Access to reproductive healthcare beyond the territorial borders. The experience of Ireland and the United States of America

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ABSTRACT: The experience of women travelling to different territories to obtain an abortion raises complex legal questions due to the numerous rules and principles involved. A comparative analysis of Ireland and the United States serves as a compelling example of how the right to terminate a pregnancy intersects with the right to travel, particularly given that neither country's constitutional texts explicitly recognise women's sexual and reproductive freedoms. This context becomes especially intricate given the contemporary paradigm shift introduced by telemedicine in which, instead of women personally seeking reproductive healthcare, abortion pills are now crossing territorial borders via mail services, with all the legal repercussions that this entails.

KEYWORDS: Abortion care; Ireland; United States of America; medication abortion; reproductive health

SUMMARY: 1. Travelling for abortion care and the advent of the abortion pill – 2. The Irish abortion pathway to England – 3. The right to travel and the lack of a right to abortion in the Constitution of the United States – 4. The revolution of the abortion pill on the States' sovereignty – 5. The pluralism of Constitutions in the sphere of reproductive rights.

1. Travelling for abortion care and the advent of the abortion pill

Travelling to England for abortion services has been a longstanding practice among Irish women throughout the 20th century. The trend emerged during times when abortion was completely prohibited in Ireland, ever since the implementation of the 1861 Britain's Offences Against the Person Act. This extremely restrictive framework left women with no options but to self-medicate through "pills, potions, and purgatives" or, when abortion became legal in the neighbouring British territory, seek care abroad.[1]

Even after terminating a pregnancy became legal in the Republic of Ireland in recent times, many women continued to opt for trips to the mainland. This was largely due to the restrictive interpretations surrounding the new law introduced in 2018, which created significant barriers to accessing safe and timely procedures within Ireland.[2]

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[1] C. DELAY, *Pills, potions, and purgatives: Women and abortion methods in Ireland, 1900–1950*, in *Women's History Review*, 28, 3, 2019, 479-499.

[2] L. MURRAY, N. KHAN, *The im/mobilities of 'sometimes-migrating' for abortion: Ireland to Great Britain*, in *Mobilities*, 15, 2, 2020, 161-172.

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In a development parallel to the Irish-British experience, the United States has recently seen a similar growing trend of women travelling for abortion services. This is because, in 2022, the Supreme Court's decision *Dobbs v. Jackson Women's Health Organization* returned the power to individual States to regulate and, in some cases, ban abortion.[3]

It is important to note that, due to recent legal developments, travel between Ireland and Great Britain has declined in the 21st century, whereas, due to legal developments in the opposite direction, the migration process through states' borders in the North American country has dramatically increased in the past few years. Although the experiences are specular in time, they nonetheless highlight the ongoing challenges and inequalities surrounding reproductive rights and access to safe medical services across different regions.

In such a scenario, the effort to reduce the costs of travelling between States and the goal of protecting the right to choose have played a key role in the expansion of telemedicine, which increased rapidly after the 2019 pandemic.

This paper aims first to analyse how the evolution in the Irish framework, which evolved from an extremely restrictive and prohibitive legal standard rooted in Catholic values to a more attainable access to abortive services, has impacted Irish women and their reproductive freedom. Secondly, the paper describes how the recent developments that have occurred in the United States have thoroughly impacted American women's right to abortion care, and how the recent declaration of lack of constitutional protection that applies to the right to abortion intertwines with the constitutional freedom of movement. Lastly, given the increasing trend of obtaining abortion pills through telemedicine, this paper aims to describe its impact on the ability of sovereign States to regulate abortion within their borders from a comparative perspective.

2. The Irish abortion pathway to England

In 1861, Britain's Offenses Against the Person Act criminalised both the acts of women who were seeking an abortion and of those who would help them execute it. When the United Kingdom of Great Britain and Ireland divided itself in 1921, the Irish Free State retained the 1861 Act, in consistency with the aspiration of building a Catholic nation based on the celebration of motherhood and the denigration of all 'deviant' sexual activities;[4] the United Kingdom, on the other hand, approved the Infant Life Protection Act, soon after the division, permitting abortions to save the lives of mothers in need.[5]

This signalled the beginning of the two very different paths and approaches towards abortion and reproductive rights in general, which would characterise the two countries for a long time. While reforms in England, Wales, and Scotland kept expanding access to abortion practices in certain exceptional circumstances, especially during the 1960s, [6] in 1983 the Irish legislation introduced the Eighth Amendment in the national Constitution, which recognised equal status to the life of the woman and to that

[3] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 2022.

[4] C. DELAY, *Pills, potions, and purgatives: Women and abortion methods in Ireland 1900–1950*, cit.

[5] L. EARNER-BYRNE, D. URQUHART, *The Irish abortion* journey, 1920–2018, in *Springer*, 2019, 33-34.

[6] S. CALKIN, E. BERNY, *Legal and non-legal barriers to abortion in Ireland and the United Kingdom*, in *Medicine Access@ Point of Care*, 5, 2021.

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of the foetus.[7] At the time, respecting reproductive freedom was becoming a progressively intense tendency worldwide, as overseas the Supreme Court of the United States had recognised constitutional protection to the right to abortion in the early 70s.[8] Still, the Irish Republic was set in a position of nonconformism.

The illegality of abortion on paper did not signify a lack of incidence of termination of pregnancies. The legalisation of abortions would have simply allowed for the procedures to be safer than 'back-street' terminations, and, when Great Britain adopted the 1967 Abortion Act, the main motivation behind the legislation was in fact "to curb the high mortality and morbidity associated with clandestine abortion".[9]

The introduction of the 1967 Act in Britain, although legislatively irrelevant in Ireland's framework, still dramatically altered life for Irish women, opening up the so-called 'abortion trail', which thousands of them have travelled on ever since to end their unwanted pregnancies across the sea.[10] Between 1980 and 2000, at least eighty thousand Irish women left their homes for England, Wales, or Scotland seeking abortion services.

To ease the travel involved in accessing these services, several Irish medical centres were actively providing information about abortion facilities located in Great Britain. This process of sharing useful information for women seeking to terminate their pregnancies outside of Ireland became the central focus of legal proceedings.

The first set of proceedings involved two medical centres: Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. Both organisations offered a range of services related to marriage, family planning, reproductive health, and general health matters. In regard to abortion, they provided non-directive counselling, meaning they did not advocate for or against abortion. Instead, they offered objective information about abortion when requested by the client, and, in some instances, they would arrange travel solutions.[11]

In June 1985, the pro-life organisation called Society for the Protection of the Unborn Child (SPUC) filed a lawsuit against the two counselling centres, claiming that their practices violated Article 40.3.3 of the Irish Constitution. The Article, which had been introduced in the Constitution in accordance with the 1983 referendum as the Eighth Amendment, stated: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, asfar as practicable, by its laws to defend and vindicate that right".[12]

When the Irish Supreme Court, in March 1988, upheld its judgment on the matter, it granted an injunction that prohibited the two centres from assisting pregnant women within its jurisdiction in travelling abroad for abortions. The assistance forbidden by the Supreme Court included referring women to clinics, arranging travel, or informing them of the identity, location, and methods of communication

[7] J. MISHTAL, G. ZANINI, S. DE ZORDO, D. CLOUGHER, AND C. GERDTS, *'To be vigilant to leave no trace': secrecy, invisibility and abortion travel from the Republic of Ireland*, in *Culture, Health & Sexuality*, 25, 7, 2023, 914-928.

[8] Roe v. Wade, 410 U.S. 113, 1973.

[9] E.C. ROMANIS, A. MULLOCK, J.A. PARSONS, *The excessive regulation of early abortion medication in the UK: the case for reform*, in *Medical Law Review*, 30, 1, 2022., 7.

[10] C. DELAY, *Pills, potions, and purgatives: Women and abortion methods in Ireland*, 1900–1950, cit., 2.

[11] R. LAWSON, *The Irish abortion cases: European limits to national sovereignty?,* in *European Journal of Health Law*, 1, 2, 1994, 167-186.

[12] Eighth Amendment of the Constitution Act, 1983.

with specific clinics. The unanimous decision argued that there could not be an implied and unenumerated constitutional right to such information and that allowing access to this information could directly undermine the expressly guaranteed constitutional right to life of the unborn.[13]

Encouraged by its previous success, SPUC launched a second legal challenge and sued several student organisations in which students had published and distributed handbooks, free of charge, containing information on alternatives available to pregnant women, including options such as keeping the child, adoption, foster care, and methods for contacting facilities in England that provided abortion services.[14]

SPUC sought to prevent the distribution of this information, arguing that it aided women in terminating their pregnancies, which they claimed violated the Eighth Amendment. In contrast, the students argued that Irish women had the right, under Articles 59 and 60 of the Treaty of Rome,[15] to travel to another Member State of the European Economic Community to receive medical services that were lawfully provided there. As a corollary to this right, the students' groups believed that Irish women also had the right to be informed about medical services available in other Member States, arguing that such interpretation aligned with the Human Rights Convention.[16]

Because the students' unions, represented by their official, Mr. Grogan, had cited European Community law in their defence, the High Court decided to refer specific questions to the European Court of Justice (ECJ) for a preliminary ruling under Article 177 of the EEC Treaty.[17]

In the ruling *Society for the Protection of Unborn Children Ltd v. Grogan et al.*, the Court of Justice first determined that "medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty".[18]

In the realm of goods and services, the ECJ had often considered that consumer access to information was vital for ensuring free movement. In the *Grogan* case, though, the Court did not affirm that Irish consumers had the right to receive information about services available in England, weakening one of the fundamental pillars of the Community. According to the European Convention on Human Rights, unless a Member State can justify a deviation from the Treaty, it cannot obstruct the flow of services, either directly by limiting the providers or indirectly by limiting the recipients. Therefore, the Court should have recognised how a woman travelling to England to receive medical services for terminating a pregnancy qualified for Treaty protection as a recipient of a service and, unless there was a justified reason for deviating from the Treaty, Ireland could not restrict her freedom of movement.[19]

However, even if the ECJ recognised that abortion was a service as per the definition of the European Community, the Court did not address the conflict between the right to freedom of expression

[13] R. LAWSON, *The Irish abortion cases: European limits to national sovereignty?,* cit.

[14] C.M. COLVIN, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish abortion law and the free movement of services in the European Community*, in *Fordham Int'l LJ,* 15, 1991, 476-526.

[15] Treaty establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412.

[16] COLVIN, C.M., *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish abortion law and the free movement of services in the European Community*, cit.

[17] R. LAWSON, *The Irish abortion cases: European limits to national sovereignty?*, cit.

[18] The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others, European Court of Justice, Case C-159/90.

[19] C.M. COLVIN, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish abortion law and the free movement of services in the European Community*, cit.

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guaranteed by the Human Rights Convention and the right to life of the foetus, protected by the Irish Constitution.[20]

Nevertheless, the issues related to balancing the interests of the foetus and the woman outlined in the Irish Constitution continued to create difficulties and serve as the basis for legal proceedings.

When, in 1992, the Supreme Court of Ireland was called to intervene in the case of a fourteen-year-old rape victim, pregnant due to sexual abuse, the Justices allowed the girl to travel by considering that the constitutional amendment mentioned above – which equated the mother's right to life with the right to life of her foetus – could allow for the termination of the pregnancy if it determined a real and substantial risk to the mother's life. The risk of suicide posed by the victim of the case was deemed to be included in the exception.[21]

The Justices also commented in their dicta on the relevance of the extraterritorial effects of the High Court's order that would not have allowed for the abortion to occur, by restraining the girl from leaving the jurisdiction. In such matter, all five Justices found no issue with the extraterritoriality of the order, as some of them considered the parallel with certain criminal offences committed outside of Ireland which are nevertheless judged under Irish law, and some other Justices went as far as explicitly stating that the right to travel of a woman is necessarily a lesser right than the right to life of the unborn. [22]

The gravity of the case set the ground base for the introduction of a referendum on the abortion matter. A majority of sixty per cent of Irish voters approved the remodification of the Eighth Amendment, [23] which now stated:

> "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right. This subsection shall not limit freedom to travel between the State and another state.
> This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state".[24]

However, the new formulation of the Amendment still proved inadequate, leading to an increasing demand for respect of women's bodily autonomy. In 2010, the right to travel abroad introduced in the 1992 Amendment played a significant role in the *A, B & C v. Ireland* case, in which the European Court of Human Rights found that the State had violated one of the applicants' right to a private family life but, in doing so, applied a wide margin of appreciation, raising some perplexities.[25]

In the case at hand, the three women had all obtained abortions in the UK: applicant A and B had sought a termination due to health and well-being concerns, while applicant C, who suffered from cancer, feared that continuing her pregnancy posed a risk to her life. Whilst the first two applicants'

[20] C.M. COLVIN, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish abortion law and the free movement of services in the European Community*, cit.

[21] I.G. COHEN, *Travel to other states for abortion after Dobbs*, in *The American Journal of Bioethics*, 22, 8, 2022, 42-44.

[22] C.S. BRADFORD, *What Happens If Roe Is Overruled-Extraterritorial Regulation of Abortion by the States*, in *Arizona Law Review*, 35, 1993.

[23] I.G. COHEN, *Travel to other states for abortion after Dobbs*, cit.

[24] Eighth Amendment of the Constitution Act, Constitution of Ireland, 1983.

[25] C. RYAN, *The Margin of Appreciation in A, B and C v Ireland: A Disproportionate Response to the Violation of Women's Reproductive Freedom*, in *UCL Journal of Law and Jurisprudence*, 3, 2014, 237-261.

requests would have found no legal satisfaction under Irish law, the third applicant's abortion may have been deemed legal, but she claimed that she could not receive sufficient information about the risks of her pregnancy nor determine how to establish her right to an abortion, as there was no effective procedure available to do so.[26]

In its judgement, the European Court of Human Rights determined that no violation of Article 2 of the Convention had occurred, since there was no legal impediment to the applicants' right to travel, nor of Article 3, arguing that the level of psychological, physical and economic burden the applicants had suffered did not reach the level of severity necessary to determine a violation of the prohibition of torture.[27]

The main focus and place of contention was the alleged violation of Article 8. More specifically, while the Grand Chamber was adamant in underlining the right to respect for private and family life does not confer a right to abortion, it also recognized that the first and second applicants' complaints to seek an abortion for reasons of health and/or well-being, and the third applicant's inability to establish her eligibility for a lawful abortion pertained to the scope of the right of Article 8. The question, then, was whether the interference of the State with the exercise of said right could be exceptionally allowed because it was "in accordance with the law" and "necessary to a democratic society", as Article 8(2) required. Given the difference in the substantial claims of A and B on the one hand, and of C on the other, the Court analysed the potential breach of Article 8(2) in separate determinations.[28]

With respect to applicants A and B, the Court essentially found that the Irish prohibition of abortion on health and well-being grounds proved coherent with Article 8. It was argued that, on the one side, the right to travel abroad for an abortion was lawfully established as an alternative, and, on the other side, the prohibition was rooted in the "profound moral views of the Irish people as to the nature of life", somehow failing to realize the inconsistency of these two arguments.[29]

The third applicant's complaint was analysed on the positive obligation stemming from Article 8, which provides that, once the State legally permits abortion, even if only in stringent situations, then it must also ensure its accessibility.[30] In this instance, Ireland was found in violation of its human rights obligations for failing to provide criteria or procedures that would allow a woman to establish her right to a lawful abortion on the territory, determining a violation of Article 8.[31] Nevertheless, the Court's choice

[26] E. WICKS, *A, B, C v Ireland: Abortion Law under the European Convention on Human Rights*, in *Human Rights Law Review*, 11, 3, 2011, 557.

[27] C. RYAN, *The Margin of Appreciation in A, B and C v Ireland: A Disproportionate Response to the Violation of Women's Reproductive Freedom*, cit., 240.

[28] European Court of Human Rights, Grand Chamber, A, B and C v Ireland, Application 25579/05, paragraph 214.

[29] E. WICKS, *A, B, C v Ireland: Abortion Law under the European Convention on Human Rights,* cit., 562-563 "What the Court seems to fail to realise is the apparent inconsistency of these two points. If the views of the Irish people, and the Irish state, are so profound and fundamental to the continuation of its democratic society, how can the right to travel abroad for an abortion be tolerated? If a foetal life is to be regarded as one worthy of the full protection of the right to life, why are Irish women entitled, by a constitutional provision, to take a short journey across the Irish sea to terminate their pregnancies? While there is no doubt that the globalisation of healthcare presents serious challenges to a state that wishes to heavily regulate a particular treatment, the blatant hypocrisy of the Irish solution cannot be a viable or ethically sound way forward".

[30] J.N. ERDMAN, *Procedural abortion rights: Ireland and the European Court of Human Rights*, cit., 23.

[31] J.N. ERDMAN, *Procedural abortion rights: Ireland and the European Court of Human Rights*, cit., 23.

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to disregard the European's consensus in favour of greater access to abortion based on the reasoning that the Irish government was better suited to determine the content and requirements of national morals was subject to numerous legitimate critics, as recognising the existence of a broad consensus and then choosing "to ignore it when determining the width of Ireland's margin of appreciation [was] indeed an unwelcome new approach that threaten[ed] to undermine the evolutive nature of the Convention's obligations".[32]

Following the *A, B & C v. Ireland* case, the Irish government appointed a group of medical and legal experts to recommend opinions for implementing the judgment. The report was still in the making when the tragic death of Savita Halappanavar occurred in an Irish hospital after she had been refused an abortion following a miscarriage. An investigation into her death revealed that the treating doctors believed they could not prevent the death by treating the risk of infection and sepsis because, despite the foetus being unviable, it still had a beating heart and the lack of guidance on lawful abortion was deemed as a contributing factor in the doctors' inability to act.[33]

The preventable deaths and the accumulation of years without exercising the right to bodily autonomy led to nationwide protests demanding urgent reform of the abortion law.

On July 30th, 2013, the Protection of Life During Pregnancy Act was passed and signed, becoming effective on the 1st of January, 2014. Although many argued that the legislation was not recognising a right but merely reaffirming the criminal prohibition and articulating specific exceptions, it was a step towards accessible abortion healthcare, nonetheless.

In May 2018, a national referendum finally repealed the Eighth Amendment with a decisive 66% majority, allowing for new legislation to expand abortion services.[34] After the repeal vote, the government began its legislative work and, in December of the same year, the Health (Regulation of Termination of Pregnancy) Act was passed, permitting abortion upon request up to 12 weeks of gestation and allowing it to occur at a later stage in cases where there was a risk to the health or life of the patient, or in the event of a severe foetal anomaly. Still, the new law maintained criminal penalties for anyone who assisted a person in obtaining an abortion outside the provisions of the law, but not for the women seeking the termination.

In January of 2019, abortion services officially began in Ireland.[35]

3. The right to travel and the lack of a right to abortion in the Constitution of the United States

As mentioned above, the Irish experience represents a sort of reproduction of the history of the United States, but in reverse.[36]

Although some intrinsic differences characterise the comparison, namely the necessary diversity between travelling intra-nationally through States of the same federation and taking on international

[32] WICKS, E., *A, B, C v Ireland: Abortion Law under the European Convention on Human Rights*, cit., 562.
[33] J.N. ERDMAN, *Procedural abortion rights: Ireland and the European Court of Human Rights*, cit., 25.
[34] J. MISHTAL, ET AL., *'To be vigilant to leave no trace': secrecy, invisibility and abortion travel from the Republic of Ireland*, cit., 915.
[35] S. CALKIN, E. BERNY., *Legal and non-legal barriers to abortion in Ireland and the United Kingdom*, cit., 3.
[36] I.G. COHEN, *Travel to other states for abortion after Dobbs*, cit., 42-44.

journeys, both Ireland and the United States have complicated histories when it comes to abortion rights.

More importantly, in both frameworks, the relevance of the right to travel is recognised as having a constitutional bearing. Both the Irish Supreme Court and the Constitution, in the Eighth Amendment's version after the 1992 referendum, addressed the interaction between the right to travel and the abortion prohibitions.[37] In the United States, the right to travel is a fundamental right that existed before the formation of the federation and is mentioned in the Articles of Confederation, recognised by the Supreme Court as implicitly referenced in the United States Constitution.[38]

The connection between the right to travel and the right to terminate a pregnancy goes deeper than merely allowing women to journey across state lines for abortions. Both rights, though not explicitly recognised, echo with an implicit understanding by the Supreme Court.

The concept of free movement was something that colonists committed to since the beginning, as the Articles of Confederation explicitly protected interstate travel, stating that "the people of each State shall have free ingress and regress to and from any other State". According to the Supreme Court, the omission of an explicit mention of this right in the Constitution was due to the consideration that such a fundamental right was inherently understood to be part of the stronger union that the Constitution aimed to establish.[39]

According to this interpretation, several provisions of the Constitution, such as the Dormant Commerce Clause and the Privileges and Immunities Clause in Article IV, in addition to the Due Process Clauses, implicitly protect the right to movement and support this conclusion. Each Amendment was considered related to the liberty of free travel in specific ways, in connection with their underlying expressive and non-discriminatory purposes.[40]

Therefore, even if the word 'travel' is not mentioned once in the constitutional text, the Supreme Court's interpretation of the combination of Amendments still ensured equal treatment across state lines regardless of people's status as visitors or natives. More specifically, in the 1999 case *Saenz v. Roe,* the majority opinion stated that, regardless of the lack of explicit mention of the right to travel, the right was still "firmly embedded in our jurisprudence".[41]

In delivering the Court's majority opinion, Justice Stevens placed significant emphasis on the right to travel, particularly in relation to movement between states and the principle of equal treatment, although, for some, he did not heed enough attention to the historical context which would have complicated the enforcement of the right to travel. Nevertheless, with this judgement, Stevens was able

[37] C.S. Bradford, *What Happens If Roe Is Overruled-Extraterritorial Regulation of Abortion by the States*, cit., 92.
[38] R. Sobel, R.L. Torres, *The Right to Travel: A Fundamental Right of Citizenship*, in *Journal of Transportation Law*, Logistics & Policy, 80, 1, 2013, 13-47.
[39] N. Smith-Drelich, *The Forgotten Fundamental Right to Free Movement*, in *North western University Law Review*, 2024, 4, 119.
[40] N. Smith-Drelich, *The Forgotten Fundamental Right to Free Movement*, cit.
[41] O. Meyer, *The Ethical Path: The True Significance of Saenz versus Roe and the Establishment of the Right to Travel*, in *Student Research*, DePauw University, 2021

to legally move the United States forward and establish a new welfare responsibility for the federal government regardless of the origins and current location of the citizens.[42]

As mentioned above, the right to move freely and the right to obtain an abortion share a commonality in terms of legal recognition: neither is explicitly stated in the Constitution, yet both have been consistently interpreted as rights by the Supreme Court over time.

The right to obtain an abortion was first recognised in the landmark 1973 Supreme Court decision, *Roe v. Wade*. The Court opened Section VIII of its opinion with a clear statement: "The Constitution does not explicitly mention any right of privacy".[43]

However, the ruling went on to explain that several precedents acknowledged the existence and protection of such a right. The right to privacy was viewed by the Supreme Court as sufficiently broad to include a woman's decision to terminate her pregnancy, whether derived from the penumbras of personal liberty in the Fourteenth Amendment or the Ninth Amendment's reservation of rights to the people. The argument was based on the reasoning that the absence of explicit mention of a right to privacy or a right to seek abortion in the Constitution did not negate the existence of these rights, per se.[44]

On the basis of this judgement, for almost fifty years, women of every State obtained the recognition of their right to terminate a pregnancy, and exercised it, theoretically, anywhere, although reality often made the procedure less accessible in certain states with a pro-life agenda.

Then, on June 24, 2022, the Supreme Court ruled on the *Dobbs v. Jackson Women's Health Organization* case, declaring that the Constitution did not explicitly mention a right to abortion, nor was there any justification for protecting such a right based on the nation's tradition and history. As a result, the Court overturned the long-standing precedent established by *Roe v. Wade*, which had been in place for almost half a century.[45]

In his arguments, Justice Samuel Alito, who authored the majority opinion, stated that any constitutional analysis should start with the language of the Constitution, a method of interpretation that provided a "fixed standard for ascertaining what [the] founding document means". In this specific instance, he concluded that the text of the Constitution made no express reference to the right to abortion, and, therefore, those who believed that the Constitution did protect this right had to demonstrate that it was somehow implied within the text.[46]

Given the absence of an explicit mention in the constitutional text, Alito also considered whether the right to obtain an abortion could be viewed as rooted in the nation's history and traditions. The Justice provided a historical overview, stating that it was necessary to "set the record straight" because "Roe

[42] O. MEYER, *The Ethical Path: The True Significance of Saenz versus Roe and the Establishment of the Right to Travel*, cit.

[43] Roe v. Wade, 410 U.S. 113 (1973), at 152.

[44] 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, 2012.

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

[46] *Dobbs v. Jackson* Women's Health Organization, Opinion of the Court, 9.

either ignored or misstated this history", describing how, in the 19th century, abortion was widely considered a crime in most states.[47]

Consequently, Alito concluded that a right to abortion could not be protected by the Supreme Court's interpretation of the Constitution, as it could not be linked to the nation's history or traditions.[48]

This change in the legal framework affected not only the freedom of legislators, who were no longer constrained by the respect of a federal right to abortion, but also marked the beginning of an era where American women seeking to terminate a pregnancy in a state that prohibited it had to travel to more permissive states. However, it is important to note that travelling to different states to obtain reproductive healthcare was already an increasing trend before the overturn.

In the pre-*Dobbs* era, as the efforts to restrict access to the termination of pregnancies had increased during the previous twenty years, individuals who were pregnant and seeking an abortion in States where it was heavily restricted often faced difficult decisions regarding travel, finances, and time away from work or school.[49]

When the *Dobbs* decision gave back to the individual States the power to discipline or ban abortion, States like Texas, Arkansas, Wisconsin, and Oklahoma readily approved new legislation or gave effect to old ones to completely ban the surgical procedure.[50]

In his concurrence of the ruling, Justice Kavanaugh, while fully supporting the overturn of the precedent(s), emphasised that the changes which would be caused by the decision would not entail attacks on the right to travel for abortions, deeming the abortion-related question that wondered if a State could prevent a resident from travelling to another State to obtain the procedure as "not especially difficult as a constitutional matter" because of the "constitutional right to interstate travel".[51]

Even though both the right to terminate a pregnancy and the right to travel freely stem from interpretive readings, the former was deemed historically and culturally irrelevant in the *Dobbs* ruling, resulting in its loss of protection at a federal level. In contrast, Kavanaugh viewed the second as firmly rooted in history and tradition, making its legitimacy unquestionable.

However, various legal decisions and newly enforced laws quickly demonstrated that the right to travel was not as 'stable' as Kavanaugh had described it, at least in relation to the right to abortion.

Shortly after the ruling was issued, President Biden signed an executive order to fund and protect the legal right to travel for abortion care. The most effective way to achieve this goal would have been to establish it in legislation. However, the federal Senate Bill introduced to prevent states from restricting travel did not garner enough support to be enacted.[52]

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[47] 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.

[48] Dobbs v. Jackson Women's Health Organization, Opinion of the Court, 25.

[49] C.F. KENNEDY, *Are We There Yet?: Mobilities, Shame, and the Rhetoric of the Abortion Road Trip*, Master's thesis, The University of Alabama, 2024, 4.

[50] A. MATTHEWS, C. MERRIL, *One year without Roe, How the frenzy of legal actions shifted the landscape of access to abortion,* in *CNN*, published June 24, 2023.

[51] L. FRANCIS, J. FRANCIS, *Federalism and the right to travel: medical aid in dying and abortion*, in *Journal of Health Care Law & Policy*, 26, 2023, 1.

[52] C.F. KENNEDY, *Are We There Yet?: Mobilities, Shame, and the Rhetoric of the Abortion Road Trip*, cit., 6.

In the *Dobbs* era, States became spoiled for choice in deciding how to constrict the abortion-related movement. In Idaho, a statute was approved in April 2023 to create a crime for those who recruited, harboured or transported an unemancipated minor within the State to obtain an abortion; in Alabama, the Attorney General threatened, in August 2023, to prosecute medical professionals and abortion funds that facilitated access to abortion care in other States; in Texas, an ordinance made it a civil offence to knowingly transport or provide money for the costs of travel to those who are moving in the provision of obtaining an abortion.[53]

The argument that some scholars had put forward, endorsed by Justice Scalia in his dissenting opinion of the *Casey* decision, that overturning *Roe* would allow for simpler ways of regulating abortion because States would be able to "craft laws without the threat of constitutional litigation", quickly proved to be fallacious once the landmark precedent was in fact overruled.[54]

The constitutional reference, upheld by the Supreme Court until 2022, served as a common point of limitation but still allowed heterogeneous legislation to be enacted; once the barrier was eradicated, not only did the common denominator of a minimum level of abortion healthcare disappear, but inter-jurisdictional legal conflicts flared up, creating confusion rather than stability.

After the overturn, the future of U.S. citizens' reproductive health became an increasingly polarising topic of contention. During the 2024 November elections, eleven States included measures related to abortion on the ballot, either towards constitutionalising the right or prohibiting the procedure. Out of all eleven measures, seven were approved in Arizona, Colorado, Maryland, Missouri, Montana, New York, and Nevada. Each of these approved measures set out the implementation of a constitutional right to abortion or recognised reproductive and sexual freedom, except for Nebraska, where the Constitution was amended to provide that "unborn children shall be protected from abortion in the second and third trimesters".[55]

4. The revolution of the abortion pill on the States' sovereignty

In the 1980s, the French pharmaceutical company Roussel-Uclaf invented a synthetic drug, which would later be more commonly known as RU-486 or mifepristone, with abortifacient effects. The French Ministry of Solidarity, Health, and Social Welfare approved the drug for distribution a couple of years later, followed by other European countries. Overseas, the approval process proved more difficult, and only in the year 2000 did the Food and Drug Administration approve the distribution on the market of mifepristone.[56]

The administration's approval represented only the beginning of a burdensome journey characterised by numerous changes in the discipline for distribution, dosing, and use.

The latest update of the Risk and Evaluation Mitigation Strategy (REMS) program in place for Mifiprex, the trade name for mifepristone, eliminated the requirement that patients had to travel to a hospital,

[53] I.G. COHEN, E. ADASHI, M. ZIEGLER, *The New Threat to Medical Travel for Abortion*, in *The American Journal of Medicine*, 137, 4, 298-299.

[54] D.S. COHEN, G. DONLEY, R. REBOUCHÉ, *The new abortion battleground, in Columbia Law Review*, 123, 1, 2023, 3.

[55] 2023 and 2024 abortion-related ballot measures, in Ballotpedia, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures.

[56] E. PINHO, *The Story of RU-486 in the United States,* in *Harvard Library*, 2001.

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clinic, or medical office to pick up their pill, and could now instead receive it through postal services – an improvement directly conditioned by the experience of the Covid-19 pandemic.[57]

Access to abortion through mifepristone became extremely relevant once *Dobbs* overturned the precedent and lifted the federal protection that had surrounded the right to abortion up to that point. As court decisions and new policies altered the regulation of abortion, healthcare providers adjusted their practices accordingly and many began offering medication abortions virtually. For instance, in 2020, two nurse practitioners partnered with a physician certified in family medicine to launch Choix, a virtual clinic which started operating in California, Colorado, Maine, New Mexico, and Illinois. [58] Choix prescribed abortion pills to women up to 11 weeks pregnant, as it partnered with an online pharmacy that delivered medications to patients within one to four business days after the intake process. The total cost for this service was $289, which was approximately $300 less than the cost of medication abortions offered at clinics.[59]

Therefore, in comparison with traditional clinics, virtual clinics and online pharmacies offered care that was more affordable and provided greater privacy without compromising the quality or effectiveness of care.[60]

Nevertheless, while access to abortion pills through telemedicine services started to prove itself as a more easily attainable alternative to the surgical procedure, which had been banned in multiple states, the threat to safe reproductive health was and remains significant. On one hand, the abortion pill cannot serve as the sole safe method for terminating a pregnancy, as it is only effective in certain situations and time frames. On the other hand, the abortion pill itself is not immune to pro-life efforts that aim to restrict or ban its use.

The pro-life movement is alert and focused on the changing landscape regarding abortion access, and state legislators opposed to abortion are proposing and enacting laws that specifically target abortion medication. These laws may entirely ban abortion drugs, prohibit their shipment through the mail, or impose additional burdens on their distribution.[61] Although the practical aspects of intercepting mail containing illegal abortion pills make it dubious that access to the medication from international pharmacies could efficiently be put to a stop, the effort to limit even this option to terminate pregnancy is undeniably threatening to the safety of reproductive care.

In March of 2023, Wyoming enacted the Life is a Human Right Act, a total criminal abortion ban immediately enforceable, and Senate Bill 109, an abortion medication ban, which prohibited "prescrib[ing], dispens[ing], distribut[ing], sell[ing] or us[ing] any drug for the purpose of procuring or performing an abortion". Although the District Court of Teton County quickly granted a temporary restraining order,[62] the abortion medication ban included even more restricted exceptions in comparison to the criminal

[57] J.J. Serpico, *Abortion exceptionalism and the mifepristone REMS*, in *Contraception*, 104, 1, 2021, .8-11.
[58] R. Rebouché, *Remote Reproductive Rights, in American Journal of Law & Medicine*, 48, 2-3, 2022, 244-255.
[59] R. Rebouché, *Remote Reproductive Rights*, cit.
[60] G. Donley, R. Rebouché, *The Promise of Telehealth for Abortion*, in I.G. Cohen, D.B Kramer, Et Al., *Digital Health Care Outside of Traditional Clinical Settings: Ethical, Legal, and Regulatory Challenges and Opportunities,* 2024, 79-91.
[61] G. Donley, R. Rebouché, *The Promise of Telehealth for Abortion*, cit.
[62] K. Babu, *Case: Johnson v. State of Wyoming II*, in *Civil Rights Litigation Clearinghouse*, University of Michigan, March 2024.

abortion ban, exemplifying the latest trend of limiting access to abortion pills that has developed in some states.[63]

More specifically, many states may not directly challenge the FDA's federal approval of mifepristone, but their laws that ban abortion do not differentiate between surgical procedures and medication, which allows for a broader interpretation that could include prohibiting abortion pills as part of their overall bans on abortion.[64]

To summarise, even if access to abortion pills can partially fill in the gaps lacking protection for those who need to terminate a pregnancy, some elements make this solution only partially helpful: first and foremost, states that are against abortion will continue to implement restrictive and prohibitive measures. Secondly, State law is not the only barrier to remote care, as unequal access to telehealth also reflects broader health disparities because patients often require access to a telehealth-capable device, high-speed internet, and digital literacy. Additionally, remote care does not accommodate those who prefer in-person services or who need care in a hospital setting due to the specific circumstances of their pregnancy.[65]

In Ireland, the global trend of abortion access through medication shifted the endeavour towards terminating pregnancies: from Irish women forced to take on journeys abroad to obtain surgical abortion procedures in clinics, to abortion pills travelling to Ireland, allowing for at-home ingestions instead. Pharmaceutical abortion pills, or Early Medical Abortion (EMA), introduced the possibility of abortions taking place on Irish soil but still in private, and at a level of safety incomparable to the risks of 'back-street' abortions.[66]

Furthermore, the Covid-19 pandemic led to significant advancements in abortion services, transforming Ireland from a country known for its extremely restrictive abortion laws into one of the few European nations to implement reforms that permit telemedicine for abortion.

More importantly, the Irish government committed to reviewing the remote consultation model rather than completely eliminating this service once the COVID-19 public health emergency ended. As a result, the introduction of remote consultations has helped to establish abortion as essential and time-sensitive healthcare recognised by the State.[67]

Research in public health indicates that the expanded availability of abortion pills has significantly contributed to a worldwide reduction in mortality rates associated with illegal and unsafe abortions.[68] These results are of pivotal importance in the United States, where access to abortion healthcare is becoming increasingly restricted every day and where the EMA is an indispensable resource, as well as in Ireland, where, although abortion has been recently legalised, a century of stigmatisation still drags on onto an untested and newborn legal and medical framework for reproductive rights.

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[63] L. TANNER, M. PERRONE, *Medication abortions are under fire: Here's how they work*, in *APNEWS*, March 15, 2023.

[64] L. TANNER, M. PERRONE, *Medication abortions are under fire: Here's how they work*, cit.

[65] R. REBOUCHÉ, *Remote Reproductive Rights*, cit.

[66] B. MCCAFFREY, *Technologies of protest in Irish abortion activism*, in *Feminist Anthropology*, 4, 1, 2023, 115-131.

[67] A. SPILLANE, M. TAYLOR, C. HENCHION, R. VENABLES, C. CONLON, *Early abortion care during the COVID-19 public health emergency in Ireland: Implications for law, policy, and service delivery*, in *International Journal of Gynecology & Obstetrics*, 154, 2021, 379-384.

[68] S. CALKIN, *Transnational abortion pill flows and the political geography of abortion in Ireland*, in *Territory, Politics, Governance*, 9, 2, 2021, 163-179.

In a world where reproductive freedom seems constantly under attack, the right to travel has partially lost its relevance in the discourses concerning access to abortions prohibited in the place of origin. Nevertheless, States' performance of sovereignty and their factual territorial control worked somewhat efficiently when the aim was to impede accessibility by eliminating the physical clinical spaces and the medical resources needed for the surgical abortive procedure. As medication abortion grows as a valuable alternative to surgery and telemedicine services prove capable of dispensing the pharmaceuticals through existing mail services, the traditional legislative measures become outdated and unfit for regulating reproductive healthcare.[69]

This unfolding determines optimistic considerations for the accessibility of abortion that should not be viewed as anarchic hopes implying the desire for the collapse of States' sovereignty. Instead, it should be interpreted as a temporary yet vital solution to protect women's health in countries where their reproductive freedom is denied, pending future changes that will formally ensure such protection.

5. The pluralism of Constitutions in the sphere of reproductive rights

The deep, intertwined connection intervening between States' sovereignty and the texts of their Constitutions calls for a rapid, conclusive reflection on the relationship between the people and the fundamental principles they abide by.

Nowadays, Constitutions play a role that no longer serves to mark a rupture with the past, but rather aim to look to the future, heralding the pluralist framework of antagonistic interests that is inherent to democratic societies. The regulation of the conflict between irreconcilable interests corresponds exactly to the 'social object' of the Constitution, which by no means claims to settle it once and for all, but instead establishes rules and procedures that can make it possible to find future points of balance between interests that are acceptable to all.[70]

If this premise is accepted, it becomes simpler to understand how the Eighth Amendment of the Irish Constitution allowed the compression of women's right to choose in favour of the foetuses' right to life for decades: whether it is agreeable or not, moral oppositions cannot deny the legitimacy of such a provision, given that its enforcement complied with the Constitution's requirements. The Constitutions' tendency to enshrine contradicting principles, therefore, is nothing more than a mere, but fundamental, representation of the conflicting perspectives that co-exist in the people who refer to the constitutional texts.[71]

The same reasoning becomes more complex to apply in the context of the United States because the right to abortion is not explicitly stated in the Constitution. In 1973, the Supreme Court recognised the constitutional legitimacy of abortion by framing it as part of the right to privacy, which is implicitly recognised in either the 14th or 9th Amendment, depending on the interpretation. However, in 2022, the same court rejected this conclusion, specifically because of the lack of an explicit mention of abortion in the Constitution. This highlights that the constitutional text is not static but, rather, it is open to various interpretations. It allows the establishment of a framework that guarantees principles and

[69] S. CALKIN, *Transnational abortion pill flows and the political geography of abortion in Ireland*, cit.
[70] R. BIN, *Che cos'`e la Costituzione*?, in *Quaderni costituzionali*, 1, 2007, 20.
[71] R. BIN, *Che cos'è la Costituzione?,* cit.

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rights for the citizens while maintaining a flexible structure which accommodates the diverse and unpredictable developments arising from social conflict and political manoeuvring.
Balancing conflicting rights, adapting to societal changes, and acknowledging diverse values through evolving interpretations are constitutional features that are intricately linked to the society they pertain. Consequently, the challenge for reproductive healthcare should not only focus on pushing for legislative change but should find its roots in societal changes as well. The repeal of the Eighth Amendment by the Irish people in 2018 perfectly displays how the cultural shift, though not exponentially extensive, impacted both the constitutional provisions and the related laws and regulations.

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