 48 hours later, so that the development of a pregnancy is stopped and a voluntary, chemically induced miscarriage allows for the uterus to be cleared out. The combination of drugs is approved for use up until 70 days after a woman's last menstrual period, and the success rate is very high. [483] When practicable, this termination of pregnancy is preferred because it is «less expensive, less invasive, and affords more privacy than surgical abortions». [484]

A peculiarity of the FDA's approval in 2000 of Mifepristone, the first drug to be used for medical abortion, was the inclusion of a Risk Evaluation and Mitigation System (REMS), an imposition that can only be allowed if a REMS is necessary to ensure that the drug's benefits outweigh its risks. [485] REMS concerning Mifepristone have been revised numerous times in the past but, in December of 2021, the FDA made access to the first of the two-drug regimen significantly easier by permanently lifting the requirement that patients could only obtain it by visiting an authorized clinic or doctor in person. [486]

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[481] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape, op. cit.,* page 263 ss.
[482] A.R. AIKEN, U.D. UPADHYAY, *The future of medication abortion in a post-Roe world*, in *BMJ*, 2022.
[483] D. LOWE, *Abortion and the FDA*, in *Science*, 27 June, 2022.
[484] P. BELLUCK, *Abortion Pills Take the Spotlight as States Impose Abortion Bans*, in *The New York Times*, published June 26, 2022, updated June 27, 2022.
[485] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 53 ss.
[486] P. BELLUCK, *Abortion Pills Take the Spotlight as States Impose Abortion Bans*, *op. cit.*

Now, the medication abortion can be obtained simply through a consultation with a doctor through video, phone, in person, or just by filling out an online form, and then the pills can be easily acquired when they arrive in the mail letter. The patient must participate in the consultation while being in the territory of a State that allows abortion, and, even if it could mean only having the make the phone call right over the border, access for women of poor backgrounds and low economic resources is nonetheless limited and unsatisfactory. [487]

Still, enforcement challenges will grow arduous for States that ban abortions in all forms, as the difficulties that are entailed when monitoring the activities of sending or receiving pills or traveling to a state for the consultation are much harder than the challenges involved in shutting down a clinic. [488]

Furthermore, though medication abortion provided by telemedicine prevented a tragic return to the pre-Roe era, these models are not preferable, as they do not address the core issue at stake, meaning the fact that people «should have reproductive autonomy, including access to legal, clinically supported healthcare if they want it.» [489]

3.2.3 The repercussions on the right to travel……..

In his concurrent opinion, Justice Kavanaugh posed the question: «May a State bar a resident of that State from traveling to another State to obtain an abortion?», replying that the answer was no, almost as if it was redundant to wonder about such possibilities. In his view, the answer was evidently negative, given that such activity is based on a constitutional right to interstate travel, and he considered the abortion-related legal question as «not especially difficult as a constitutional matter». [490]

Even if the issue was raised as almost a rhetorical question, the facts unraveling after the Dobbs decision quickly denied the accuracy of Kavanaugh's statement, as a multitude of States did indeed start to enact laws restricting citizen's right to travel interstate to access abortions in neighboring States.

There are instances in which a State can «criminally prosecute a resident for an activity that happens wholly beyond its borders, even if that activity was legal in the other state». [491] Truth be told, there is also a general rule that States cannot use ordinary criminal laws to prosecute residents for crimes committed outside of their borders, but the rule has enough gaps that it, in reality, a wide variety of crimes that take place outside the jurisdiction of a State can be still prosecuted by said State. [492]

Some of the ways in which this extra-territorial jurisdiction effectiveness is enacted include referring to an 'effects doctrine', according to which if the criminal act takes place outside the State but the results of the crime are intended to cause harm within the State, the State in question can prosecute the criminal conduct. In the context of abortion, the consequences of applying the effects doctrine after

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[487] P. BELLUCK, *Abortion Pills Take the Spotlight as States Impose Abortion Bans*, *op. cit.*
[488] P. BELLUCK, *Abortion Pills Take the Spotlight as States Impose Abortion Bans*, *op. cit.*
[489] A.R. AIKEN, U.D. UPADHYAY, *The future of medication abortion in a post-Roe world*, *op. cit.*
[490] *Dobbs v. Jackson Women's Health Organization*, Kavanaugh, J., concurring at 10.
[491] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape,* page 256.
[492] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 30 ss.

the Dobbs decision could be devastating: a State that has banned abortion and declared that the unborn children deserve full legal protection, as Georgia did in 2019, could threaten to prosecute anyone involved with the killing of a «living, distinct person», including those who work at the out-of-state abortion clinic and anyone who has helped the patient travel to the clinic. [493]

Recent developments concerning Georgia in particular have put on hold the question concerning the right to travel and the possible prosecutions, as the Superior Court of Georgia has blocked the State's six-week abortion ban. But, simultaneously, the Supreme Court of Georgia has granted a stay of the injunction, meaning that the ban is back in effect as the appeal process continues, which in return attests that great confusion is propagating within the border of the State, and even more uncertainty remains for out-of-the-borders application. [494]

Pending clarification of the perplexities stemming from the limit of the States' jurisdictions, mobile abortion clinics have been sitting across state borders to deliver medication abortion to residents crossing state lines. [495] Other clinic-on-wheels programs are also providing surgical abortions for patients who prefer the procedure or are too far along in pregnancy to use the two-drug regimen needed for the medication abortion. [496]

The question that Justice Kavanaugh brushed off as «not especially difficult» not only proved to be much more complicated than he had anticipated, but it also wasn't the only inquiry that the Court should have responded to. The dissent opinion concerned itself with filling in the blanks, posing the questions that neither the majority nor the concurrence had dared to ask, much less answered, such as if a State can bar women from traveling to another State to obtain an abortion, or it a State can prohibit advertising out-of-state abortions or helping women get to out-of-state providers. [497]

According to the opinion of the three liberal Justices, by discarding the precedent and its standard, the majority had not extricated judges from the sphere of controversy, but, rather, it had put the Court «at the center of the coming inter-jurisdictional abortion wars». [498]

3.3 The possible solutions……

The issue of reproductive rights, particularly abortion, has been a contentious and dynamic topic at both the national and federal levels. There is an ongoing effort by states that support the right to abortion to extend their protection to women across state borders. This is achieved through the implementation of telehealth and the establishment of laws that allow for abortion outside their territorial jurisdiction.

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[493] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* pages 31 – 32.

[494] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit.*

[495] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.*, page 257.

[496] P. BELLUCK, *Abortion Pills Take the Spotlight as States Impose Abortion Bans*, *op. cit.*

[497] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 36.

[498] *Dobbs v. Jackson Women's Health Organization*, Justice Breyer, Justice Sotomayor and Justice Kagan, dissenting at 37.

At the federal level, there are various options to codify the right to abortion into federal law, including Presidential executive orders and congressional action. However, navigating the challenges of the current political landscape is unprecedented and poses significant obstacles.

3.3.1 Alternative Constitutional theories for the right to abortion……..

Because the majority's opinion based its overrule on the rejection of the Fourteenth Amendment as the basis for the protection of the right to abortion, both in his substantive due process interpretation and as an equal protection argument, novel constitutional reasonings have been advanced for providing constitutional protection of this right. [499]

Some scholars have advanced arguments that rely on the constitutional protection of religious freedom, which would be violated by some restrictive anti-abortion legislation. In Indiana, the first State to enact a law banning abortion after the Dobbs decision, five women and a religious Jewish group challenged the law under Indiana's Religious Freedom Restoration Act. [500]

A similar course of action has occurred in Florida, where a complaint against the State's 15-week abortion ban argued that «in Jewish law, abortion is required if necessary to protect the health, mental or physical well-being of the woman, or for many other reasons not permitted under the act. As such, the act prohibits Jewish women from practicing their faith free of government intrusion and thus violates their privacy rights and religious freedom». [501] Additionally, the complaint deemed the imposing of other religions upon Jewish women encompassed in the abortion law as a violation of the separation of Church and State. [502]

Both instances show how, in a faultless juxtaposition to the pro-lifers' argument, although some religions believe that human life begins at conception, this is not an opinion shared by all religions or all religious people, and abortion activists are starting to use the religious freedom angle in their favor. [503]

One proposal based on the Constitution is related to the Reconstruction Era Amendments, specifically the 13th and 14th Amendments. These amendments were passed to abolish slavery and provide equal protection of bodily autonomy and reproductive freedom. The proposal highlights the fact that rape and forced reproduction of enslaved women were central components of slavery. [504]

For some, instead, the future of protection of the right to abortion could still be sourced in the 13th Amendment but through a different lens, namely a public

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[499] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 259 ss.

[500] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit.,* page 24.

[501] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 261.

[502] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 261.

[503] N.M. CAFFREY, *Abortion in America After Roe: An Examination of the Impact of Dobbs v. Jackson Women's Health Organization on Women's Reproductive Health Access*, *op. cit.,* page 24.

[504] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 259 ss.

theory perspective. The solution would lie «in transforming [the abortion matter] from a private right as it was conceptualized by the Roe opinion, to a public concern that examines the state's constitutional duties to its citizens who experience unplanned pregnancies». [505]

3.3.2 Congress' Potential Codification…….....

The quest to find solid protection for the right to abortion so that it is respected throughout the Nation does not only follow a constitutional path, as national and, most importantly, federal solutions could be pursued.

For starters, it must be specified how Congress only has the ability to enforce constitutional rights through legislative measures, but it cannot have the authority to enforce legislation that defines constitutional rights. Therefore, a recognition of the constitutional right to abortion through the means of legislation is an unlikely option. [506]

Even if the only institution that can grant the enforcement of constitutional rights is the Supreme Court, Congress has a multitude of avenues in front of it to codify the core of Roe into federal law. One of its strongest powers derives from the Commerce Clause, which permits Congress to «regulate the channels of interstate commerce, persons or things participating in interstate commerce, and economic activities that substantially affect interstate commerce». [507]

Congress could utilize the Clause and protect reproductive rights through regulations of state restrictions on out-of-state abortions. The abortion restrictions that some States have enacted that limit access not only within their borders but also limit women's ability to travel out of state for reproductive purposes can be considered unconstitutional because they affect people participating in interstate commerce. A woman crossing state lines and spending money across state lines is technically contributing to interstate commerce, and the restrictive legislation that would prohibit her from doing so could be viewed as a violation of the Commerce Clause. [508] Utilizing this reasoning, Congress could codify Roe and its essential holding into federal law by arguing that limiting abortion access has a current and future effect on commerce, which grants the power to enact a federal law that allows access to the procedure of abortion. [509]

Another tool at the federal government's disposal is preemption, the doctrine that «federal laws trump conflicting state laws». [510] If Congress were to create a federal right to abortion, the law could preempt state abortion bans, but firstly, this would involve the recognition of a constitutional right that, as it has been clarified earlier on, is only a Supreme Court's prerogative; secondly, given the current condition of the Senate, the prospects of a federal law protecting abortion rights are almost non-existent. [511] But existing federal law and regulation

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[505] Y. LINDGREN, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, *op. cit.*, page 262.
[506] M. E. J. DOSER, *Access To Legal Abortion In A Post-Roe World*, Bachelor's thesis, University of Arizona, Tucson, USA, 2022, 1 – 31.
[507] M. E. J. DOSER, *Access To Legal Abortion In A Post-Roe World*, *op. cit.,* page 9.
[508] M. E. J. DOSER, *Access To Legal Abortion In A Post-Roe World*, *op. cit.,* 1 – 31.
[509] M. E. J. DOSER, *Access To Legal Abortion In A Post-Roe World*, *op. cit.,* 1 – 31.
[510] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 53.

might already conflict with state anti-abortion provisions. As per FDA regulations, it is theoretically not possible for a state to prohibit medication abortion or impose stricter regulations than the FDA. If this principle can be implemented in practice, medication abortion during the first ten weeks of pregnancy should be available in all states, irrespective of their laws. [512]

Indubitably, these are bold arguments, and their actual realization may be improbable right at this time, but jurisprudence's evolution and society's proven support for the right to abortion might just make their implementation possible sooner than expected.

3.3.3 The Executive's Protective Powers……

A lengthy discussion has been here documented on the interstate difficulties that have created (and will create, still, for some time) great confusion and uncertainty, but a similar predicament has also been presented in reference to the interaction between federal and statal law. More precisely, the efforts of protecting the right to abortion at a national level not only concern Congress but the President as well, who has been facing increased pressure to use its power, though yet untested, to protect the right to lawfully terminate a pregnancy. [513]

The Biden administration took some executive actions immediately after the Dobbs case had been decided, creating some federal-state conflicts. In the U.S. government's separation of powers, the President can pass executive orders not requiring Congressional approval, and Biden did exactly that, enacting an executive order «protecting access to abortion services for women attempting to obtain services out-of-state». [514] Additionally, in the months following the Dobbs decision, the Biden Administration took further steps to clarify the previously mentioned EMTALA (Emergency Medical Treatment and Labor Act), specifying that «a hospital is required to provide [women] with the emergency care necessary to save [their] life, including abortion care». [515]

President Biden also released a second executive order directing the Department of Health and Human Services (HSS) to identify potential actions to «protect and expand access to abortion care, including medication abortion». [516] The order also considered what steps should be taken to provide access for women traveling out of state for abortion services and ensured that healthcare providers complied with «federal non-discrimination laws so that women may receive the medically necessary treatment without delay», as there had been cases of pharmacies limiting access to reproductive health care materials, including emergency contraception. [517]

Though only partially effective, the efforts of the President, in conjunction with the Congress' endeavor and the liberal States' out-of-border activity depict a

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[511] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.*, page 53 ss.
[512] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 53 ss.
[513] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 52.
[514] M. E. J. DOSER, *Access To Legal Abortion In A Post-Roe World*, *op. cit.,* 1 – 31.
[515] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 76.
[516] D. S. COHEN, G. DONLE, R. REBOUCHÉ, *The New Abortion Battleground*, *op. cit.,* page 70.
[517] M. E. J. DOSER, *Access To Legal Abortion In A Post-Roe World*, *op. cit.,* pages 17 – 18.

clear image that the quest of recognizing the right to abortion at a federal level, regardless or in addition to a constitutional protection, is relentlessly persevering.

CHAPTER FOUR

JURISPRUDENTIAL COMPARISON WITH THE ITALIAN POLICIES

4.1. Restraints on abortion: from the U.S. Supreme Court to the Italian Constitutional Court…….....

Though with respect to different judicial systems and forms of government, the United States and Italy both share a peculiar common denominator in the reciprocal histories on the legality of abortion, as the right to terminate a pregnancy was first introduced in each system by a constitutional ruling, meaning the Supreme Court on one side and the Constitutional Court on the other.

If the practice can be considered quite common for the Supreme Court, as in City of Boerne v. Flores (1997) the Court specified that Congress may pass legislation protecting constitutional rights but may not determine how the rights are protected by the state legislation, as the Court asserted its exclusive power to define Fourteenth Amendment rights, which Congress cannot alter, [518] in Italy, the fact that it was the Constitutional Court that pronounced itself on the matter of abortion first, instead of the legislator, represented an oddity, at least at the time.

Generally, in the Italian system, the balancing between conflicting rights and constitutional interests is the legislator's duty, and only in a second (possible, but not essential) moment does the Constitutional Court intervene to verify the reasonableness and proportionality of the legislator's compromise. [519] Nevertheless, in the last decade or so, a tendency of the Constitutional Court to fill in the blanks left void by the legislator and recognize rights has been established in a series of rulings of particular ethical and moral relevance.

Ruling 242/2019 on the question of assisted suicide exemplified this course of action, as the Court, after allowing time for the legislator to intervene and having pointlessly waited, declared unconstitutional Article 580 of the Criminal Code in the part where it did not exclude from punishment assisted medical suicide when whoever requested the procedure was fully capable of understanding and willing, had an irreversible pathology that is the bearer of severe physical or mental disease, and was surviving thanks to life-saving treatments, four conditions that the Court identified. [520] Be it as it may, in the Seventies, the Constitutional intervention on the right to abortion represented the starting point of the legal discussion on its recognition within Italian borders.

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[518] M. E. J. DOSER, *Access To Legal Abortion In A Post-Roe World*, Bachelor's thesis, University of Arizona, Tucson, USA, 2022, page 9.
« Section 5 of the Fourteenth Amendment allows Congress the ability to enforce the amendment's liberty guarantees by "appropriate legislation" (US Const. amend. XIV, sec. 5). Congress has the ability to enforce constitutional rights through legislative measures but arguments suggest that it does not have the authority to enforce legislation to define Constitutional rights, unlike the Supreme Court».

[519] G. BRUNELLI*, L'aborto 'sbilanciato'. Il bilanciamento (assente) in Dobbs e il bilanciamento (inadeguato) in Corte costituzionale n. 27/1975*, in *Biolaw Journal*, Special issue 1, 2023, 17 – 26.

[520] N. ZANON, *I rapporti tra la Corte costituzionale e il legislatore alla luce di alcune recenti tendenze giurisprudenziali*, in *Federalismi.it*, Number 3, 2021, 86 – 98.

The Supreme Court's ruling of Roe v. Wade of 1973 was met with dissatisfaction from both the pro-life and the pro-choice sides, as the first did not want a federal constraint imposing on States the protection of the right to abortion, and the second did not believe such a radical decision appropriate to end the debate, and, soon after, it showed how the debate didn't settle down, but ignited instead. Justice Ruth Ginsburg, the biggest advocate for equal rights to ever sit on the Supreme Court bench, made it clear that she shared this sentiment of dissatisfaction with the Roe decision, stating that it had «halted a political process that was moving in a reform direction and thereby […] prolonged divisiveness and deferred stable settlement of the issue». [521] On one side, the Supreme Court's intervention had raised concerns about the forceful impact that the decision had on a society still searching for consensus on the matter.

On the other side, the Constitutional Court's ruling of 1975, only a few years after the American analogous correspondent, proceeded with extreme caution, precisely because a legalizing disposition was missing in the Italian legislation, and individuated a rather restrictive contour of the conflict, by taking into consideration only the protection of the fetus on one side and the protection of the mother's right to life and health on the other. When legislation was finally passed three years after the Constitutional ruling, Law 194 of 1978 regulated the abortion matter by keeping intact the bargain introduced by the Court but added a further restriction compromising women's choice: the right of conscientious objection for medical practitioners and health professionals involved in the procedure. [522]

Fifty years later, the two legal orders' approaches to the abortion matter could not be more dissimilar, at least on paper. On one hand, the evolution has been steadily advancing in the U.S., as an incessant concatenation of State laws and Supreme Court's rulings have consistently presented the issue under new and innovative lenses, always questioning the precedents and their legitimacy in an attempt to follow science's findings and society's sentiment.

Granted, the endless uncertainty that has hovered in the air ever since Roe's decision may have gone too far when the Dobbs ruling repealed the landmark precedent and deprived women, who had since then relied on the availability of abortion, of the ability to organize intimate decisions and life choices to find their place in society. [523]

But on the other hand, Italy confined the debates, as the issue remained contended there too, outside of legislation, because, after half a century, the law regulating abortion has not been replaced, and though the normative situation may seem crystallized and untouchable, calls for reform, or a brand new law better attuned with the contemporary bioethics and scientific discoveries, are nothing if not persistent. [524] In addition, because a great percentage of Italian gynecologists present themselves as conscientious objectors, though access to

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[521] L. GREENHOUSE, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, in *The New York Times*, published Sept. 18, 2020, updated Sept. 24, 2020.

[522] G. BRUNELLI*, L'aborto 'sbilanciato'. Il bilanciamento (assente) in Dobbs e il bilanciamento (inadeguato) in Corte costituzionale n. 27/1975*, *op. cit.,* 17 – 26.

[523] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), at 856.

[524] G. BRUNELLI*, L'aborto 'sbilanciato'. Il bilanciamento (assente) in Dobbs e il bilanciamento (inadeguato) in Corte costituzionale n. 27/1975*, *op. cit.,* 17 – 26.

the abortion procedure should be guaranteed all over the Italian territory, unlike in some American States, only a few doctors are available to perform the termination, and therefore restrictions fall on Italian women like they do on American women, even if to a different extent. [525]

Furthermore, though with different degrees of relevance, the actors at play during the 1970s that contributed to the emergence and refinement of the abortion matter are the same in both the American and the Italian frameworks. The power and strength of the Vatican's position favoring procreation, a diversified political arena, and the feminist challenge to the patriarchal state and dominant patriarchal culture [526] all intertwined in Italy in the early Seventies, and, in the same way, the religious National Right to Life Committee, second-wave feminists, and the Republican and Democratic parties played a role in the abortion debate before Roe v. Wade.

4.1.1. The feminist movement in Italy and the legalization of the pill…….

First and foremost, it must be clarified that feminist opposition alone did not lead to the passing of the law legalizing abortion in Italy, but, rather, feminist groups were able to «reframe the debate in significant ways and established themselves as a dominant voice, leaving other socio-political actors, whether in favor of or opposed to decriminalization, with the need to react». [527]

After World War II, discussions about individual freedom in reproductive behavior became more prevalent and eventually came to be a foundation for political debates on issues such as contraception and abortion, both at national and international levels, specifically within the United Nations system. [528] Yet, disenchantment and anger quickly overcame the initial optimistic expectations raised by the supposed inclusion of women into the political realm since suffrage had been granted to women in 1945. In addition to the persistent issues of gender equality in waged work and the intense cultural demands placed on mothers, the so-called 'sexual revolution' had turned out to be the biggest fraud of them all, as the public proliferation of sex and the new permissiveness were not only male-centered but created new forms of subordination disguised behind 'liberating' promises. [529]

The term 'sexual revolution' referred to the complex socio-cultural transformations witnessed during the mid-1960s and mid-1980s in which visible changes occurred in sexual cultures and discourses. Two aspects of the revolution were particularly crucial concerning the evolution of reproductive rights in Italy: «the growing politicization of sex, whereby experiences of sex were considered legitimate expressions of the self» on one side, and the

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[525] F. MINERVA, *Conscientious objection in Italy,* in *Journal of Medical Ethics*, Number 2, Volume 41, February 2015, 170 – 173.
[526] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy*, in *Social History*, Number 4, Volume 42, 2017, 1 – 32.
[527] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy*, *op. cit.,* page 5.
[528] M. A. BRACKE, *Family planning, the pill, and reproductive agency in Italy, 1945–1971: From 'conscious procreation' to 'a new fundamental right'?*, in *European Review of History: Revue européenne d'histoire*, Number 1, Volume 29, 2022, 88 – 108.
[529] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy, op. cit.,* page 8 ss.

«foregrounding of sex as pleasure and its disconnection from sex as procreation» on the other. [530] One year after the other, Italy dismantled cultural taboos on sexual freedom with remarkable rapidity, putting reproductive rights on the stage of political, social, and legislative debates.

The contraceptive pill started circulating illegally in the early Sixties and thanks to Associazione Italiana per l'educazione demografica (AIED)'s effort in disseminating it, by 1968 an estimated 135,000 Italian women were using the oral contraception. The year after, the first women-only groups were formed in the most politicized cities like Milan, Turin, Padua, and Rome. [531] In 1970, after an intense parliamentary debate and media coverage, legislation allowing for women and men to both equally request divorce was enacted. [532]

A year later, the Constitutional Court presented an unexpected ruling declaring Article 553 of the Penal Code, a norm that had been elaborated in the Fascism era to elevate the birth rate and that prescribed that whoever publicly incited practices against procreation or made propaganda in favor of such practices would be punished with jail time up to one year or sanctioned with a fine, unconstitutional. [533] In the decision 49 of 1971, the Constitutional Court considered that the criminal provision firstly violated paragraph 1 of Article 21 of the Constitution, [534] which protects freedom of speech and the press, because its rationality of demographic expansion had no more relevance at the time of the ruling, when, instead, the issue of birth control had become more relevant, and, secondly, Articles 31 and 32 of the Constitution [535], which manifested the protection of health and maternity. [536]

Though the ruling represented a clear sign that the social momentum for reproductive freedom was being addressed institutionally in the Courts of law, the argument only referred to the principle of free expression of opinion, protection of women's health, and loss of validity for the population-increment argument, and no mention of individual's self-determination in reproductive matters was

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[530] M. A. BRACKE, *Family planning, the pill, and reproductive agency in Italy, 1945–1971: From 'conscious procreation' to 'a new fundamental right'?*, *op. cit.,* page 92.

[531] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy, op. cit.,* page 8 ss.

[532] M. A. BRACKE, *Family planning, the pill, and reproductive agency in Italy, 1945–1971: From 'conscious procreation' to 'a new fundamental right'?*, *op. cit.,* page 96 ss.

[533] *Articolo 553 Codice Penale* (R.D. 19 ottobre 1930, n. 1398) - Incitamento a pratiche contro la procreazione, titolo abrogato dall'art. 22, L. 22 maggio 1978, n. 194.
[Chiunque pubblicamente incita a pratiche contro la procreazione o fa propaganda a favore di esse è punito con la reclusione fino a un anno o con la multa fino a lire quattrocentomila.
Tali pene si applicano congiuntamente se il fatto è commesso a scopo di lucro.]

[534] *Articolo 21 Costituzione*:
"Tutti hanno diritto di manifestare liberamente il proprio pensiero con la parola, lo scritto e ogni altro mezzo di diffusione."

[535] *Articolo 31 Costituzione:* "La Repubblica agevola con misure economiche e altre provvidenze la formazione della famiglia e l'adempimento dei compiti relativi, con particolare riguardo alle famiglie numerose.
Protegge la maternità, l'infanzia e la gioventù, favorendo gli istituti necessari a tale scopo."
Articolo 32 Costituzione: "La Repubblica tutela la salute come fondamentale diritto dell'individuo e interesse della collettività, e garantisce cure gratuite agli indigenti.
Nessuno può essere obbligato a un determinato trattamento sanitario se non per disposizione di legge. La legge non può in nessun caso violare i limiti imposti dal rispetto della persona umana."

[536] Corte Costituzionale, Sent. 10 Marzo 1971, n. 49.

introduced. Moreover, the Constitutional Court argued that in light of the cultural changes and medical technological progress, the use of contraception was «no longer perceived as a threat to morality in sexual conduct between men and women», rather than recognizing women's unconditional control over their body as a right. [537] Nonetheless, just like for the abortion matter, the highest court of appeal had pronounced itself on the contraceptive matter first, and legislative action only followed the judicial's impulse, as new legislation abolishing Article 553 was introduced a year later. [538]

But the revolution was far from over, especially because of the discontent surrounding the lack of reference to the right to bodily autonomy in the Constitutional ruling, and by 1975 the small groups collecting in prominent cities had turned into thousands of women of «different generations, different political persuasions, different social backgrounds» still pushing for the rapid development of social change to shift norms on issues of sexuality and gender relations. [539]

During that year, Law 405 was passed to discipline the organization and activity of Family Counselling Centers, sites funded by the Regions and run by local city councils, allowing for significant local variety and initiative, that offered psychological and social assistance in preparing couples to expand their families, ensured responsible procreation by spreading information on reproductive health, and provided the services needed to promote or terminate pregnancies. [540]

4.1.2. The Vatican's influence on reproductive matters……..

Nowhere else in the world, does an independent religious state exist within the borders of another country. Rome represents both the capital of Italy and the capital of the Vatican, the state of the Roman Catholic Church, identifying not only a geographical rarity but also creating an intriguing power dynamic, especially because, though influential throughout the world, the Church's proximity with the Italian Nation creates greater authority on the Mediterranean State and its people. [541]

Such leverage found specific expression in the Lateran Pacts signed in 1929, in which Italy agreed to guarantee the Pontifical State absolute independence, the exclusive and absolute dominion of the territory of Vatican City, and, most importantly, no interfering with Vatican affairs. However, no reciprocal provision insulated the Italian government from Vatican interference. One of the most prominent ways the Roman Catholic Church gained political

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[537] M. A. BRACKE, *Family planning, the pill, and reproductive agency in Italy, 1945–1971: From 'conscious procreation' to 'a new fundamental right'?*, *op. cit.,* page 100.
[538] M. A. BRACKE, *Family planning, the pill, and reproductive agency in Italy, 1945–1971: From 'conscious procreation' to a new fundamental right'?*, *op. cit.,* page 88 ss.
[539] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy, op. cit.,* page 9.
[540] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy, op. cit.,* page 21 ss.
[541] E. DIMARCO, *The Tides of Vatican Influence in Italian Reproductive Matters: From Abortion to Assisted Reproduction,* in *Rutgers Journal of Law and Religion*, Number 2, Volume 10, Spring 2009, 1 – 30.

strength in Italy was through the formation of the Christian Democratic Party (DC) in 1942. [542]

The Catholics' position on sexuality and family values was a central doctrinal area from which the Church intended to reinforce and extend its control. In this context, marriage existed primarily for the procreation and education of children, while sex was a potentially dangerous capacity that could be used only under conditions, meaning only within the sacrament of holy matrimony, and even then there were limits on its use. [543]

Unsurprisingly, then, the Church was intransigently opposed to any kind of decriminalization of contraceptive birth control and abortion. In 1968, Pope Paul VIth's encyclical letter Humanae Vitae regarded abortion not as a woman's individual affair, because it involved the fetus, a person endowed with a relationship to God, and it clashed with women's vocation to become a mother. But the society to which the Church was preaching was evolving, and so the religious authority had to somewhat attune its strings, without denying its principles. Only a few years later, in 1974, the Italian bishops issued a Declaration on abortion that acknowledged that «the law [could] not encompass the entire moral sphere or punish all sins», but also announced a future emerging Church-led resistance against a law decriminalizing abortion. [544]

Though extremely influential at first, the weakening of both the religious institution and its political party would come to the surface, as a deep division lacerated the DC because progressive Catholics wished to steer away from the absolutism of the rights of the fetus, by introducing reflection, rather, on the pregnant woman's experience and relationship to God. A bill proposed in 1975 as an attempt at compromise maintained that abortion was punishable but introduced distinctions according to the woman's circumstances that would have lessened the sentence, such as in cases of rape. [545]

Though the Church's power and political affiliation proved quite influential in the first decades of life of the Republican State, as the Christian Democratic Party covered powerful positions within the Italian Government for thirty years, the modern urbanization and rural exodus caused the influence of the Church to dramatically decline. [546]

Nonetheless, in the second half of the 1970s decade, the changed powers dynamic still hadn't overcome the Church's authority, and the Italian legislator bore in mind Catholic arguments and opposition when redacting the law that would legalize abortion in 1978.

4.1.3. The Constitutional Ruling n. 27/1975……

As the quest for sexual and gender equality was progressing rapidly, given that, in five years, divorce and contraception had been legalized and the laws that

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[542] E. DIMARCO, *The Tides of Vatican Influence in Italian Reproductive Matters: From Abortion to Assisted Reproduction, op. cit.*, page 3 ss.
[543] L. CALDWELL, *Abortion in Italy*, in *Feminist Review*, Number 7, Spring 1981, 49 – 63.
[544] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy, op. cit.,* pages 25 – 26.
[545] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy, op. cit.,* page 24 ss.
[546] E. DIMARCO, *The Tides of Vatican Influence in Italian Reproductive Matters: From Abortion to Assisted Reproduction, op. cit.*, page 5 ss.

criminalized adultery had been declared unconstitutional in 1968 with the Constitutional Ruling 126, it was only a matter of time before feminists would tackle the abortion issue.

The feminist movement was well aware of the fact that the long-standing taboo surrounding the practice had instilled shame and guilt in women's consciousness, and though public self-denunciation had become the core practice of the new politics of the movement, the question arose of where to draw the line between what needed to be publicly politicized and where women's intimate experiences could (and should) remain private. Not only that, women and their bodies were the battlefields on which the duality of the old representation of self-sacrifice motherhood and more recent sexual objectification were contending. [547]

The image of the half-sexualized, half-victimized woman on the cover of the periodical 'L'espresso' portraying a pregnant woman crucified and titled 'Abortion: An Italian tragedy', faultlessly encapsulated the duality of how women were perceived. [548] However, in the same year the Constitutional Court ruled against the illegality of therapeutic abortion in cases of grave risk to the woman's health, exemplifying how prominent the idea that women should have control at least of the choices regarding their bodies, if not of how they were perceived.

The law forbidding abortion was part of Title X, the same group of norms from which the contraception constitutional ruling had originated, which criminalized 'Delicts against the integrity and healthcare of the offspring', spacing from abortions for women consenting or not, to abortions auto-inflicted, from the instigation to abort to incitement for practices against procreation. [549]

As it has been anticipated, the legalization of abortion in Italy passed first through Constitutional adjudication and, only in a second moment, through the legislative system. In 1975, the Constitutional Court was called to decide on the constitutional legitimacy of Article 546 of the Penal Code, which disciplined that whoever caused the abortion of a pregnant woman, who had consented to the procedure, was punished with prison time up to five years, and the same penalty would be inflicted to the woman compliant. [550]

The Constitutional Court was established by the new Italian Constitution adopted on December 22, 1947, which gave the Court the authority to review «controversies on the constitutional legitimacy of laws and measures having the

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[547] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy, op. cit.,* page 18 ss.

[548] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy, op. cit.,* page 18 ss.

[549] *Titolo X - Codice Penale* (R.D. 19 ottobre 1930, n. 1398) – Dei delitti contro la integrità e la sanità della stirpe [ABROGATO]

[550] *Articolo 546 Codice Penale* (R.D. 19 ottobre 1930, n. 1398) – Aborto di donna consenziente [ABROGATO]
Titolo abrogato dall'art. 22, L. 22 maggio 1978, n. 194.
[Chiunque cagiona l'aborto di una donna, col consenso di lei, è punito con la reclusione da due a cinque anni.
La stessa pena si applica alla donna che ha consentito all'aborto.
Si applica la disposizione dell'articolo precedente:
1) se la donna è minore degli anni quattordici, o, comunque, non ha capacità d'intendere o di volere;
2) se il consenso è estorto con violenza, minaccia o suggestione, ovvero è carpito con inganno.]

force of law issued by the State and Regions, conflicts of authority between central institutions, between State and Regions, and between Regions, and charges brought against the President of the Republic» in accordance to the provisions of the Constitution [551] Because laws were interpreted by a decentralized system of courts, as the country was divided into districts in which twenty-six courts of appeals ruled, and the primary source of ordinary law were codes, which consolidated and sometimes amplified statutes, the Italian system was consistent with the implementation of the European Civil Law system.

The judicial approach relied on Italian judges 'interpreting' rather than 'making' law, and when there was no law on point, the judges resorted to being guided by principles prevailing in the Italian system rather than judging bound by precedents in the way that American judges did when relying on Common Law methodology. [552]

In the ruling under examination, the Constitutional Court had been called to evaluate the constitutional legitimacy of Article 546 of the Criminal Code, precisely about its legitimacy compared to Article 2, Article 31 paragraph 2, and Article 32 paragraph 1 of the Constitution. The first guarantees the protection of inviolable rights, the second ensures that maternity, infancy, and childhood are shielded through the implementation of the necessary institutions, while the third safeguards health as a fundamental right of the individual and as a collective interest, ensuring free medical care to the indigent. [553]

The tribunal of Milan had raised the question of legitimacy while attempting to solve a case concerning the abortion of a woman and the prosecution of her and others involved, as the judge wondered whether Article 546 was coherent with the constitutional parameters mentioned. The common judicial interpretation deemed that a termination needed to eliminate a present and inevitable risk to the life of the mother should have been lawful because it could be reconnected to Article 54 of the Criminal Code. But the case at stake regarded the instance of an abortion practiced only to prevent a danger to the pregnant woman's health, which, because it did not pose an imminent but only a future threat and endangered the health, rather than the life, of the woman, remained banned according to the criminal legislation. Therefore, to clarify the constitutionality of the disposition, the lower court had posed an incidental question of constitutional legitimacy. [554]

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[551] *Articolo 134 Costituzione:* "La Corte costituzionale giudica: sulle controversie relative alla legittimità costituzionale delle leggi e degli atti, aventi forza di legge, dello Stato e delle Regioni; sui conflitti di attribuzione tra i poteri dello Stato e su quelli tra lo Stato e le Regioni, e tra le Regioni; sulle accuse promosse contro il Presidente della Repubblica, a norma della Costituzione."

[552] C.S. ROSS, *The Right of Privacy and Restraints on Abortion under the Undue Burden Test: A Jurisprudential Comparison of Planned Parenthood v. Casey with European Practice and Italian Law*, in *Indiana International & Comparative Law Review*, Number 2, Volume 3, 1993, 199 – 232.

[553] *Articolo 2 Costituzione Italiana*: "La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale."
Articolo 31 Costituzione Italiana, cfr. note 18.
Articolo 32 Costituzione Italiana, cfr. note 18.

[554] Corte Costituzionale, Sent. 18 febbraio 1975, n. 27.

Unlike the Supreme Court, possibly also because of the different judicial systems' characteristics, the Constitutional Court did not think it appropriate nor necessary to present a thorough historical recollection, and, rather, it immediately focused its attention on the Article in question, which was rubricated as 'Crime against the line of descent'. The Court regarded its collocation in the title dedicated to crimes against a person as correct and believed that the protection of the unborn had relevance in both the Civil Code and the Constitution. However, the Court disagreed on the absolute prevalence that such protection had been given in the criminal provision. [555]

A balance between the two colluding protections, the woman's on one side and the fetus's on the other, had to be individuated, and the Court did not believe that the mere reference to the justification written in Article 54 of the Criminal Code, which stated that no punishment would apply on who had been forced by necessity of saving himself or others from tangible and grave damage if the danger had been provoked by him and was proportionate to his actions, was not suited for the specific situation of pregnant women here analyzed.

First of all, the requirement of immediate risk could not always apply in cases of dangerous pregnancies in which the risks, though predictable, would only present themselves later on.

Secondly, the requisite of proportional assessment between the legal interest violated by the author of the crime and the interest that the author meant to save from danger through his action did not apply in the abortion equation: even though the Constitutional Court identified that protection of the fetus was constitutionally recognized, the value of the health and life of a fully formed person like the one of the pregnant woman could not be compared to the safeguarding of a fetus. [556]

The Court's conclusion, therefore, was to individuate partial illegitimacy of Article 546, specifically in the part in which it did not state that abortion could be permitted in cases where the pregnancy would implicate medically attested damage or significant danger to the mother's health. [557]

4.2. The enactment of the law 194/1978 on the 'voluntary interruption of pregnancy'……

With these changes, both at the social and the constitutional level, the Italian parliamentary parties acknowledged the importance of proposing bills of their own, conscious that legislation on abortion was going to have to be enacted soon enough. [558] However, as Parliament's debates were developing, it became clear that political bargaining had little concern for women's self-determination, and the feminist movement deeply split into two sides: those who wished for a 'good law' and those who opposed any kind of legal regulation for abortion. [559] Those opposing legal regulation believed that any law on the termination of pregnancy would give the State power to decide for women, and, instead, they were seeking

[555] C.C., Sent. 27/1975.
[556] C.C., Sent. 27/1975.
[557] C.C., Sent 27/1975.
[558] L. CALDWELL, *Abortion in Italy*, *op. cit.*, page 52 ss.
[559] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy*, *op. cit.*, page 21 ss.

full liberalization, meaning the «repeal of existing legislation (through a referendum) and the introduction of a law which stated only women's full self-determination, the need for abortion to be performed by recognized medics, and the banning of abortion against the woman's will», allowing both public and private hospitals to perform abortions. [560]

By the end of 1975, the year in which the Constitutional Court had recognized the constitutionality of therapeutic abortion, a combined text was approved in the Senate, but the government's resignation abruptly interrupted the process, which had to be commenced from the start after the new elections. [561] When a tragic event occurred in Seveso, a province of Milan, as the spreading of a toxic cloud from a chemical factory exposed hundreds of women in their early stages of pregnancy to a concrete risk of fetal malformations brought the abortion issue in the hands of Parliament right after the 1976 election. [562]

At the time, 26 therapeutic abortions were executed, though not without strong disapproval from the Church and those who deemed the practice as a eugenic project, [563] but the pressure to regulate the matter had increased, and the newly appointed pro-abortion majority was committed to legalization. [564]

A united text was presented and passed in the Camera in January of the following year but consequently rejected by the Senate, stirring discussions among the abortion lobby and fury amid feminists, as the bill could not theoretically be re-presented for another six months. Nevertheless, the bill was immediately presented again in the Camera, and the Senate eventually passed it in June 1978. [565]

The further delays occurred both for reasons of ordinary political debating, as the already sensitive issue became a bargaining power for other political gains, [566] and for extraordinary reasons too, because, though the Italian Communist Party (PCI) was determined to safeguard the normal parliamentary functioning, the political crisis occurring during the fifty-five-day capture of former Prime Minister Aldo Moro by the Red Brigades in March of 1978 had indubitably impacted parliamentarians' sentiments. [567]

Nevertheless, as data emerged that an estimated 3 million abortions were performed each year at the time, and around 20,000 of those resulted in women's deaths, the need to legalize the practice dawned upon Italian citizens and the consensus amongst Italian parliaments quickly crumbled down. [568]

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[560] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy*, *op. cit.*, page 24.
[561] L. CALDWELL, *Abortion in Italy*, *op. cit.*, page 52 ss.
[562] I. FANLO CORTES, *A quarant'anni dalla legge sull'aborto in Italia. Breve storia di un dibattito*, in *Politica del diritto,* Number 4, 2017, 643 – 660.
[563] I. FANLO CORTES, *A quarant'anni dalla legge sull'aborto in Italia. Breve storia di un dibattito*, *op, cit.,* page 648.
[564] L. CALDWELL, *Abortion in Italy*, *op. cit.*, page 52 ss.
[565] L. CALDWELL, *Abortion in Italy*, *op. cit.*, page 52 ss.
[566] L. CALDWELL, *Abortion in Italy*, *op. cit.*, page 52 ss.
[567] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy*, *op. cit.*, page 8 ss.
[568] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy*, *op. cit.*, page 13.

The abortion legislation that resulted from such a peculiar historical and politically complex situation was a legal regulation in which the termination of pregnancies was treated as a «mix of an individual concern and a social problem under the tutelage of the state». The peculiar notion of 'moral objections', often religiously grounded, was separated from the State's motives and transferred to the private realms of individual doctors' choices.

Overall, the regulations of Law 194, compared to other historically Catholic countries like the Republic of Ireland, Belgium, or Poland, where abortion remained largely illegal at the time, stood out as more advanced than other Nations' provisions. Nonetheless, many feminists felt that women's bodies had become a political playground, and the discussion on abortion had only been framed around the social value of motherhood and the State's duty to protect the fetus' life, rather than establishing a discourse rooted in the right of bodily autonomy. [569]

4.2.1 The legislation's attempt to find a compromise between contrasting rights……

Article 1 of Law 194 of 1978 explicitly declared that the State «protected human life since its beginning». [570] Assuming that the beginning of life to which the Article referred could be identified with conception, though the Law did not explicitly say so, the introductory norm made it look as if absolute protection was guaranteed for the fetus' life.

However, Article 4 of the Law introduced a time framework to identify when abortion was allowed, in a similar approach as the one introduced by Roe's trimester rule, prescribing how, during the first 90 days of pregnancy, a woman whose personal circumstances would have made the continuance of the pregnancy a grave danger for her mental or physical health, both concerning her health conditions and her economic, social or family's status, could have access to the abortion procedure. [571] Included in the list of valid reasons for access to the termination of a pregnancy, were also listed the possibility of an abnormal fetus, rape, and incest. [572]

According to Article 6, second-trimester abortions were deemed legal only in two cases: when the physician considered that the continuation of the pregnancy or the delivery would have been a great threat to the mother's life or

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[569] M. A. BRACKE, *Feminism, the State, and the centrality of reproduction: abortion struggles in 1970s Italy*, *op. cit.*, page 29 ss.

[570] Legge 22 Maggio, 1978, n. 194 – Norme per la tutela sociale della maternita' e sull'interruzione volontaria della gravidanza.

Articolo 1: "Lo Stato garantisce il diritto alla procreazione cosciente e responsabile, riconosce il valore sociale della maternità e tutela la vita umana dal suo inizio."

[571] Legge 194/1978

Articolo 4: "Per l'interruzione volontaria della gravidanza entro i primi novanta giorni, la donna che accusi circostanze per le quali la prosecuzione della gravidanza, il parto o la maternità comporterebbero un serio pericolo per la sua salute fisica o psichica, in relazione o al suo stato di salute, o alle sue condizioni economiche, o sociali o familiari, o alle circostanze in cui è avvenuto il concepimento, o a previsioni di anomalie o malformazioni del concepito, si rivolge ad un consultorio pubblico istituito ai sensi dell'articolo 2, lettera a), della legge 29 luglio 1975 numero 405, o a una struttura socio-sanitaria a ciò abilitata dalla regione, o a un medico di sua fiducia."

[572] M. FILICORI, C. FLAMIGNI, *Legal Abortion in Italy*, in *Family Planning Perspectives,* Number 5, Volume 13, Sep. – Oct., 1981, 228 – 231.

physical health, or when a professional diagnosis of fetal abnormality had occurred, and had identified serious endangerment for the woman's physical or mental health. [573]

Though, after the Dobbs decision, the Supreme Court did not believe a right to abortion could find constitutional protection, at the time of the enactment of the Italian law, the U.S.' approach to the abortion matter was regulated by the Roe decision first, and Casey's ruling after, and, besides the trimester's reference, similarities between the Italian and American legal standards before the overturn of 2022 were a fair amount.

For instance, Pennsylvania's provision of a twenty-four-hour waiting period discussed in Casey found assonance with Article 7 of the Italian law, which required a seven-day waiting period after counseling when the situation was not deemed urgent by a medical expert.

Furthermore, in line with the Italian, and overall European, practice was also the Supreme Court's upholding of the provision that required informed consent to be obtained from the woman undergoing the procedure before it took place. Similarly, Article 5 of Law 194 prescribed that Family Counseling Centers were required to inform the pregnant woman of her rights and of the methods through which she could obtain application of the provisions concerning her protection. [574]

In addition, the Casey Court had proven consistent with Italian practice when it had chosen to strike down the husband notification, as Italy only required the husband's signature in cases where the woman was mentally ill, and, even in that case, the last word still pertained to the woman, according to Article 13.

Conclusively, provisions regarding minors, who had to obtain parental consent, were found permissible by the Supreme Court under the undue burden standard as long as the minor had gone through a judicial bypass procedure, and a similar approach was also prescribed by Italian Law in Article 12, whose constitutionality has been confirmed by the Constitutional Court. [575]

It was rather clear that, before the change of paradigm of 2022, regardless of the differences between Italy's civil law system and the United States common law structure, similarities in the legal prescriptions on abortion were more numerous than one might have predicted.

4.2.2 The right to object on moral or religious grounds……

A unique feature of the Italian law regulating abortion was the introduction of the 'conscientious objection' encompassed in Article 9, which read that «health personnel and allied health personnel [should have] not be required to assist in the procedures referred to in Sections 5 and 7 or pregnancy terminations if they [had] a conscientious objection, declared in advance». [576]

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[573] M. FILICORI, C. FLAMIGNI, *Legal Abortion in Italy*, *op. cit.,* 228 – 231.

[574] C.S. ROSS, *The Right of Privacy and Restraints on Abortion under the Undue Burden Test: A Jurisprudential Comparison of Planned Parenthood v. Casey with European Practice and Italian Law*, *op. cit.,* pages 214 ss.

[575] C.S. ROSS, *The Right of Privacy and Restraints on Abortion under the Undue Burden Test: A Jurisprudential Comparison of Planned Parenthood v. Casey with European Practice and Italian Law*, *op. cit.,* pages 214 ss.

However, the Article also cared to specify that the exemption guaranteed with the conscientious objection would not apply to cases in which performing the abortion was essential to save the life of a woman in imminent danger. Outside of these exceptional circumstances, criminal persecution would occur for the refusal to provide abortion care. [577]

In Italy, abortions could only be performed by gynecologists and obstetricians, never by general practitioners. Therefore the number of «professionals who [could] perform abortions [was] relatively small compared with countries where no specialization in gynecology or obstetric [was] required to perform the [procedure]». [578]

Furthermore, Law 194 did not specify which professional categories among healthcare personnel could object and which activities could be objected to, but, instead, paragraph 3 of Article 9 stated that those who identified themselves as conscientious objectors could be exempted «from carrying out the procedure and activities specifically and necessarily designed to bring about the termination of pregnancy» but would not be exempted from «providing care prior and following the termination». [579] Because the 'specific and necessary' criteria and the 'before and after' reference have both been interpreted quite differently by doctors, lawsuits have been presented to Italian Courts throughout the years in an attempt to find a common understanding of the legal text, but the interpretative issues

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[576] Legge 194/1978

Articolo 9: "Il personale sanitario ed esercente le attività ausiliarie non è tenuto a prendere parte alle procedure di cui agli articoli 5 e 7 ed agli interventi per l'interruzione della gravidanza quando sollevi obiezione di coscienza, con preventiva dichiarazione. La dichiarazione dell'obiettore deve essere comunicata al medico provinciale e, nel caso di personale dipendente dello ospedale o dalla casa di cura, anche al direttore sanitario, entro un mese dall'entrata in vigore della presente legge o dal conseguimento della abilitazione o dall'assunzione presso un ente tenuto a fornire prestazioni dirette alla interruzione della gravidanza o dalla stipulazione di una convenzione con enti previdenziali che comporti l'esecuzione di tali prestazioni.

L'obiezione può sempre essere revocata o venire proposta anche al di fuori dei termini di cui al precedente comma, ma in tale caso la dichiarazione produce effetto dopo un mese dalla sua presentazione al medico provinciale.

L'obiezione di coscienza esonera il personale sanitario ed esercente le attività ausiliarie dal compimento delle procedure e delle attività specificamente e necessariamente dirette a determinare l'interruzione della gravidanza, e non dall'assistenza antecedente e conseguente all'intervento.

Gli enti ospedalieri e le case di cura autorizzate sono tenuti in ogni caso ad assicurare lo espletamento delle procedure previste dall'articolo 7 e l'effettuazione degli interventi di interruzione della gravidanza richiesti secondo le modalità previste dagli articoli 5, 7 e 8. La regione ne controlla e garantisce l'attuazione anche attraverso la mobilità del personale. L'obiezione di coscienza non può essere invocata dal personale sanitario, ed esercente le attività ausiliarie quando, data la particolarità delle circostanze, il loro personale intervento è indispensabile per salvare la vita della donna in imminente pericolo.

L'obiezione di coscienza si intende revocata, con effetto, immediato, se chi l'ha sollevata prende parte a procedure o a interventi per l'interruzione della gravidanza previsti dalla presente legge, al di fuori dei casi di cui al comma precedente.©

[577] E. CARUSO, *The hyper-regulation of abortion care in Italy*, in *International Journal of Gynecology & Obstetrics*, 2023.

[578] F. MINERVA, *Conscientious objection in Italy,* in *Journal of Medical Ethics*, *op. cit.,* 170 – 173.

[579] Legge 194/1978

Articolo 9, supra 51.

would only be accurately solved if the law was amended with provisions clarifying the equivocal aspects mentioned. [580]

Additionally, the present legislation proved inadequate in ensuring secure accessibility to abortion services in hospitals and regional authorities where a high number of conscientious objectors existed. This became a recurrent problem in various regions of Italy, resulting in restricted access to these services, despite the provisions of Law 194. [581]

As the number of conscientious objectors has been increasing over time, the consequently growing material difficulty of access to the procedure has raised concerns both at a national level and at the European level. In 2012, the International Planned Parenthood Federation lodged a complaint against Italy for an alleged violation of Article 11 of the European Social Charter due to «inadequate protection of the right to access procedures for the termination of pregnancy» because Law 194 did not explain «how to guarantee women safe access to abortion when there are not enough healthcare practitioners to perform the intervention». [582]

Ten years later, as judgment for the Dobbs decision was being pronounced overseas, the Committee on Economic, Social and Cultural Rights expressed ongoing worry, highlighting that access to abortion services continued to be restricted in Italy, especially due to the considerable application of the conscientious objection's clause. [583]

On the subject, the European Committee of Social Rights delivered a decision in 2016 on the complaint presented by the 'Confederazione Italiana Generale per il Lavoro' (CGIL) to demonstrate the inadequacy of Article 9 §4, as the difficulties in accessing abortion procedures due to the particularly high number of personal health exercising their right to conscientious objection and the insufficiency of the measures taken by the competent authorities to cope with the phenomenon. [584]

The Committee, which is a body responsible for monitoring compliance in States parties and not a judiciary organism, agreed with the complainer that the shortcomings of the abortion's provisions remained unremedied and «women seeking access to abortion services continue[d] to face substantial difficulties in obtaining access to such services in practice». [585] The European board also concluded that it was rather concerning that some health facilities did not implement the appropriate measures to address the service deficiencies that arose when health workers exercised their right of conscientious objection, and when the measures were implemented they often resulted as inadequate. [586]

Overall, the Committee unanimously declared the violation of Article 11 of the European Social Charter, which recognized the right to «benefit from any measures enabling [the enjoyment of] the highest possible standard of health

[580] F. MINERVA, *Conscientious objection in Italy,* in *Journal of Medical Ethics*, *op. cit.,* 170 – 173.
[581] F. MINERVA, *Conscientious objection in Italy,* in *Journal of Medical Ethics*, *op. cit.,* 170 – 173.
[582] F. MINERVA, *Conscientious objection in Italy,* in *Journal of Medical Ethics*, *op. cit.,* 170 –173.
[583] E. CARUSO, *The hyper-regulation of abortion care in Italy*, *op. cit.*
[584] European Committee of Social Rights, Complaint No. 91/2013, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy,* page 41.
[585] Complaint No. 91/2013, page 47.
[586] Complaint No. 91/2013, page 47.

attainable», as well as the violation of other rights concerning the prohibition of discrimination and safeguarding work conditions. [587]

The Ministry of Health's most recent annual report showed that, in 2021, the phenomenon of conscientious objection had applied to an overall 63.6% of gynecologists, one percent less than the year before, 40.5% of anesthetists and 32.8% of non-medical personnel, painting a picture that, one side, does not portray real access to the procedure no matter what the legislature has established, and, on the other side, does not seem to improve regardless of the numerous European scoldings. [588]

4.3. The developments……..

Though the legalization of abortion was certainly a victory for women's rights and their independent choices regarding their bodily integrity, flaws that pertained to Law 194 were already present at the time of the enactment and the lack of reform for fifty years did certainly not help avoid a growing addition of complaints.

First of all the hyper-regulatory regime of the law proved inconsistent with the World Health Organization Abortion Care guidelines. The great number of conscientious objectors, the struggles surrounding the implementation of the 'abortion pill', and the lack of development on telemedicine on medical abortion, all intertwined in creating gaps between what the Law imposed and what happened in practice. The legal framework that results from such a context is far removed from international standards of quality abortion care, does not comply with human rights law, and lacks updating coherent scientific developments. [589]

Secondly, the recognition of the relevance that the fetus held in the Constitutional ruling first and in the abortion law second does not seem to be losing ground, and, instead, political efforts to push both ordinary legislation and coded law into recognizing greater protection of the unborn's rights are consistent.

Besides the patent need for reform of the law, the perspective on which to introduce amendments should revolve around the guiding principle that puts women's right to bodily autonomy at the center of the equation.

4.3.1. Medical abortion and telemedicine's remedy during the pandemic…….....

According to the World Health Organization (WHO), «access to safe and legal abortion is an essential part of sexual and reproductive health services» and therapeutic abortion represents a «non-invasive and highly acceptable option to pregnant persons». [590] The medical procedure that identifies this self-managed

[587] European Social Charter,
Article 11: "Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable".
[588] Relazione del Ministro della Salute sulla attuazione della legge 194/78 tutela sociale della maternità e per l'interruzione volontaria di gravidanza - dati 2021.
[589] E. CARUSO, *The hyper-regulation of abortion care in Italy*, *op. cit.*
[590] S.DE VIDO*, Under His Eyes: riflessioni sul ruolo della tecnologia sul corpo delle donne a seguito della sentenza Dobbs della Corte Suprema degli Stati Uniti,* in *Biolaw Journal*, Special issue 1, 2023, page 345

abortion, as mentioned earlier on, [591] consists of the ingesting of two active principles, aka Mifepristone and Prostaglandin, within 48 hours between the first and the second. [592]

In Italy, access to such an easier procedure of termination of pregnancy, instead of the surgical operation of abortion, has always been legalized on paper, thanks to Article 15 of Law 194 of 1978, which astutely foresaw that technological advances would have changed the abortion practice. The normative text read that Regions, following universities and hospitals' research, had to promote the updating of medical and auxiliary personnel, among other things, on the issues of contraceptive methods and the latest, most respectful of women's dignity and less risky techniques concerning the termination of pregnancy. [593]

In reality, the introduction of the RU846 pill was full of debate, as it was first introduced in the Piemonte region thanks to the efforts of gynecology and obstetrician specialist and political activist Silvio Viale, who started pushing for the introduction of the 'morning after' pill in the region in 2000. [594]

On January 29, 2001, Viale presented to the Saint Anne Hospital of Turin a request for implementation of medical abortion as an alternative for the surgical procedure at least in the first weeks of the pregnancy, through the use of three drugs: RU846 (not available yet in Italy) and Metrotrexato and Misoprostol (already accessible). As the legitimacy of the medical procedure had been confirmed within the legal framework introduced by Law 194, a proposal for an experimental clinic at Saint Anne's was presented and eventually approved, and the trial started taking place in 2002. [595]

Though in 2006 the WHO approvingly stated that the introduction of the abortion pill had proven essential for women's health, especially in countries where sanitary conditions were precarious, and the pill had significantly decreased maternal mortality, the Italian debate on the implications of the use of this peculiar method of abortion was major, and it had moved in the political arena. [596]

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[591] This thesis, chapter 3, paragraph 3.2.2 Telemedicine services and self-managed medical abortions.

[592] S.DE VIDO*, Under His Eyes: riflessioni sul ruolo della tecnologia sul corpo delle donne a seguito della sentenza Dobbs della Corte Suprema degli Stati Uniti, op. cit.,* pages 343 – 359.

[593] Legge 194/1978

Articolo 15: "Le regioni, d'intesa con le università e con gli enti ospedalieri, promuovono l'aggiornamento del personale sanitario ed esercente le arti ausiliarie sui problemi della procreazione cosciente e responsabile, sui metodi anticoncezionali, sul decorso della gravidanza, sul parto e sull'uso delle tecniche più moderne, più rispettose dell'integrità fisica e psichica della donna e meno rischiose per l'interruzione della gravidanza Le regioni promuovono inoltre corsi ed incontri ai quali possono partecipare sia il personale sanitario ed esercente le arti ausiliarie sia le persone interessate ad approfondire le questioni relative all'educazione sessuale, al decorso della gravidanza, al parto, ai metodi anticoncezionali e alle tecniche per l'interruzione della gravidanza. Al fine di garantire quanto disposto dagli articoli 2 e 5, le regioni redigono un programma annuale d'aggiornamento e di informazione sulla legislazione statale e regionale, e sui servizi sociali, sanitari e assistenziali esistenti nel territorio regionale."

[594] A. CARAPELLUCCI, G. MANFREDI, N. PISANO, *RU486: UNA VITTORIA RADICALE*, Torino, Ottobre 2009.

[595] A. CARAPELLUCCI, G. MANFREDI, N. PISANO, *RU486: UNA VITTORIA RADICALE*, *op. cit.,* page 23.

[596] C. MELEGA, *La legge 194: un dibattito riacceso*, in *Biolaw Journal*, Special issue 1, 2023, page 33.

Viale, who deemed the efforts of the central right parties to oppose the introduction of the pill on the market as a choice that would've ridiculized Italy at the international level, stated such politicization of the matter represented an «adaptation to political requests completely unusual in the scientific world». [597]

Nonetheless, on October 19, 2009, the Agenzia Italiana del Farmaco (AIFA) approved the immission of the pill in national commerce. More than 10 years later, as the pandemic started unraveling, access to abortion was still rather restricted, in part because of the minimal recognition of the assistance that telemedicine could have played for the obtainment of medical abortions, and in part because of the unjustified and serious restraints imposed on abortion in general during the periods of mandatory isolation. [598]

During the lockdown caused by the spreading of COVID-19, plenty of hospitals, stating their compliance with the directions of the Ministery of Health of March 9, suspended their service for abortions, considering it as a non-essential procedure, regardless of the fact that Law 194 had identified the termination of pregnancy as an indispensable practice. Even though the situation for Italian women seeking an abortion during the lockdown was rather dramatic, and regardless of the European Union's multiple reprimands, the Italian Health Ministry keeps declaring that the level of access to the procedure offered in the Nation is appropriate. [599]

In August 2020, the adoption of new guidelines adopted by the Italian government on medical abortion only authorized the permissible period for the use of voluntary termination of pregnancy with pharmacological methods to 9 weeks of gestation, instead of 7 as it had been determined in the 2010 guidelines. [600]

Though the two-week allocation represented a positive development, more in tune with scientific evidence and medical best practices, several regions were reluctant to enforce the updated guidelines. In many clinics, the RU486 was not administered due to several 'bureaucratic-administrative' issues. [601]

Furthermore, even if remote medical assistance in Italy became part of the National Health Service in 2020, the services provided still do not include the voluntary interruption of pregnancy, despite the Società Italiana di Ginecologia e Ostretricia (SIGO)'s recommendation that laying out a «set of standards for medical abortion through a totally remote procedure monitored by telemedicine services» could be a safe and effective option. [602]

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[597] A. CARAPELLUCCI, G. MANFREDI, N. PISANO, *RU486: UNA VITTORIA RADICALE*, *op. cit.,* page 50

[598] S.DE VIDO*, Under His Eyes: riflessioni sul ruolo della tecnologia sul corpo delle donne a seguito della sentenza Dobbs della Corte Suprema degli Stati Uniti,* page 350.

[599] C. MURATORI, M. L. DI TOMMASO*, I segni della crisi sui corpi delle donne*, in *Ingenere,* April 15, 2020.

[600] S.DE VIDO*, Under His Eyes: riflessioni su ruolo della tecnologia sul corpo delle donne a seguito della sentenza Dobbs della Corte Suprema degli Stati Uniti, op. cit.*

[601] G. MONTANARI VERGALLO, R. RINALDI, R. ET AL., *Is the Right to Abortion at Risk in Times of COVID-19? The Italian State of Affairs within the European Context*, in *Medicina,* Volume *57*, 2021.

[602] G. MONTANARI VERGALLO, R. RINALDI, R. ET AL., *Is the Right to Abortion at Risk in Times of COVID-19? The Italian State of Affairs within the European Context*, *op. cit.*

Nonetheless, the persistent discontinuation or reduction in services in some hospitals and clinics caused by the great percentage of conscious objectors, the persisting difficulties surrounding access to the self-managed option, and the lack of interest in expanding telemedicine services to the reproductive area, depict a legal framework where the right to health and self-determination of Italian women seems hardly in line with what the legal standards of Law 194 had imposed.

4.3.2. The legal capacity of the unborn…….....

Contrarily to the American approach where the Supreme Court managed to define the right to abortion as a penumbra of the constitutional, and enumerated, right to privacy, and the Roe majority refused to endorse any 'theory of life', [603] the Constitutional Court's ruling of 1978 clearly stated that «protection of the conceived has constitutional grounding». [604]

Though today abortion is, at least on paper, seemingly accessible within the Italian territory, an underlying concept that has been hiding below the surface in every political and legal discussion regarding reproductive rights in Italy is the recognition of a duty to protect the 'unborn', meaning the fetus and, prior, the embryo. In addition to playing a key role in the discussions unfolding on the abortion issue, the significance of the unborn's protection became relevant in every legal discourse concerning reproductive matters, such as the regulating of medically assisted reproductive techniques which had become extremely prominent in the legislative debates of the early 2000s.

4.3.2.1. In the matter of Medically Assisted Reproduction of Law 40/2004….

In 2004, the Medically Assisted Reproduction Law (MARL) passed with a strong majority in the Senate, thanks to the Catholics' siding with the center-right government, displaying how the Vatican's influence, even if it had been somewhat defeated in the abortion battle, was still quite relevant in political discussions. The law restricted many aspects of assisted reproduction and scientific research, as well as strongly limiting the scope of application, because «only infertile, stable, heterosexual couples» were considered eligible for assisted reproduction techniques. [605]

Although an abundance of Constitutional rulings intervened on the law, materially changing its content and reshaping its provisions more accordingly to a scientifically accurate framework, rather than adhering to the Catholic Church's principles as did the original text of the legislation, [606] what is relevant to point out is how the law regulated the use and disposal of embryos.

Article 1 of Law 40 of 2004 declared that to resolve reproductive issues caused by infertility or sterility, medically assisted reproduction was allowed within the rules and regulations of the law, which cared to «ensure the protection of the rights of all parties involved, *including* the conceived's». [607] Complications

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[603] *Roe v. Wade*, 410 U.S. 113 (1973), at 160.
[604] C.C., Sent. 27/1975.
[605] E. DIMARCO, *The Tides of Vatican Influence in Italian Reproductive Matters: From Abortion to Assisted Reproduction,* page 16 ss.
[606] E. FALLETTI, *Reproductive Rights in Italy*, page 201.

instantaneously arose both from the position of the law on the right to life and from the lack of specification of when an embryo comes into existence and deserves the recognition of its rights. [608]

Of course, religious actors had played a significant role in pushing the unborn's rights agenda forward, and when, in 2005, in the referendum on MARL only 26 percent of the 50 million eligible voters cast their votes, it was clear that the urging of the Pope to boycott the referendum had played a huge role, alongside other causes such as the complexity of the law's scientific constraints and a certain amount of voters' apathy. [609]

Furthermore, Section VI of the Law was titled «Protective measures for the embryo», clearly reiterating that the legislation was approaching the medically assisted reproduction matter from a precise perspective on the theory of life. Article 13 of the Section prohibited any research or experimentation on unused embryos, but one of the multiple interventions of the Constitutional Court taking place in 2015 exhibited how the Court found the part of the article that prohibited the selection of the embryos unconstitutional, as it imposed the fertilization of women with embryos affected by genetic diseases. [610]

On the same aim of the preservation of embryos was Article 14, which imposed a general veto on the cryo-conservation and suppression of embryos. Because embryos in excess do not have a perspective of ever enduring a biological development, because they have not been selected for fertilization, they are preserved until their natural extinction. Though embryos not utilized for reproductive goals because they are bearers of genetic defects are of no use, some of the embryos conserved are healthy and available for fecundation and the hypothesis of offering them to parents looking for 'pre-natal adoption' so that they do not go to waste has been presented by some scholars. [611]

Nonetheless, even if the ratio of Law 40 of 2004 was to guard and protect embryos and their development, no provision has been introduced to more

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[607] Legge 19 Febbraio 2004, n.40 – Norme in materia di procreazione medicalmente assistita.
Articolo 1: "Al fine di favorire la soluzione dei problemi riproduttivi derivanti dalla sterilità o dalla infertilità umana è consentito il ricorso alla procreazione medicalmente assistita, alle condizioni e secondo le modalità previste dalla presente legge, che assicura i diritti di tutti i soggetti coinvolti, compreso il concepito."

[608] E. DIMARCO, *The Tides of Vatican Influence in Italian Reproductive Matters: From Abortion to Assisted Reproduction,* page 16 ss.

[609] E. DIMARCO, *The Tides of Vatican Influence in Italian Reproductive Matters: From Abortion to Assisted Reproduction,* page 16 ss.

[610] Legge 40/2004
Articolo 13 comma 1: "È vietata qualsiasi sperimentazione su ciascun embrione umano."
La Corte Costituzionale, con sentenza 21 ottobre - 11 novembre 2015, n. 229 (in G.U. 1ª s.s. 18/11/2015, n. 46), ha dichiarato "l'illegittimità costituzionale dell'art. 13, commi 3, lettera b), e 4 della legge 19 febbraio 2004, n. 40 (Norme in materia di procreazione medicalmente assistita), nella parte in cui contempla come ipotesi di reato la condotta di selezione degli embrioni anche nei casi in cui questa sia esclusivamente finalizzata ad evitare l'impianto nell'utero della donna di embrioni affetti da malattie genetiche trasmissibili rispondenti ai criteri di gravità di cui all'art. 6, comma 1, lettera b), della legge 22 maggio 1978, n. 194 (Norme per la tutela della maternità e sulla interruzione della gravidanza) e accertate da apposite strutture pubbliche".

[611] R. CRISTIANO, *Gli embrioni soprannumerari: tutela e sperimentazione,* in *Rivista Associazione Italiana dei Costituzionalisti,* Numero 2, 2018, 1 – 19.

usefully and purposefully use embryos that have failed to be selected for the reproductive use they had been created for. [612]

4.3.2.2. In the Civil Code……

Moreover, the legal protection of the conceived has not only played a key role in all the legislations concerning bio law issues on the regulation of reproductive rights, but it has also been the object of initiatives aiming to reform the text of the Civil Code to make it recognize legal capacity since the moment of conceiving. [613]

As of today, Article 1 of the Civil Code reads that «Legal capacity is acquired from the moment of birth» and, though Italian law defines some rights that can be recognized to the unborn, «the rights that the law recognizes in favor of the conceived are dependant on the event of birth». [614] The latest of the many amendment proposals that have been presented throughout the years dated back to last year, and provided that attribution of legal capacity should have been granted since the moment of fertilization, rather than the moment of birth, so that personal rights including the right to life could also be recognized in their whole capacity to the conceived. [615]

Though presented as a clarifying intervention, which would presumedly help a better understanding of the abortion regulation of Law 195, the real object of the 2021 proposal seemed more like an indirect attempt to attack women's, and more specifically mothers' rights, indirectly. Because conflicting interests are necessarily at play when the possibility of a termination of pregnancy arises, both incompatible positions cannot prevail at the same time and express their scope unconstrainedly, but, instead, a balancing between the two has to determine the gradually diminishing of one of the interests clashing.

In this case, both the Constitutional Court and Law 194 had agreed on approaching the issue of weighing the two rights at play in the abortion context by considering that the fetus' position had to succumb when its protection proved incompatible with the mother's rights. The 2021 proposal, instead, wished to grant greater scope to the protection of the fetus, so that the balancing would have more hardly favored the women's protection. Therefore, the real aim of the legislative proposal was to crack the equilibrium identified in Law 194, rather than simply clarifying the content of the Law, and the plain underlying intention was to restrict access to abortion. [616]

Though the proposal never got enacted, it was yet another proof, and rather a recent one, that the fight aiming for greater protection for the fetus, at the expense of pregnant women, was, and is, far from over in Italy.

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[612] R. CRISTIANO, *Gli embrioni soprannumerari: tutela e sperimentazione, op. cit.,* page 4 ss.

[613] A. PISU, *Capacità giuridica al concepito e tutela della vita nascente. La proposta di modifica dell'articolo 1 del codice civile italiano nel nuovo scenario globale sull'aborto*, in *Biolaw Journal*, Special issue 1, 2023, 319 – 329.

[614] *Articolo 1 Codice Civile* (R.D. 16 marzo 1942, n. 262) – Capacità giuridica
"La capacità giuridica si acquista dal momento della nascita [22 Cost.].
I diritti che la legge riconosce a favore del concepito sono subordinati all'evento della nascita."

[615] A. PISU, *Capacità giuridica al concepito e tutela della vita nascente. La proposta di modifica dell'articolo 1 del codice civile italiano nel nuovo scenario globale sull'aborto*, *op. cit.,* 319 – 329.

[616] A. PISU, *Capacità giuridica al concepito e tutela della vita nascente. La proposta di modifica dell'articolo 1 del codice civile italiano nel nuovo scenario globale sull'aborto*, *op. cit.,* 319 – 329

4.3.3. The right to bodily integrity as a compelling perspective……..

Those who oppose the content of Law 194 and its regulation of abortion consider that the practical problems reconnected to the legislation's provisions and the difficulties of accessing abortion are inevitable, precisely because of the legislation's framework. The argument relies on the belief that Law 194, though referred to as 'abortion law', is essentially written to consecrate motherhood. Respect for women's bodily autonomy is minimal, as the Law does legalize the practice of voluntary interruption of pregnancy but the service is represented as an exception strongly discouraged by the wording of the law. [617]

Moreover, the complementary sides of the right to bodily autonomy, being the legality of formally attributing to the woman the choice of interrupting a pregnancy, and the morality of this choice, have not been treated equally: the legal provision has never been amended, but the moral aspects have been incessantly attacked by exterior factors, weakening women's position. [618]

Instead of approaching the issue from a rights perspective, which would have induced more pondering on how women should be able to choose what happens to their bodies as well as deserve the chance to shape their lives with their own hands, pregnant women have been treated as helpless creatures in need of guidance. [619]

When the cultural, social, and religious pressure to discourage women from terminating their pregnancies fails, the depiction of immature and weak people in need of persuasion falls. On one side, biblical interferences play a role in villainizing women seeking an abortion, because they become sinners «deserving pain and punishment» according to the scripture, and the great influence that Catholic institutions and beliefs have on Italian society has been previously unmasked as nothing but forceful.

On the other side, cultural disapproval is deeply entrenched in hospital corridors and operating rooms, as the number of conscientious objectors has become the vast majority. [620]

In hospitals with a high percentage of objectors, abortion providers have become bearers of the burden of the increased workload, «spending most of their working hours performing abortions, which can hinder their career progressions». [621] Additionally, because the act of performing terminations of pregnancies is often viewed as 'dirty work', the decision of conscientiously objecting loses the moral connotation, and a gynecologist's or anesthesiologist's decision to object

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[617] E. CARUSO, *The ambivalence of law: some observations on the denial of access to abortion services in Italy*, in *Feminist Review*, Issue 124, 2020, 183 – 191.
[618] F. ANGELINI, *Parlare di aborto per rimettere al centro la libertà delle donne. Ripartire dal principio di autodeterminazione come responsabilità della gestante*, in *Biolaw Journal*, Special issue 1, 2023, 207 – 216.
[619] F. ANGELINI, *Parlare di aborto per rimettere al centro la libertà delle donne. Ripartire dal principio di autodeterminazione come responsabilità della gestante*, *op. cit.,* 207 – 216.
[620] E. CARUSO, *The ambivalence of law: some observations on the denial of access to abortion services in Italy*, *op. cit.,* page 187 – 188.
[621] R. GHIGI, V. QUAGLIA, *In the Name of Women. Comparing Gynecologists' Discourses About Abortion in Italy*, in *Italian Sociological Review*, Number 3, Volume 13, 2023, page 398.

may depend on considerations that do not necessarily reflect an ethical opposition to women's right to terminate a pregnancy. [622]

Recentering the specificity of women's bodies and their right to choose should be the perspective from which to reform Law 194 if enacting a brand new legislation seems unattainable for now. Motherhood should not be imposed on a woman and the qualities that determine the possibility of using her body for reproductive reasons are distinctive biological and sexual characteristics that should not dictate her life choices. [623]

Evidence of this is obtainable through reverse reasoning: in the case of total lack of self-determination, those who make the determinations for others should protect them, but in more than forty years very little governmental effort has been made to comply with Law 194 provisions requiring funding and financing 'consultori' and their work on ensuring favorable conditions for accessing responsible motherhood. Though Article 1 of the Law professed its mission of protecting all lives, including prenatal life, the concrete application of the regulations has proven as more protective of the life of the child before it is born than when his life starts, because social assistance for the part of motherhood that happens after birth is greatly insufficient. [624]

4.3.4. The significant distance between the formal application and the substantial access to abortion care……..

The obstacles, both organizational and ideological, that Italian women have to overcome to access a procedure that should be granted by law are numerous, and the limitations and restrictions imposed on abortion in Italy have a bitter aftertaste comparable to America's.

Though a deeply contended issue, the legalization of abortion has not found total consensus even within its supporters, as the conditions of abortion, such as «the extent of legitimate intervention of the state over private decisions, the degree of access to abortion services and their availability, the appropriate number of abortions in a lifetime, the distinction between the use and the abuse of abortion, but also the most appropriate abortion technique», are continuously questioned. [625] Nonetheless, the legalization of the practice should safeguard its attainability for women, no matter what disagreements may intertwine between and within the disputing sides.

But in Italy, because, as it has been analyzed, many actors play a role in opposing the procedure, political, moral, and religious factors shape a specific conception of the female body and its role, taking choices 'in the name of women' instead of letting women decide for themselves. [626]

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[622] R. GHIGI, V. QUAGLIA, *In the Name of Women. Comparing Gynecologists' Discourses About Abortion in Italy*, *op. cit.,* page 395 ss.
[623] F. ANGELINI, *Parlare di aborto per rimettere al centro la libertà delle donne. Ripartire dal principio di autodeterminazione come responsabilità della gestante*, *op. cit.,* 207 – 216.
[624] F. ANGELINI, *Parlare di aborto per rimettere al centro la libertà delle donne. Ripartire dal principio di autodeterminazione come responsabilità della gestante*, *op. cit.,* 207 – 216.
[625] R. GHIGI, V. QUAGLIA, *In the Name of Women. Comparing Gynecologists' Discourses About Abortion in Italy*, *op. cit.,* page 394.
[626] R. GHIGI, V. QUAGLIA, *In the Name of Women. Comparing Gynecologists' Discourses About Abortion in Italy*, *op. cit.,* page 393 ss.

Since the substantial protection and respect of the right to abortion in Italy determine the possibility of undergoing the surgical procedure as widely constrained by conscientious objectors and the access to the self-managed alternative is restricted as well, when abortion is not fully provided, «women are forced to perform it illegally and in very risky ways». [627]

The Ministry of Health's report on abortion of 2022, concerning the data of the year 2020, estimated that the phenomenon represented a low-impact entity, individuating between 10,000 and 13,000 cases of 'back-alley' abortions, according to calculations defined in 2016. If on the one side, because abortion is legal and its access should be guaranteed, the number of illicit abortions should be zero, on the other side, because the number of voluntary interruptions of pregnancy has greatly diminished between 2016 and 2022, it is rational to imagine that the unlawful phenomenon has reached a greater percentage on the abortions provided overall. [628]

Clandestine abortions are only the last of a long series of similarities that exist between a nation in which the right to obtain an abortion has been recognized as not constitutionally protected like the United States, and a state like Italy where such right, instead, was not only recognized by the Constitutional Court but also legalized more than forty years ago. Yet, the two apparently different legal approaches share a worryingly amount of characteristics.

In economically developed countries, fertility should walk hand in hand with consistent regard for sexual and reproductive health, through guaranteeing contraception and abortion services; however, Italy seems to be marching in the opposite direction, following in the footsteps of European Nations who have always historically opposed abortion like Poland and Hungary, but also emulating the overseas American more restrictive approach introduced with the Dobbs decision. [629]

The narrative of framing abortion as a trauma endangers the efforts of feminists to eradicate the paternalistic view of women incapable of making rational decisions typical of the last century, but somewhat still engrained today. The perception of abortion as harmful can be challenged by the experience and everyday clinical practice, and women, by determining their bodily choices, should take back what should have already been theirs. [630]

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[627] R. GHIGI, V. QUAGLIA, *In the Name of Women. Comparing Gynecologists' Discourses About Abortion in Italy*, *op. cit.,* page 394.
[628] C. MELEGA, *La legge 194: un dibattito riacceso, op. cit.,* 27 – 37.
[629] C. MELEGA, *La legge 194: un dibattito riacceso, op. cit.,* 27 – 37.
[630] R. GHIGI, V. QUAGLIA, *In the Name of Women. Comparing Gynecologists' Discourses About Abortion in Italy*, *op. cit.,* page 407 ss.

CONCLUSIONS

The abortion question has always been and will always be a dividing issue. Like most bioethical matters, many aspects of personal morality and spirituality dictate how to value the procedure, and the diversification of belief systems will never allow for a homogeneous common perception. But differences based on the set of principles to which individuals refer are what makes us human, and the liberty of self-determination, the possibility of making our own choices, is a fundamental right that allows us to express our point of view protected by equal rights and equal opportunity.

Because of the great impact that the abortion question has both on a theoretical level, as the fairness of resorting to a procedure that can terminate a pregnancy is differently judged according to one's morality, and on a very real and practical level, because the consequences that women who are either denied or allowed access to the procedure dictate the evolving of the rest of their lives, it is rather easy to steal away from the legal borders of the issue and end up discussing aspects of the matter that have little to do with the question of legalization.

It is not a casualty that a rather long part of this dissertation has focused on the recollection of the events that preceded the revolutionary Supreme Court decision of 2022, because, though the ruling focuses on the legal aspect of constitutional recognition of the right to abortion, a great deal of elements, from political strategies to religious opposition, have played a role, whether superficial or substantial, in shaping the context that allowed for such a landmark decision to take place.

Therefore, the aim that has been here attempted to achieve, has been to portray how arduously it has been for legislation to regulate personal and full-of-personal implications issues such as abortion. The more contentious the matter is, the harder it is to balance contrasting interests in order to explicate a set of rules that will find sufficient consensus in those who will have to obey them.

It is crucial to note that lawmakers cannot use ineffective or inadequate regulation as a justification when dealing with complex and contentious issues. The primary objective of this dissertation is to emphasize the significance of comprehending the background and circumstances that led to the regulation's formulation. By doing so, we can gain a deeper understanding of the regulation's rationale and its potential implications on the matter being addressed.

The recollection of the American history of abortion criminalization before Roe, the violence against abortion providers in the 1990s, and the growing political appointment process of Justices, are some examples of events here analyzed that have, prima facie, little or nothing to do with the legislative and judicial development on abortion. But, in fact, they allow for a more comprehensive understanding of how and why the issues that have presented themselves in the legal sphere in the way and at the time that they did.

Therefore, if we look back to the different approaches brought into play to balance the opposing interests concerning the legalization of abortion, and we don't lose sight of the fact that external non-legal forces have contributed to the legal factor, it is rather effortless to connect the aim of the specific law enacted and the roots from which it stemmed.

A first analysis, therefore, concerns the fairness of the various abortion regulations passed by both Italy, the means of comparison chosen for this dissertation, and some American States, the leading character of the essay. In order to create equitable legislation on abortion, the guiding principle that allows for social and individual aspects to come into play should be the right to self-determination mentioned above, meaning allowing access for those who consider abortion coherent with their set of values, and at the same time ensuring that the choice of continuing the pregnancy is equally attainable for those who could not obtain an abortion without distressing guilt.

The freedom of choice here reflects itself in a much greater sphere of bodily autonomy, as discretion to whether or not to terminate a pregnancy first and foremost impacts the body, the health, and at times the life, of a woman. Not to mention, the material changes that occur in a woman's life if the pregnancy is brought to term.

Nonetheless, rather than focusing on the right to self-determination as the underlying concept from which to elaborate regulations that will allow for safe and legal access to abortions (for those who wish to do so), the common ground from which legislation of both the Italian and American systems concerns the establishment of a conflict between opposing interests, the woman's on the one side, and the fetus's on the other.

Besides introducing a participant of the discourse – the unborn – who has no ability to voice his interest and whose position is therefore defended by external parties like the Church or, more often than not, the State, the formulation of the issue as a two-sided dispute, rather than a unilateral choice, imposes a balancing effort that freezes and immobilizes the equilibrium as individuated by the legislator. Even if we recognize the abortion issue as the result of conflicting positions, which is not the interpretation of all women whatsoever, the decision to allow the legislator to impose his resolutive equilibrium partially denies the right of self-actualization that pertains to all citizens, and women, alike.

Moreover, TRAP regulations and Law 194/1978 introduced a series of restrictions concerning abortion clinics and providers, ranging from specific requirements for procedure rooms and corridors, transfer arrangements, and hospital privileges, to consenting that conscientious objectors be excluded from the duty to perform abortions besides in the most dangerous cases, which further disproportionally unsettle the precarious and legally imposed equilibrium of the abortion matter, more often than not to the detriment of women.

On the other hand, paternalistic and patriarchal nuances also weaken the already compromised extent of free choices for women, as the expectations of their maternal duty and their weaker-sex classification intertwine in retroceding in the aspiration towards equality.

Therefore, a red thread seems to be guiding legislative choices, entangling together women's right to self-determination and bodily autonomy, which are constantly under attack, and the protection of the unborn, with everything that comes along with such an interpretation of the theory of life.

As legislators approach the issue within the parameters they have imposed on themselves, though aware of the social consensus that should come from the public who has voted them into power, judges also play a prominent role in

framing the abortion issue, especially in a legal system like the one of the United States that follows the Common Law approach.

In a legal system where jurisprudence plays a significant role in shaping norms, the principles of precedent and stare decisis promote consistency and predictability. While courts have the authority to interpret and apply the law, they are not bound by it. As a result, complex legal issues can reach the highest court of appeal with the expectation that they will be subject to a distinct interpretation by the judicial system, separate, and possibly opposite, from the legislative branch's determination.

The constitutional duty of the Supreme Court to practice judicial review and the ability to invalidate a Statute whenever it is in violation of the Constitution represent a vast power held in the hands of solely nine Justices, who are chosen by the citizen's highest representative, the President at the time, and confirmed through the votes of the Senate. This selection process originated from the need to identify a fair and equitable Justice on one hand and reflect the people's preference by allowing the President to hand-pick his nomination on the other hand.

The mechanism functioned smoothly both in theory and practice for a while. However, as the appointment review process became a politicized battleground, Presidential choices began to favor judges who aligned with the political principles of one of the parties rather than those who were more competent.

Although this discussion may seem more appropriate for the field of political science rather than strictly legal and jurisprudential matters, it is important to remember that the Supreme Court holds extensive authority and powerful prestige but is ultimately composed of individuals who have their own distinct set of moral principles that guide their judicial reasoning.

To gain a true understanding of their opinions, one must examine the social context and values that the Justices have relied on to shape their interpretation of legal texts and judgments.

The appointment of three Justices during Trump's presidential term brought into existence the configuration of the conservative majority that authorized the overturn of the landmark ruling of Roe v. Wade in 2022, denying that the right to abortion could find constitutional protection in neither the Fourteenth Amendment nor in the traditions deeply rooted in the Nation's history, exemplified how increasing partisanship is staining the Court's reputation and, most importantly, its authority.

After Dobbs v. Jackson Women's Health Organization was decided, the criminalization of abortion in a great number of States on one side, and the contradictory data that most Americans think that abortion should be legal to some degree[631] on the other, shaped a heterogenous landscape that is both confusing and flawed.

Though solutions are being advanced to minimize as much as possible the consequences that the emerging restrictions on the procedure have created, and to, hopefully, reinstate the protection of the right to abortion at a federal level at

[631] According to Gallup's latest data pertaining to Americans' views on abortion, 34% believe abortion should be legal "under any circumstances," 51% say it should be legal "only under certain circumstances," and 13% say it should be *illegal* in all circumstances.
Where do Americans stand on abortion?, in *Gallup,* updated on July 7, 2023.

some time in the future, the most pressing issue is represented by the dangers that the health and lives of pregnant women have to endure.

The endangerment comes from both the percentage of pregnancies with medical complications that need access to the termination in order to safeguard the life of the mother, and the amount of back-alley, unsafe, and hazardous abortions that take place when the legal option is not accessible, and the pregnancy could be taken to termination, but it would impose a life of struggles and economic hardships.

Because the situation existing today represents an exceptional and unexplored instance, brought into being rather recently, no plausible prediction can be presented as to how the developments will unravel toward the reinforcement of constitutional protection of the right to abortion or not. What is unequivocal, though, is that legislative measures will have to reintroduce access to a right that is seemingly accepted by the majority of American citizens.

The American evolution should symbolize a cautionary tale for the Italian counterpart. Just because in Italy the right to abortion is legislatively regulated and access to the procedure is seemingly guaranteed, as it has been explained in the conclusive chapter, the clause of conscientious objection and the lack of solutions for the vast percentage of doctors that refer to it delineate a landscape in which the concrete possibility of abortion is lesser than it should be.

The Italian Parliament's reluctance to address reproductive rights by deeming Law 194 of 1978 untouchable is hindering progress. Legislative provisions must be adjusted to reflect the current medical and social context surrounding abortion. The protection and accessibility of the procedure are crucial for the well-being of Italian women, and their freedom of choice should not be compromised.

There is no need to wait for the worst to come if action can be taken today.

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