ARTICLE

ABORTION, JUDICIAL REVIEW, AND POPULAR SOVEREIGNTY

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ABSTRACT

Women have long resorted to litigation to claim their space in societies and shape the rights that they consider meaningful to achieve equal citizenship stature. This has particularly been the case for the right to abortion. In some instances, litigation was not the sole mechanism used, but has still been a necessary step in the path to achieving legislative change through the majoritarian political process. This Article explores these dynamics in the United States, where Dobbs v. Jackson Women's Health *has stripped women and persons with the capacity to gestate of their right to abortion, while advancing the argument that this is done for democratic reasons, to give back the right to decide on these matters to the people and their representatives. This Article then turns to a comparative study of three countries that have recently liberalized the right to abortion: Argentina, Ecuador, and Ireland. Each of these countries has used a different mechanism to liberalize abortion (a referendum, new legislation, and the use of the Constitutional Court). To examine these developments, this Article relies on Seyla Benhabib's model of "dialogic constitutionalism" to highlight the conversation between courts, legislative authority, and civil society, and how these conversations serve to upgrade standards of rights protection over time. This Article claims that in all these countries the role of courts has been essential in contributing to the democratic dialogue around abortion, its limits, and its place in society. It has also contributed to the expansion of popular sovereignty by the inclusion of women through the permission to control their own bodies.*

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INTRODUCTION

In the decision *Dobbs v. Jackson Women's Health*, the United States (U.S.) Supreme Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey,* holding that the U.S. Constitution does not confer a right to abortion.[1] This decision stripped women and persons with the capacity to gestate of a right that they have had for almost five decades.[2] Among the many arguments used to overturn these decisions, Justice Samuel Alito claimed in the majority opinion that *Roe* was not decided based on a democratic process.[3] He stated that in *Roe*, the Supreme Court "short-circuited the democratic process by closing it to the large number of Americans who disagreed with [it]," and that "[t]he Court . . . asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy."[4] Indeed, it is hard to argue that ensuring democracy is not essential, especially in light of the current events in the U.S. and worldwide. However, it is ironic that claims of democracy are wielded to curtail essential rights—a right that the same Court once considered paramount to ensure women's equal citizenship stature by permitting them "to participate equally in the economic and social life of the Nation."[5]

The argument that judicial review is not democratic is far from new; judicial review has long been criticized for exacerbating the "counter-majoritarian difficulty" and promoting "elitist paternalism."[6] Critics argue that legislatures are better positioned to resolve disagreements about rights, as they represent the majoritarian decision-making process and the most democratic path.[7] In the U.S., some saw judicial review of statutes on abortion as an example of the Supreme Court overreaching and establishing a constitutional meaning apart from the majoritarian opinion of society.

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

2. Though this Article uses the term "women," not all people with the capacity to gestate or seek an abortion identify as women. Non-binary, transgender, and gender nonconforming people may become pregnant and seek an abortion, and their ability to do so must be included in the broader right. This Article acknowledges their experiences and uses the term "women" to reflect the language used in the statutes discussed and used by the organizations that have historically advocated for the right to abortion. Use of the term "women" throughout this Article is not intended to diminish the experiences of people with the capacity to gestate who do not identify as women.

3. *Dobbs*, 142 S. Ct. at 2305.

4. *Id.* at 2266.

5. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856 (1992).

6. Seyla Benhabib, *Dialogic Constitutionalism and Judicial Review*, 9 GLOB. CONSTITUTIONALISM 506, 509 (2020) [hereinafter Benhabib, *Dialogic Constitutionalism and Judicial Review*] (quoting work from Alexander M. Bickle and Learned Hand).

7. *Id.*

Yet a closer exploration of the dynamics of judicial review in different jurisdictions shows the important role courts play in the democratic process of defining the meaning of rights and in expanding popular sovereignty. Nowhere is this more visible than with the right to abortion. While in the majority of countries the right to abortion has not been addressed as a constitutional matter, but rather through ordinary statute,[8] courts have still engaged in a dialogue with legislatures and civil society organizations to define its content and catalyze change. These dynamics are better understood through the model of "dialogic constitutionalism" which highlights the conversation between courts, legislative authority, and civil society, and how these conversations serve to upgrade standards of rights protection over time.[9] This Article uses this model to examine the legitimacy of judicial review through the exploration of the women's movement's advocacy on the liberalization of abortion laws in different countries.

Women's civil society organizations have long resorted to litigation to claim their space in their constitutions[10] and shape the rights that they consider meaningful to achieve equal citizenship stature. This has been done at the national, regional, and international level. The right to abortion is a prominent example of this use of strategic litigation. In some circumstances, though litigation was not the sole mechanism used, it has been a necessary step to achieve legislative changes through the majoritarian political process.[11] Either way, women have followed the premise that "the constitution we have depends upon the constitution we make and do and are,"[12] and courts have often been central in including women as part of the popular sovereign. This Article explores these dynamics in the U.S., where the first decision on abortion sparked a controversy that is still ongoing almost five decades later.

A comparative study of three countries that have liberalized abortion in recent years—Ireland, Argentina, and Ecuador—reveals the different mechanisms used to liberalize abortion laws. In Ireland, for example, the Eighth Amendment of its Constitution was repealed through a referendum that later resulted in a statute regulating abortion.[13] In Argentina, the Parliament finally approved legislation

8. RUTH RUBIO-MARIN, GLOBAL GENDER CONSTITUTIONALISM AND WOMEN'S CITIZENSHIP: A STRUGGLE FOR TRANSFORMATIVE INCLUSION 233 (2022).

9. Benhabib, *Dialogic Constitutionalism and Judicial Review*, *supra* note 6, at 512–13.

10. GENDER OF CONSTITUTIONAL JURISPRUDENCE 1 (Beverley Baines & Ruth Rubio-Marin eds., 2005).

11. Sandra Fredman provides a comparative account of the interaction between legislatures and courts on the case of abortion establishing how courts have been operating in both directions, striking down prohibitions on abortion, but also striking down legislation permitting abortion. *See* SANDRA FREDMAN, COMPARATIVE HUMAN RIGHTS LAW, 187–206 (2018).

12. Hanna F. Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 168 (1987).

13. On May 25, 2018, Irish citizens voted to amend their Constitution to repeal Article 40.3.3. (or the Eighth Amendment) which enshrined the right to life of the unborn. After this referendum, the Constitution was amended and a new legislation regulating the new right to abortion was passed. *See* Thirty-Sixth Amendment of the Constitution Bill 2018 (Ir.). For a detailed timeline of the abortion referendum, *see* Luke Fiel, *The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date*, 33 IRISH POL. STUD. 608, 608 (2018).

liberalizing the previous restrictive regulation of abortion after two rejections of the statute allowing abortion on request.[14] In Ecuador, the Constitutional Court recently (partly) liberalized restrictions on abortion by declaring a portion of the provision in the Criminal Code unconstitutional and expanding access to abortion to more women.[15] The developments in the two last countries are particularly relevant due to the effect these decisions can have in the region. The Constitutional Courts in Latin America are characterized by their constitutional dialogue in the reasoning of their decisions.[16] In all of these countries, the role of courts has been essential in contributing to the democratic dialogue around abortion, its limits, and its place in society.[17] The courts have also contributed to the expansion of popular sovereignty by including women and making them the moral agents over their bodies. Even in the countries where a statute was adopted, national and international judicial authority played a significant role in the conversation with the legislature and upgrading the standards of rights protection.[18]

I. SOVEREIGNTY AND JUDICIAL REVIEW

Critics of judicial review are suspicious of courts' power to review legislation that has been enacted by a majoritarian decision-making process.[19] Jeremy Waldron, a prominent critic of the strong form of judicial review, advances that judicial review of legislation is an inappropriate mode of final decision-making in a free and democratic society as it allows "unelected and politically unaccountable judges to strike down legislation enacted through the complex majoritarian procedures of legislation."[20] Criticism is mainly directed towards the strong-form of judicial review, where courts can reject application of a statute to a particular case or modify the effect of the statute to make its application conform with fundamental rights and freedoms.[21] The U.S. exemplifies what Waldron defines as strong-form judicial review. Courts can decline to apply a statute in a particular case or modify the effects to make its application to conform with individual rights. There is, however, a debate as to what extent U.S. courts may strike out legislation like the Kelseain model followed in European courts, where courts can strike down legislation out of the books altogether.[22] Still Waldron considers

14. Access to the Voluntary Termination of Pregnancy, Law No. 27610, Jan. 15, 2021, B.O. 239807 (Arg.).

15. Corte Constitucional del Ecuador [Constitutional Court], Apr. 28, 2021, J.P: Karla Andrade Quevedo, Sentencia No. 34-19-IN/21 (Ecuador).

16. *See infra* Section III.

17. *Id.*

18. *Id.*

19. Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006).

20. *Id.* at 1353.

21. *Id.* at 1354.

22. *Id.* at 1354–55.

that the effects of courts' authority is "not much short of it."[23] In a system of weak-form judicial review, which arises as an intermediate model between judicial supremacy, the American model, and parliamentary sovereignty,[24] courts scrutinize legislation for its conformity to rights but cannot decline to apply it simply because rights would otherwise be violated.[25] This means that, while there is a judicial role in interpreting legislation according to rights, the legislature has the final word on what the law is.[26] This is the case in the United Kingdom, Canada, and New Zealand— a model that has been called the "new commonwealth model of constitutionalism."[27] For instance, in the United Kingdom, courts may interpret legislation in accordance with the European Convention of Human Rights (which has been incorporated through the Human Rights Act of 1998), and may declare legislation incompatible with a Convention right.[28] However, this declaration does not affect the validity of the legislation, which continues to be in operation.[29] In New Zealand, courts cannot decline to apply legislation that is contrary to the Bill of Rights, but can only interpret it in such a way to avoid violations.[30]

Opponents of judicial review maintain that rights are not necessarily better protected by courts than they would by a democratic legislature, and that judicial review is democratically illegitimate.[31] Waldron develops a "rights-based critique of constitutional rights," considering that individuals have a right to participate in the democratic governance of their community.[32] This includes participating on equal terms in social decisions to determine the scope and limits of their rights.[33] Individuals are not only rights bearers, but also authors and rights interpreters.[34] Shifting these decisions to courts is a form of disenfranchising them. Waldron's case against judicial review is conditioned on four assumptions: (1) having democratic institutions in reasonably good working order; (2) having adequate judicial

23. *Id*. at 1355, n.24 (providing further information on the debate within the U.S. as to whether U.S. courts can strike unconstitutional legislation out of the statute book).

24. Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167, 167–68 (2010).

25. Waldron, *supra* note 19, at 1355.

26. Gardbaum, *supra* note 24, at 170.

27. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 709 (2010) (claiming that this model has put an end to the idea that legislative supremacy is incompatible with the effective protection of fundamental rights). For a more nuanced study of weak judicial review, *see* Rosalind Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, 17 INT'L J. CONST. L. 904 (2019) (examining the array of factors that the weakness of judicial review depends on); Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 OXFORD J. L. STUD. 487 (2012).

28. Human Rights Act 1998, C. 42, § 4(2), (6) (U.K.).

29. Waldron, *supra* note 19, at 1355; Human Rights Act, *supra* note 28.

30. Waldron, *supra* note 19, at 1356.

31. *Id*. at 1353.

32. Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 20 (1993).

33. *Id*. at 37.

34. *Id*. at 38.

institutions in reasonably good working order; (3) a commitment to rights from most parts of society; and (4) a persisting, substantial and good faith disagreement about rights.[35] In these societies, disagreements over rights should be settled by the legislature—the only way to enable majority rule to prevail.[36] He does concede, however, that the case against judicial review is not absolute, and "[it] may still be the case that judicial review is necessary as a protective measure against legislative pathologies relating to sex, race, or religion in particular countries."[37]

Richard Bellamy, another prominent critic of judicial review, uses the concept of "political constitutionalism" to defend the contention that a democratic political system "offers the most legitimate and effective mechanism for constraining governments . . . including by ensuring they protect and promote rights.[38] Similarly to Waldron, he argues that rights "are matters of reasonable disagreement" and "that the most appropriate way to show citizens equal respect and concern in resolving these disagreement is via a democratic system that treats their different views and interest impartially and equitably by giving them an equal influence in any collective decision, including those concerning rights."[39] He does acknowledge that the legislative process can be supplemented by a weak form of judicial review,[40] as it allows for reasonable disagreement, the fallibility of any decision about them, and the need for the equal consideration of the views of interest of citizens.[41]

Waldron and Bellamy's views have not been received without criticism. There have been numerous arguments in favor of judicial review, based on ideas that judges are better positioned for moral decision-making or as a wider part of a society's decision-making on upgrading rights. For example, political science and philosophy professor Seyla Benhabib notes that Waldron and Bellamy miss the "essential dialectic between human and constitutional rights and the exercise of popular sovereignty,"[42] and do not provide standards for "upgrades of rights protections."[43] The development of the model of "dialogic constitutionalism" is a response to these arguments. Dialogic constitutionalism is akin to Benhabib's own "democratic iterations."[44] The latter is concerned with the iteration of legal norms in civil society associations and through social movements,[45] whereas the

35. Waldron, *supra* note 19, at 1360–69.

36. JEREMY WALDRON, LAW AND DISAGREEMENT 248 (2004).

37. Waldron, *supra* note 19, at 1352.

38. Richard Bellamy, *The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights*, 25 EUR. J. INT'L L. 1019, 1024 (2014).

39. *Id*.

40. *Id*. at 1028.

41. *Id*. at 1029.

42. Seyla Benhabib, *The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism*, 5 GLOB. CONSTITUTIONALISM 109, 121 (2016) [hereinafter Benhabib, *The New Sovereigntism and Transnational Law*].

43. Benhabib, *Dialogic Constitutionalism and Judicial Review*, *supra* note 6, at 513.

44. Benhabib, *The New Sovereigntism and Transnational Law*, *supra* note 42, at 112–13.

45. Benhabib, *Dialogic Constitutionalism and Judicial Review*, *supra* note 6, at 508–09. (describing it as "complex process of public argument, deliberation and exchange through which universalist rights

former focuses on the relations of the courts and the legislature and other instances of law-and rule-making agencies.[46] It has two dimensions: the formal and institutionalized conversations among official bodies and the feedback between judicial decisions, civil society, and social movement activism.[47] This model:

> (1) [D]oes not neglect legislative authority but places it in the context of a conversation with judicial authority whether domestic or transitional; (2) such conversations serve to upgrade a standard of rights protection and should not be viewed as defending frozen precommitments over time; and (3) constitutions also have a representative function of standing for the intergenerational continuity of the people, whereas legislatures are bound by electoral cycles.[48]

In response to criticisms that judicial review is a democratic illegitimacy, this model argues that judicial review protects "the equal sovereignty of a people's members by guaranteeing the highest standards of rights protection, often as a result of judicial dialogues. People's sovereignty cannot be equated with democratic majoritarianism."[49] Judicial review is thus justified by the link between the exercise of popular sovereignty and the entitlement to equal rights.[50]

The legitimacy of judicial review from a dialogic perspective is also defended by other legal scholars. For instance, Judith Resnik, a law professor who studies the relationship of democratic values to government services such as courts, believes that "rather than presuming courts to be a problem for democracy, courts are resources in that they facilitate democratic practices."[51] She views courts as regular participants in the public sphere and adjudication as an ongoing dialogue with the majoritarian decision-making process.[52] The strength of the conversation between courts, the legislature, and citizens is central to the "democratic constitutionalism" model developed by constitutional law professors Robert Post and Reva Siegel.[53] This model emphasizes the role of government, a mobilized

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claims are contested and contextualized, invoked and revoked, posited and positioned through legal and political institutions as well as in the association of civil society. Every interaction transforms meaning, adds to it, enriches it in ever-so-subtle ways"); *see also* Seyla Benhabib, *Democratic Exclusions and Democratic Iterations: Dilemmas of 'Just Membership' and Prospects of Cosmopolitan Federalism*, EUR. J. POLIT. THEORY 445, 447 (2007).

46. Seyla Benhabib, *Dialogic Constitutionalism and Judicial Review*, 9 GLOB. CONSTITUTIONALISM 506, 509 (2020).

47. *Id*. at 514.

48. *Id*. at 513.

49. *Id.*

50. *Id*. at 514.

51. Judith Resnik, *The Production and Reproduction of Constitutional Norms*, 35 N.Y.U. REV. L. & SOC. CHANGE 226, 245 (2011).

52. *Id*. at 246.

53. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C. R.-C.L. L. REV. 373, 379 (2007).

citizenship, and the role of courts in interpreting the constitution.[54] It views adjudication as being "embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning."[55] In this sense, judicial review is part of the democratic process of shaping the meaning of the constitution. Constitutional norms and rights are construed through dialogue and the interactions between law and politics.[56] An example of these interactions is the initial judicial decisions and debates surrounding the right to abortion in the U.S.[57]

II. WOMEN'S CITIZENSHIP IN THE U.S.

The controversy over the liberalization of abortion in the U.S. began with *Griswold v. Connecticut*, where the Supreme Court recognized the right to privacy within the "penumbras" of the Bill of Rights and held the Connecticut statute criminalizing the use of contraceptive devices unconstitutional.[58] The right to privacy then propelled the advancement of sexual and reproductive rights, including the granting of the right to access contraceptives to non-married couples,[59] striking down legislation criminalizing sodomy,[60] permitting homosexual couples to marry,[61] and allowing the termination of a pregnancy before viability with the consultation of a physician.[62]

In *Roe v. Wade*, the Supreme Court held that the right to privacy was broad enough to encompass a woman's right to terminate her pregnancy in consultation with her doctor.[63] Thus, the Court declared unconstitutional the provisions of the Texas statute criminalizing abortion except when it was procured to save the life of the mother.[64] The Court established a trimester scheme in order to regulate the right to abortion: during the first trimester, the abortion decision was left to the woman and the medical judgment of her physician; during the second trimester, the state could regulate abortion to protect maternal health; and during the last trimester—after viability of the fetus—the state may promote its interest in the

54. *Id.*

55. *Id.*

56. Benhabib, *The New Sovereigntism and Transnational Law*, *supra* note 42, at 122.

57. REVA SIEGEL, *The Constitutionalization of Abortion*, *in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1057, 1058 (Michel Rosenfeld & András Sajó eds., 2012).

58. Griswold v. Connecticut, 318 U.S. 479, 484–86 (1965).

59. Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (extending the right to privacy to unmarried persons to use contraceptives).

60. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding the Texas statute criminalizing "deviate sexual intercourse with another individual of the same sex" as unconstitutional).

61. Obergefell v. Hodges, 576 U.S. 644, 663–76 (2015) (holding that the Fourteenth Amendment of the Constitution allows states to license a marriage between two persons of the same sex, as well as to recognize the marriage between two people of the same sex when it has been lawfully licensed and performed out-of-state).

62. Roe v. Wade, 410 U.S. 113, 154 (1973).

63. *Id.* at 117–18.

64. *Id.* at 164.

potential of human life and may prescribe abortion for the preservation of the life or health of the mother.[65]

The Connecticut and Texas statutes aimed to regulate women's sexuality and limit their access to equal citizenship stature. Both were adopted in the nineteenth century before female suffrage, enacted by exclusively male legislatures, chosen by exclusively male electorates.[66] These statutes sought to impose a particular morality based on patriarchal notions of women's role in society.[67] However, the Connecticut statute was an outlier in American society, whereas with *Roe,* the Supreme Court struck down the legislation of the majority of states.[68]

Roe sparked a debate on the role of courts in the U.S., as many viewed its judicial review with suspicion. Criticism also came from supporters of women's rights. For example, Justice Ruth Bader Ginsburg considered *Roe* to be too far reaching and sweeping and believed it "stopped the momentum on the side of change."[69] Other scholars have emphasized that *Roe* brought the legislative process to a halt, especially the process of education, persuasion, and bargaining that takes place in legislatures.[70]

Yet what *Roe* really did was expand American popular sovereignty to include women. With control over their bodies and reproductive health, women could become full participants in the American economy and social sphere. This allowed them, in effect, to shape their constitution.[71] The centrality of abortion in women's access to citizenship was later acknowledged in *Planned Parenthood v. Casey*.[72] While the Court did overturn the trimester scheme established in *Roe* for not giving enough consideration to states' interest and substituted this for the "undue burden" criteria,[73] the Court recognized that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated

65. *Id*. at 164–65.

66. AKHIL AMAR, AMERICA'S UNWRITTEN CONSTITUTION 291 (2012).

67. Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 EUR. J. LEGAL STUD. 153, 167 (2008).

68. *Roe*, 410 U.S. at 118–19, n.2 (providing that similar statutes to the Texan one existed in a majority of the States, and citing around 30 states with similar statutes where New York was the only state that complied with the criteria determined by the court); *see* AMAR, *supra* note 66, at 117 ("According to Harvard University law professor Laurence Tribe, every state except perhaps New York had laws on the books at odds with *Roe*'s sweeping vision of abortion rights.").

69. Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, U. CHI. L. SCH. (May 15, 2013), https://perma.cc/Q6TK-KUA9.

70. Bill Moyers, *Mary Ann Glendon: Law of Abortion and Divorce,* Moyers & Co. (Apr. 1, 2015), https://perma.cc/PVR7-VPW8.

71. *See* Reva B. Siegel, *The Constitutionalization of Abortion*, *in* ABORTION IN TRANSNATIONAL PERSPECTIVE 13, 13 (Rebecca J. Cook, Joanna N. Erdman, & Bernard M. Dickens eds., 2014).

72. *Casey*, 505 U.S. at 835 (holding that the centrality of abortion is seen as essential to women's political and economic participation in society).

73. *Id*. at 838 (holding that states are permitted to promote their interest at the start of the pregnancy, as long as these do not pose an "undue burden" to women's right to abortion before viability).

by their ability to control their reproductive lives."[74] Justice Ginsburg also emphasized the connection between the right to abortion and women's citizenship in her dissent in *Gonzales v. Carhart*, noting how legal challenges to undue restrictions on abortion procedures "do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[75] It is true, however, that *Roe* limited the ambit of potential legislation and did not leave space to discuss the adequate framing of the right to abortion.[76] For example, many feminist scholars have argued that it should have been framed as sex equality.[77] They claim that using sex equality as a lens could have centered the conversation around the disproportionate impact that the criminalization of abortion has on women and enabled a deeper understanding of the societal perspective of pregnancy, abortion, and how gender relations shape childbearing and childrearing.[78]

Perhaps an extensive legislative debate would have enabled a better framing and understanding of the right at stake, in line with what Waldron claims happened in the United Kingdom,[79] or what more recently took place in Ireland, and Argentina.[80] But judicial review was the only path available for American women. The women's movement had been attempting to include the Equal Rights Amendment (ERA) in the Constitution since 1923.[81] In 1972, Congress finally adopted it,[82] but the thirty-eight state ratifications necessary to include the amendment in the Constitution were not achieved before the congressionally-imposed deadlines on the ratification of the ERA.[83] Only in January 2021 did the thirty-eighth state, Virginia, ratify the amendment.[84] This ratification sparked a legal battle. The National Archivist refused to include the ERA in the

74. *Casey*, 505 U.S. at 835.

75. Gonzales v. Carhart, 550 U. S. 124, 172 (2007) (Ginsburg, J., dissenting).

76. *Casey*, 505 U.S. at 856.

77. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007); Catharine A. MacKinnon, FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW, 93–102 (1983); *see also* Reva B. Siegel, *Justice Reva Siegel, Concurring*, *in* WHAT *ROE V WADE* SHOULD HAVE SAID 63 (Jack M. Balkin, ed. 2005) (providing an account of how *Roe* could have been decided as a violation of the right to sex equality under the Fourteenth and Nineteenth Amendment).

78. FREDMAN, *supra* note 11, at 222–23.

79. Waldron, *supra* note 19, at 2006 (praising the richness of the House of Commons debate on the liberalization of abortion).

80. See *infra* Sections III.B, III.C.

81. Julie C. Suk, *The Equal Rights Amendment, Then and Now*, *in* OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah Brake, Martha Chamallas, & Verna Williams eds., 2021) [hereinafter Suk, *The Equal Rights Amendment*].

82. Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J. L. & FEMINISM 381, 383 (2017) [hereinafter Suk, *An Equal Rights Amendment for the Twenty-First Century*].

83. *Id.*

84. Timothy Williams, *Virginia Approves the E.R.A., Becoming the 38th State to Back It*, N.Y. TIMES (Jan. 16, 2020), https://perma.cc/ASY5-7MCS.

Constitution, arguing that the last three ratifications took place outside the ten-year limit established by Congress for the ratification of the ERA.[85] The struggles and difficulties in amending the Constitution to reflect gender issues reaffirm scholars' concerns that the Constitution no longer works from a popular sovereignty perspective.[86] Women have been trying to amend the Constitution for over a century now, yet the rigidity of Article V is not letting them.[87] Without the ERA, it is extremely difficult for the federal government to enact a statute on abortion.[88] Such a statute could only be passed under the Commerce Clause or the Fourteenth Amendment, but after *United States v. Morrison*, it seems highly unlikely to happen.[89] In *Morrison,* the Supreme Court struck down a section of the Violence Against Women Act that established a federal civil remedy for victims of gender-based violence.[90] It held that this section could not be sustained under the Commerce Clause or Section Five of the Fourteenth Amendment.[91]

The struggles of women seeking recognition of their rights through the majoritarian political process reveal an essential flaw in Waldron and Bellamy's argument: their theory against judicial review is based on too idealistic premises of how the legislative process works, and, for example, the preconditions of democracy required by Waldron are not present in most—not to say all—countries.[92] The difficulty that generations of women have faced in the U.S. demonstrates that lawmaking alone cannot sustain constitutional democratic legitimacy.[93] Unfortunately, *Dobbs* has now set back women's citizenship in many states in the U.S. to that of 1972.[94] This was done in spite of the emphasis throughout the decision of the need to ensure democracy by returning the authority to regulate abortion to the people.[95] Thus, the people that the Supreme Court sought to protect in

85. Suk, *The Equal Rights Amendment*, *supra* note 81*;* Veronica Stracqualursi, *House Passes Joint Resolution to Remove ERA Deadline*, CNN (Mar. 17, 2021, 2:25 PM), https://perma.cc/WF8X-YCE4 (stating the House of Representative passed a resolution removing the ERA deadline, which will then have to be decided by the Senate).

86. David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. REV. 664, 668 (2018).

87. *Id.* at 687 (arguing that the American sovereign is not sleeping, but has fallen into a coma or has been imprisoned); U.S. CONST. art. V.

88. Suk, *An Equal Rights Amendment for the Twenty-First Century*, *supra* note 82, at 444 (arguing that the ERA would provide a platform for Congress to legislate on gender issues).

89. United States v. Morrison, 529 U.S. 598, 627 (2000).

90. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1941, § 13981.

91. *Morrison*, 529 U.S. at 607–27. For a criticism of this decision, *see* CATHARINE A. MACKINNON, *Disputing Male Sovereignty on* United States v. Morrison, *in* WOMEN'S LIVES, MEN'S LAWS 206, 207 (2005) (providing that with this decision the Court told that "this legal system not only need not, but by virtue of its structural design may not, where gender-based violence is concerned, deliver meaningful equal protection of the laws to them").

92. Waldron, *supra* note 19, at 1360–69.

93. Post & Siegel, *supra* note 53, at 380.

94. *After Roe Fell: Abortion Laws by State,* CTR. REPROD. RTS., https://perma.cc/M87F-QKYY (last visited Apr. 2, 2023).

95. *Dobbs*, 142 S. Ct. at 2259 (providing that, in overturning *Roe* and *Casey*, the court is returning "the power to weigh those arguments to the people and their elected representatives").

its decision are only half of the American people, and the importance the Court once gave the right to abortion as a part of women's citizenship has disappeared.

III. TRANSNATIONAL PERSPECTIVES ON THE LIBERALIZATION OF ABORTION LAWS

An examination of transnational developments on the liberalization of abortion legislation also confirms the relevance of judicial decisions in enabling and contributing to the constitutional exchange on the definition of fundamental rights. These decisions should not be considered in isolation but as part of a wider framework on liberalizing abortion legislation. Dialogic constitutionalism highlights the significant role judicial decisions played in conversation with the legislature—even in cases where abortion was liberalized through legislation—upgrading standards of rights, and in updating the constitution to the current generation.

A. ECUADOR

A recent case of liberalization of abortion is Ecuador.[96] Ecuador exemplifies a common trend in Latin America on abortion lawfare: where pro-abortion groups have centered their strategies on the courts, particularly in the constitutional courts, in order to liberalize the restrictive abortion legislation in the region.[97] And this has been possible due to the role international human rights law plays in most Latin American legal systems. In fact, it has been the pro-life, conservative, and religious groups that have chosen the legislative path to advance their anti-abortion agenda.[98]

In April 2021, Ecuador's Constitutional Court declared Provision 150(2) of the Criminal Code, which only permitted women to have an abortion if they had mental disabilities and the pregnancy was a result of rape, unconstitutional.[99] Women without mental disabilities were not exempt from the criminal penalty of the provision if they had an abortion due to rape, but the Court held that all women should be permitted to obtain an abortion in cases of rape.[100] Relying on regional and international human rights standards, and transnational law, the Court found that all women should be allowed to access an abortion when the pregnancy is a result of rape.[101] As reparations, the Court considered that striking down this provision was not enough to do justice to women, and ordered the development of a new statute to establish a regulatory framework regarding consensual abortion in cases of rape. This statute had to be drafted by the Ombudsman, with the active participation of civil society, and in coordination with other governmental institutions.[102] It also had to contain the minimum core standards decided by the Court, which included criteria developed by regional and international

96. Corte Constitucional del Ecuador, *supra* note 15.
97. Siri Gloppen, *Conceptualizing Abortion Lawfare*, 17 REVISTA DIREITO GV 1, 3 (2021).
98. *Id*. at 14.
99. Corte Constitucional del Ecuador, *supra* note 15.
100. *Id*.
101. *Id*.
102. *Id*. at ¶ ¶ 193, 195–96.

human rights norms.[103] After drafting, the statute was to be debated by the National Assembly, adhering to "the highest standards of democratic deliberation and respect to the criteria established" in the decision.[104]

In this case, the criticism against strong judicial review as democratically illegitimate is harder to sustain. The legitimacy of the Constitutional Court to provide judicial review has been established in its same text.[105] The case was litigated through various writs of constitutionality, an easy and effective mechanism recognized in the Ecuadorian Constitution that permits *any* individual to directly access the Constitutional Court to contest statutes that they deem unconstitutional and shape the meaning of constitutional norms.[106] Since the Constitution recognizes the binding nature of international human rights treaties,[107] the legitimacy of the decision is further reinforced by its reliance on international and regional human rights norms, which in turn have been shaped by a dialogue between international bodies, states, and national and transnational civil society organizations.[108] In 2022, Ecuador's Assembly passed a law in compliance with this decision.[109]

In Ecuador, judicial review started the needed democratic conversation on the inclusion of women's rights in the constitutional order. The reparations awarded by the Constitutional Court reinforced the idea of popular democracy, by ensuring that citizens, including women and other people with the capacity to gestate, are truly authors of the content and limits of their rights. This Court exemplifies the idea of an effective constitutional court as it is "able to draw other policymakers, and at times the citizenry, into the discourse they constitute and curate as a jurisprudence of rights."[110] The Court is inviting the legislatures to think again,[111] consider women's issues, and update constitutional norms. It does not claim to have a final word, but it became a catalyst of change.[112]

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103. *Id.*

104. *Id.*

105. ART. 436, CONSTITUCIÓN DE LE REPÚBLICA DEL ECUADOR [CONSTITUTION OF THE REPUBLIC OF ECUADOR] (Ecuador).

106. *Id.* at ART. 439 (providing that writs of constitutionality may be presented by any citizen, individually or collectively).

107. *Id.* at ART. 10, 11.

108. Judith Resnik, *Comparative (In)Equalities: CEDAW, the Jurisdiction of Gender and Heterogeneity of Transnational Law Protection,* 10 INT'L J. CONST. L. 531 (2011) (highlighting how the reservations, understanding and derogations exemplifies the dialogue between states and the United Nations).

109. Ley Orgánica que regula la interrupción voluntaria del embarazo para niñas, adolescentes y mujeres en caso de violación, PAN-EGLLA-2022-0244 (Apr. 18, 2002), https://perma.cc/A4CR-CPRL.

110. Alec Stone Sweet & Clare Ryan, A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2018); Benhabib, *Dialogic Constitutionalism and Judicial Review*, *supra* note 6, at 508 (considering the courts "slant some of the major issues of Kant's political philosophy in the direction of courts and judicial supremacy.").

111. Bellamy, *supra* note 38, at 1029.

112. Although the Constitutional Court held that Article 50 of the Criminal Code was unconstitutional, it left to the National Assembly, the Ombudsman, and civil society to delineate the new legal framework that ensured women's right to abortion in cases of rape. Corte Constitucional del Ecuador, *supra* note 15, at 49–50.

B. ARGENTINA

In January 2021, Argentina enacted the Access to the Voluntary Interruption of the Pregnancy Act, which permits women to obtain an abortion on demand within the first fourteen weeks of pregnancy and in specific circumstances after fourteen weeks.[113] Argentina is another example of judicial decisions in conversation, and pushing the conversation—with the legislature, civil society, and even with international and transnational law—towards enhancing rights. Before this new legislation, the Criminal Code of Argentina criminalized abortion except in two circumstances: (1) as a last resort to prevent danger to the life or health of the mother, when this danger could not be avoided by other means; and (2) when the pregnancy was a result of rape or indecent assault on a woman with a mental disability.[114]

Since 2004, several bills seeking to amend the Criminal Code to liberalize abortion were pending Congress's review. However, these bills were not successfully passed due to a lack of political will, as well as the Catholic Church's lobbying against any liberalization of abortion.[115] The prohibition of abortion had no effect on reducing the rates of abortions,[116] which continued to be performed illegally, and generated one of the highest rates of maternal mortality and morbidity in the world.[117] Additionally, in the limited cases where abortion was not criminalized, women were still not able to obtain them, as abortion was rarely available in different sectors of the Argentinian health system, resulting in "an 'informal rule' banning the practice" of abortion.[118] This dire situation led civil society organizations to litigate successfully against the hostile environment experienced by women before the United Nations Human Rights Committee.[119]

The seminal case here is *L.M.R. v. Argentina*,[120] concerning a young woman, L.M.R., with a permanent mental disability who became pregnant after she was raped.[121] At the time, Article 86(2) of the Argentinian Criminal Code permitted women with mental disabilities to access abortion in the case of rape, but despite

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113. Law No. 27610, *supra* note 14, at Art. 4.

114. CÓDIGO PENAL [CÓD. PEN.] [National Criminal Code] Art. 86 (Boletin Oficial, Buenos Aires, 1985) (Arg.).

115. Palacios Zuluaga, *Can the Inter-American System Accommodate Abortion Rights?*, 21 HUM. RTS. L. REV. 899, 899 (2021).

116. *Unintended Pregnancy and Abortion Worldwide*, GUTTMACHER DATA CTR., https://perma.cc/92CH-K6BQ (last visited Mar. 5, 2023) (noting on several occasions that prohibitions of abortion does not reduce the number of abortions, it just pushes them to the shade).

117. Zuluaga, *supra* note 115, at 899.

118. Paola Bergallo, *The Struggle Against Informal Rules in Argentina*, *in* ABORTION IN TRANSNATIONAL PERSPECTIVE 143 (Rebecca J. Cook, Joanna N. Erdman, & Bernard M. Dickens eds., 2014).

119. *Women Human Rights Defenders*, UNITED NATIONS https://perma.cc/6AZ9-BEZ6 (last visited Apr. 23, 2023) (noting that the United Nations' Human Rights Committee is the body responsible for monitoring and implementing the ICCPR).

120. CCPR, L.M.R. v. Argentina, Comm. 1680/2011 (Apr. 28, 2011) (Arg.) (establishing that denial of access to abortion for a woman with a mental disability that was raped is a form of inhumane and degrading treatment and a violation of her right to privacy).

121. *Id.* at ¶ ¶ 2.1, 2.2.

being legally entitled to access an abortion, L.M.R. was refused an abortion by hospitals she visited. One of the hospitals alleged that she required a judicial authorization, despite this not being a legal requirement.[122] A juvenile court intervened to prohibit the abortion, a decision that was later confirmed by a Civil Court.[123] The Supreme Court of Justice of Buenos Aires overturned the decision and also confirmed that there was not a legal requirement to obtain a judicial authorization in order to have the abortion.[124] Despite this ruling, the hospital came under enormous pressure from opposition groups and refused to perform the procedure claiming that the pregnancy was too advanced.[125] L.M.R. eventually managed to get a clandestine abortion, thanks to the support of women's organizations.[126] The Human Rights Committee found that Argentina violated several of L.M.R.'s rights enshrined in the International Covenant on Civil and Political Rights (ICCPR), including the right to be free from torture (Article 7), the right to be free from arbitrary interference in her private life (Article 17(1)), and the right to an effective remedy should the right to female equality (Article 3(7), (17)) be violated.[127]

This decision—together with other decisions of the Committee and of the Interamerican System of Human Rights[128]—served as one of the justifications for the Argentinian Supreme Court of Justice of the Nation to later declare the provision of the Criminal Code that permitted abortions in cases of rape only for women with mental disabilities unconstitutional.[129] The Court expanded the limited exception to the crime of abortion to include access to all women who had become pregnant as a result of rape, timidly expanding the right to abortion in the country, and calling on authorities to implement health protocols to remove barriers to accessing it.[130]

These decisions were part of the wider exchange with the legislature and civil society on how to continue expanding the meaning of the right to abortion and to include women as national sovereigns. The legislature, nine years later, significantly

122. *Id*.; CÓDIGO PENAL *supra* note 114, at Art. 86.

123. *L.M.R*., Comm. 1680/2011 at ¶ ¶ 2.4–2.5.

124. *Id*. at ¶ 2.6.

125. *Id*. at ¶ 2.7.

126. *Id*. at ¶ 2.8.

127. *Id*. at ¶ ¶ 9.2–9.4, 10.

128. The Interamerican System of Human Rights is composed by the Inter American Commission and the Interamerican Court. They are both organs of the Organization of American States that promote and protect human rights in the American continent. For more information, *see What is the IACHR?*, OAS, https://perma.cc/MC3M-GACP (last visited Apr. 2, 2023). Both the Commission and Court have addressed some cases on reproductive rights that had an impact in the region. For example, the case *In Vitro Fertilization* established the principle that asserted that the protection of pre-natal life must be proportionate and reasonable on how they impact the rights of pregnant persons. *Artavia Murillo ("In Vitro Fertilization") v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 257 (Nov. 28, 2012).

129. *Argentina: Supreme Court Decision on Abortion*, LIBR. OF CONG., (Mar. 16, 2012), https://perma.cc/4XV4-CLAG.

130. *Id*.

expanded the scope of the right to abortion and anchored it within an array of rights recognized by international human rights law, including sex equality.[131]

C. IRELAND

The liberalization of abortion in Ireland follows a similar path to that of Argentina, with judicial decisions playing a profound role in expanding popular sovereignty to women. In 1983, Ireland adopted its Eighth Amendment of the Constitution (Section 40.3.3), which provided that "[t]he 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."[132] This pushed thousands of women seeking abortions overseas.[133] The bill introducing this amendment—and later the amendment *per se*—was unsuccessfully challenged before the Irish Supreme Court.[134] Only after a fourteen-year-old girl became pregnant as a result of rape did the Supreme Court interpret the Eighth Amendment to allow abortions if there was a "real and substantial risk to life, as distinct from the health of the mother, which can only be avoided by the termination of her pregnancy."[135]

Irish women's groups did not end their battle there, and while the Supreme Court did not grant recognition of the rights they sought, they accessed the regional and international fora.[136] Before the European Court of Human Rights (ECtHR), they brought the case of *A, B and C v. Ireland*.[137] The story of these applicants reflected the experience of many other Irish women who had to travel to England in order to terminate their pregnancy.[138] The applicants underwent this trip alone and in secrecy, experiencing economic challenges and suffering physical and mental distress from this experience.[139] Applicant A became pregnant unintentionally and traveled to England alone and in secrecy.[140] Upon her return to Dublin, she started bleeding and was taken to the hospital, where she experienced pain, nausea, and additional bleeding.[141] At the time of the application, she struggled with depression.[142] Applicant B also had to travel alone to

131. Law No. 27610, *supra* note 14, at Art. 3.

132. Eighth Amendment of the Constitution Act 1983 (Ir.) (amending Article 40.3.3 of the Constitution).

133. *See, e.g.,* CCPR, Amanda Jane Mellet v. Ireland, Comm. 2324/2013 (Mar. 31, 2016) (Ir.); Siobhán Whelan v. Ireland, Hum. Rts. Comm., Comm. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (July 11, 2017).

134. Aileen Kavanagh, *Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic*, OXFORD LEGAL STUD. RSCH. PAPER, 4 (2013).

135. Att'y Gen. v. X [1992] 1 I.R. 1 (Ir.).

136. *See, e.g.*, Amanda Jane Mellet v. Ireland, Comm. 2324/2013; Siobhán Whelan v. Ireland, Comm. 2425/2014.

137. A, B & C v. Ireland, Eur. Ct. H.R. (2010).

138. *Id.* ¶ ¶ 13, 18, 22.

139. *Id.* ¶ ¶ 13–26.

140. *Id.* ¶ ¶ 14–15.

141. *Id.* ¶ 16.

142. *Id.* ¶ 17.

England after becoming pregnant unintentionally, despite having taken the "morning-after pill."[143] On her return to Ireland, she began having blood clots and eventually sought follow-up care at a clinic in Dublin.[144] Applicant C became unintentionally pregnant after having undergone three years of chemotherapy.[145] She consulted her general practitioner and several medical consultants about the consequences this pregnancy could have on her health.[146] Due to the chilling effect of the Irish legal framework, she received insufficient information on the risks of this pregnancy.[147] She had to search on the internet and, due to the uncertainty about the risk, she traveled to England.[148] On returning to Ireland, she suffered complications as a result of an incomplete abortion, and was not given adequate medical care.[149] The ECtHR examined the circumstances of the three applicants under the auspices of Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR).[150]

The applicants alleged that Irish abortion restrictions were not effective, as they did not achieve the intended aim of protecting fetal life,[151] did not have a legitimate aim, no longer reflected the position of Irish people, and the means to achieve the aim were disproportionate.[152] Moreover, these restrictions disproportionately harmed women and were not part of the consensus of other member states of the Council of Europe.[153] Applicant C argued further that the lack of a legal framework or guidelines to determine her qualification for accessing an abortion to save her life constituted a violation of Article 8 as well.[154]

In this case, the ECtHR distinguished between Applicants A and B, who traveled to England for health and/or wellbeing reasons, and Applicant C, who feared the pregnancy constituted a risk to her life.[155] The Court held that there had been no violation of Article 8 of the ECHR in regards to the first two applicants, as there was found to be a balance between the rights of the applicants and the state interest in restricting abortion, as they lawfully traveled to England for an abortion and were able to access pre- and post-abortion information and medical care in Ireland.[156] Regarding Applicant C, the Court did find violations of Articles 8

143. *Id.* ¶ 19.
144. *Id.* ¶ 21.
145. *Id.* ¶ ¶ 23–24.
146. *Id.* ¶ 24.
147. *Id.*
148. *Id.* ¶ ¶ 24–25.
149. *Id.* ¶ 26.
150. The complaints made under Article 2 (right to life) of Applicant C, and of Article 3 (inhumane, degrading treatment) by the three applicants were dismissed by the Court. *Id.*
151. *Id.* ¶ 170.
152. *Id.* ¶ ¶ 170–71.
153. *Id.* ¶ ¶ 173, 175.
154. *Id.* ¶ 177.
155. *Id.* ¶ 167.
156. *Id.* ¶ ¶ 241–42.

(right to privacy)[157] and Article 13 (right to an effective remedy).[158] Six judges out of sixteen dissented from the decision to not find a violation of Article 8 for Applicants A and B.[159]

Seven years later, however, the United Nations Human Rights Committee held that Irish legislation criminalizing abortion violated human rights law, in particular, the ICCPR, and ordered Ireland to amend its legislation, including the Constitution, to ensure compliance with international law.[160] The Human Rights Committee considered the cases of Amanda Jane Mellet[161] and Siobhán Whelan.[162] Both women had to flee to England in order to obtain an abortion as each fetus had a condition that would cause the fetus to die in utero or shortly after.[163] The women suffered the consequential psychological, physical, and economic cost of this trip.[164] For example, Siobhán Whelan described how this experience made her feel "like a criminal."[165] Back in Ireland, they could not access counseling.[166] In these cases, the Human Rights Committee took a stance further than its European counterpart, and found that the experiences these women had to go through, due to restrictive abortion legislation, violated Article 7 (prohibition on cruel, inhumane, or degrading treatment), Article 17 (right to privacy), and Article 26 (equality before the law and non-discrimination) of the ICCPR.[167] Only a year later, in May 2018, the Eighth Amendment was repealed through a referendum,[168] and a statute was passed permitting abortion upon request up to twelve weeks and on specific grounds thereafter.[169] Decisions of regional and international human rights bodies created space for the debate about the liberalization of abortion in Ireland. References to these decisions were used

157. *Id.* ¶ 268.

158. *Id.* ¶ 274.

159. *Id.* (Rozakis, J., Tulkens, J., Fura, J., Hirvelä, J., Malinverni, J., & Poalelungi, J., dissenting in part) (criticizing the use of the proportionality test by the majority, especially given that it is one of the rare times the Court has not narrowed the margin of appreciation despite the existence of a European consensus, and the majority's choice to give Ireland a broad margin of appreciate legislate on abortion, despite the existence of a European consensus regarding the right to abortion).

160. Amanda Jane Mellet v. Ireland, Hum. Rts. Comm., Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (Mar. 31, 2016).

161. *Id.*

162. Siobhán Whelan v. Ireland, Hum. Rts. Comm., Commc'n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (July 11, 2017).

163. Mellet, U.N. Doc. CCPR/C/116/D/2324/2013 ¶ 2.2; Whelan, U.N. Doc. CCPR/C/119/D/2425/2014 ¶ ¶ 2.1–2.4.

164. Mellet, U.N. Doc. CCPR/C/116/D/2324/2013 ¶ ¶ 2.4–2.5, 7.10; Whelan, U.N. Doc. CCPR/C/119/D/2425/2014 ¶ ¶ 2.5, 7.11.

165. Whelan, U.N. Doc. CCPR/C/119/D/2425/2014 ¶ 2.4.

166. Mellet, U.N. Doc. CCPR/C/116/D/2324/2013 ¶ ¶ 2.5, 7.10; Whelan, U.N. Doc. CCPR/C/119/D/2425/2014 ¶ 7.11.

167. Mellet, U.N. Doc. CCPR/C/116/D/2324/2013 ¶ 8; Whelan, U.N. Doc. CCPR/C/119/D/2425/2014 ¶ 8.

168. Aisling Reidy, *Ireland Votes Overwhelmingly to Repeal Abortion Ban*, HUM. RTS. WATCH (May 26, 2018, 1:10 PM), https://perma.cc/CSG7-2YCD.

169. Health (Regulation of Termination of Pregnancy) Act 2018 (Act No. 31/2018) (Ir.).

to justify the need for the liberalization of abortion during the debates in the Oireachtas, Ireland's bicameral parliament.[170]

These cases demonstrate the essential role that judicial decisions play in furthering the democratic discussion on women's citizenship through the expansion of the right to abortion. The right to abortion has been achieved or promoted through constitutional dialogues between civil society, legislatures, national courts, and other supranational courts. This democratic dialogue is neglected by arguments that find judicial review to be undemocratic, such as those made by Waldron and Bellamy.[171] The model of dialogic constitutionalism allows for a better understanding of the position of courts in the democratic conversation on the shaping and re-shaping of rights. Moreover, the democratic iterations between international human rights law and civil society further reinforce the legitimacy of the liberalization of abortion. Civil society organizations in these countries have worked transnationally to shape the global public sphere in establishing minimum standards on abortion.[172] Nationally, civil society organizations relied on these human rights norms to shape constitutional rights. In Argentina and Ireland, the meaning of the right to abortion has expanded the standards established in international law precisely thanks to this democratic iteration.[173] In Ecuador, the Constitutional Court's decision has propelled the approval of new legislation regulating the access to abortion in cases of rape.[174] And while there is still a path to the recognition of the right to abortion on request, it is still a net positive for women's rights and just the beginning of a long-overdue conversation.

CONCLUSION

The examples provided in this Article show that judicial decisions have been an essential mechanism used by the women's movement to advance reproductive rights and amend their constitutions.[175] Judicial review has played a key role in expanding popular sovereignty and contributing to democratic dialogue with the legislature. In Ireland, national litigation was initially not successful in avoiding—and later repealing—the Eighth Amendment.[176] Yet the European Court of Human Rights and the United Nations Human Rights Committee, to a different degree, established a path to enabling the discussion of abortion, and the call for the 2018 referendum.[177] In Argentina, the democratic conversation between international human rights norms, civil society organizations, and the branches of

170. 973 Dáil Deb. (Oct. 16, 2018) col. 5, https://perma.cc/BF4N-YK8D (transcribing a parliamentary debate where Deputy Catherine Connolly explicitly referred to the cases against Ireland before the European Court of Human Rights and the United Nations Human Rights Committee).

171. Benhabib, *Dialogic Constitutionalism and Judicial Review*, *supra* note 6, at 512.

172. *See Across Borders: How International and Regional Reproductive Rights Cases Influence Jurisprudence Worldwide*, CTR. FOR REPROD. RTS., 4 (2022), https://perma.cc/4G7P-2GW4.

173. *See supra* Sections III.B, III.C.

174. *See* Corte Constitucional del Ecuador, *supra* note 15.

175. *See supra* Sections II, III.

176. *See supra* Section III.C.

177. *Id.*

government slowly gave rise to a statute that permits abortion on request—something unimaginable a few years ago.[178] Ecuador's partial liberalization of abortion came after a judicial decision triggered the approval of new legislation regulating the rights and guarantees for women who have been raped to access abortion.[179] In the U.S., judicial review was the primary avenue for women to shape their rights at the national level, and it expanded U.S. popular sovereignty.[180] Now that *Dobbs* has rescinded this right to abortion, pro-choice activists are still relying on state courts to strike down the growing proliferation of state-level statutes greatly restricting access to abortion. But the decision has sparked the need to pursue further strategies as well. More significantly, it has also triggered the amendment of some state constitutions to recognize access to abortion as a right and affected the constitution-making process, reflecting important dynamics on federalism and women's rights.[181]

All of these cases illustrate how important it is to not overlook the dynamics between the courts, legislature, and civil society that push forward conversations. All of them contribute to the shaping and re-shaping of fundamental rights. The dialogic constitutionalism model establishes the democratic legitimacy of judicial review precisely by calling attention to these dynamics and how they are used to expand and update the constitution to conform to modern society. This model responds to critics of judicial review by stressing the role of courts in the democratic conversation on the establishment of rights or their enhancement. Judicial review continues to play an important role in moving the conversation around access to abortion forward, expanding the meaning of the right to abortion and, through this, ensuring the equal citizenship stature of women and those with the capacity to gestate.

178. *See supra* Section III.B.

179. *See supra* Section III.A.

180. *See supra* Section II.

181. Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 31, 2023), https://perma.cc/4U87-DM6H.