NOTES

THE ROOTS OF RIGHTS: WHERE DO COURTS FIND CONSTITUTIONAL SUPPORT FOR A WOMAN'S RIGHT TO CHOOSE OR A FETAL RIGHT TO LIFE?

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I. INTRODUCTION

Around 73 million abortions are performed worldwide each year.[1] Before they turn forty-five, approximately 24% of women living in the United States will have had an abortion,[2] yet only 38% of American women between the ages of thirteen and forty-four live in a state that supports abortion rights.[3]

"Abortion presents a profound moral issue on which Americans hold sharply conflicting views."[4] This philosophical divide can also be seen on the global stage. For example, the United Nations Office of the High Commissioner for Human Rights declared that access to legal, safe abortion is a human right,[5] while the Catholic Church declared abortion a "moral evil."[6] Those who identify as pro-choice believe that it is up to the individual to decide when—or if—the individual will have children, even if the pro-choice person would not choose abortion for themself; those who identify as pro-life tend to believe that life begins at conception and terminating a pregnancy at any stage of fetal development is effectively murder.[7]

The debate over abortion is often framed as a balancing act between the rights of the pregnant woman and the rights of the fetus. But what are these rights, exactly, and where do they come from? What rights or legal protections serve as the basis for finding that a woman has the right to terminate her pregnancy or that a fetus has the right to fully develop? What written and unwritten constitutional provisions help tip the scales in favor of one party over another?

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[1] *Unintended Pregnancy and Abortion Worldwide*, GUTTMACHER INST. (Mar. 2022), https://www.guttmacher.org/fact-sheet/induced-abortion-worldwide.

[2] *Induced Abortion in the United States*, GUTTMACHER INST. (Sept. 2019), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states.

[3] *Id.* For more specific details, see *State Abortion Policy Landscape: From Hostile to Supportive*, GUTTMACHER INST. (Aug. 29, 2019), https://www.guttmacher.org/article/2019/08/state-abortion-policy-landscape-hostile-supportive.

[4] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).

[5] U.N. Hum. Rts. Comm., General Comment No. 36, Article 6: Right to Life, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

[6] *Respect for Unborn Human Life: The Church's Constant Teaching*, U.S. CONF. OF CATH. BISHOPS, https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/respect-for-unborn-human-life (last visited Oct. 29, 2022).

[7] While "pro-life" and "pro-choice" are most often used to describe the different sides of the abortion debate, those terms can sometimes be misleading. Planned Parenthood has begun using the terms "pro-reproductive rights" and "anti-abortion" to characterize people's beliefs in terms of their stance on access to abortion instead of framing their views in terms of the morality of abortion. *See Can You Explain What Pro-Choice Means and Pro-Life Means?*, PLANNED PARENTHOOD: ASK THE EXPERTS (Oct. 16, 2019), https://www.plannedparenthood.org/learn/teens/ask-experts/can-you-explain-what-pro-choice-means-and-pro-life-means-im-supposed-to-do-it-for-a-class-thanks; *see also* Kaia Hubbard, *Making Abortion Murder*, U.S. NEWS (May 6, 2022), https://www.usnews.com/news/national-news/articles/2022-05-06/the-push-to-make-fetuses-people-and-abortion-murder.

The international landscape of abortion rights is rapidly shifting. In September 2021, Mexico's Supreme Court unanimously voted to decriminalize abortion, with Chief Justice Arturo Zaldívar lauding the decision as "a historic day for the rights of all Mexican women."[8] In the United States, conservatives are pushing for absolute bans on abortion after the Supreme Court held that no fundamental right to abortion exists in June 2022.[9] The seemingly endless debate over the abortion question—how to balance a woman's right to choose whether to terminate her pregnancy against the potential rights of a fetus—is reaching a boiling point.

This Note will compare competing constitutional rights considered in abortion cases in five jurisdictions: the United States (prior to *Dobbs*),[10] Mexico, Canada, the Council of Europe, and Germany. The governing constitutions or conventions for these jurisdictions—the Constitution of the United States of America, the Political Constitution of the United States of Mexico, the Canadian Charter of Rights and Freedoms, the European Convention on Human Rights, and the Basic Law for the Federal Republic of Germany, respectively—offer an ideal basis for comparative analysis for three reasons.

First, within these jurisdictions, the right to abortion has either been specifically created or limited by judicial action. This is in contrast to jurisdictions where the constitution explicitly addresses abortion[11] or where other branches of government have been allowed to debate the issue and regulate abortion without judicial interference.[12] Second, the abortion decisions from these jurisdictions span a wide range of findings. For example, Canada has no legal barriers to abortion,[13] while Germany has repeatedly affirmed that "life

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[8] Natalie Kitroeff & Oscar Lopez, *Mexico's Supreme Court Votes to Decriminalize Abortion*, N.Y. TIMES (Sept. 7, 2021), https://www.nytimes.com/2021/09/07/world/americas/mexico-supreme-court-decriminalize-abortion.html.

[9] *Dobbs*, 142 S. Ct. at 2242. For a survey of current state laws banning abortion, see Caroline Kitchener et al., *Abortion is Now Banned or Under Threat in These States*, WASH. POST (Nov. 23, 2022, 1:07 PM), https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe.

[10] The recent *Dobbs* decision will be analyzed within the context of rulings from the other jurisdictions and the United States' own precedent at the end of this Note.

[11] *See* CONSTITUTION OF IRELAND 1937 art. 40.3.3 ("Provision may be made by law for the regulation of termination of pregnancy."). *See also* CONSTITUCIÓN DE LE REPÚBLICA DOMINICANA [CONSTITUTION] June 13, 2015, art. 37 (Dom. Rep.) ("The right to life is inviolable from conception until death.").

[12] Israel is one example of a country whose abortion laws developed largely without judicial interference. *See* Rebecca Steinfeld, *Wars of the Wombs: Struggles Over Abortion Policies in Israel*, 20 ISR. STUD. 1, 7 (2015) ("[J]udicial statistics indicate that after 1960 no case of abortion was discussed in the Israeli courts.").

[13] GUTTMACHER INST., STATUS OF THE WORLD'S 193 COUNTRIES AND SIX TERRITORIES/NON-STATES, BY SIX-ABORTION-LEGALITY CATEGORIES AND THREE ADDITIONAL LEGAL GROUNDS UNDER WHICH ABORTION IS ALLOWED (2017), https://www.guttmacher.org/sites/default/files/report_downloads/aww_appendix_table_1.pdf.

which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution . . . for the entire duration of the pregnancy."[14] Third, despite the differing cultures, histories, and constitutional contexts, these jurisdictions have significantly similar forms of government; all are—broadly speaking—representative governments, operating under a federal system, whose people enjoy universal suffrage. The United States and Mexico are traditional democratic republics, with power split between the federal government and fifty and thirty-one states, respectively. Their federal governments are divided into three branches of government: the executive (embodied by a president), the judiciary, and the legislature (in both cases, a bicameral Congress).[15] Germany is a federal parliamentary republic; Canada is a federal parliamentary democracy. Like the United States and Mexico, their states (or "provinces," in Canada's case) enjoy significant independence and legislative power.[16] All the chosen jurisdictions are democratic. The Economist Intelligence Unit's Democracy Index characterizes Canada and Germany as full democracies and the United States and Mexico as flawed democracies.[17] The Council of Europe is an association of European states working to promote democracy and human rights throughout Europe.[18] The foreign affairs ministers of each member state act as the Council's decision-making body, while other representatives from each state debate issues of the day in the Parliamentary Assembly.[19] So, while not technically a country, the Council of Europe can be thought of as existing in a similar context as the other jurisdictions.

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[14] Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts 1–95 (1975) (Ger.), *translated in* Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to* Roe v. Wade, 9 J. MARSHALL J. PRAC. & PROC. 605, 605 (1976) [hereinafter *Abortion I*].

[15] *See Our Government*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government (last visited Oct. 14, 2022); Enrique Gómez Ramírez, *Mexico's Parliament and other Political Institutions*, EUR. PARL. 1 (Jan. 2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679057/EPRS_BRI(2021)679057_EN.pdf.

[16] *See Federal State*, FACTS ABOUT GERMANY, https://www.tatsachen-ueber-deutschland.de/en/politics-germany/federal-state (last visited Oct. 14, 2022). Canada is also technically a constitutional monarchy; though it became wholly independent from the United Kingdom in 1982, Canada is still a part of the British Commonwealth, and His Majesty Charles III is the King of Canada. His role is mostly symbolic, as it is in the United Kingdom. *See Democracy in Canada*, GOV'T OF CAN. (Oct. 11, 2022), https://www.canada.ca/en/democratic-institutions/services/democracy-canada.html.

[17] THE ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2020: IN SICKNESS AND IN HEALTH? 8–13 (2020), https://pages.eiu.com/rs/753-RIQ-438/images/democracy-index-2020.pdf.

[18] *Values: Human Rights, Democracy, Rule of Law*, COUNCIL OF EUR., https://www.coe.int/en/web/about-us/values (last visited Oct. 29, 2022).

[19] *Structure*, COUNCIL OF EUR., https://www.coe.int/en/web/about-us/structure (last visited Oct. 29, 2022).

This Note will conduct a comparative analysis in three parts. Part One will introduce the major abortion decisions made by the Supreme Court of the United States (pre-*Dobbs*), the Supreme Court of Justice of the Nation,[20] the Supreme Court of Canada, the European Court of Human Rights, and the Bundesverfassungsgericht.[21] Part Two will identify which individual rights cited in each jurisdiction's landmark abortion cases support the right of a woman to obtain an abortion and will analyze the strength and full extent of those guarantees. Part Three will do the same for the individual rights that favor the fetus.

This Note will conclude that the right to liberty most strongly supports finding a constitutional right to abortion and that a positive right to life most strongly supports finding a fetal right to life. This Note will also demonstrate that the same battle over abortion rights, fought over different constitutional terrains, ultimately converges on similar themes across all jurisdictions. The purpose of this Note is to suggest that if a constitution contains certain provisions or rights, courts should find the presence of those rights compelling in determining whether the rights of the woman or the rights of the fetus should be more heavily favored in answering the abortion question.

Finally, this Note will explore whether the recent United States Supreme Court decision in *Dobbs v. Jackson Woman's Health Organization* is consistent with how other jurisdictions—and even prior U.S. cases—have interpreted the same constitutional rights at issue in that case. In other words, is the *Dobbs* decision consistent with a global understanding of what it means to have certain constitutional rights in a free democratic society?

II. GOVERNING DOCUMENTS AND LANDMARK ABORTION CASES IN THE RELEVANT JURISDICTIONS

A. The United States

i. The Constitution of the United States of America

Ratified in 1788, the Constitution of the United States is the country's governing document, outlining the structure and operations of the federal government.[22] Subsequent amendments to the Constitution, like the Bill of Rights, define the rights of citizens in relation to the government.[23] The Constitution functions as the supreme law of the land in the United States.[24] All other laws must operate consistently with their provisions or else be struck down as

[20] The Supreme Court of Justice of the Nation is the Supreme Court of Mexico.
[21] The Bundesverfassungsgericht is the Federal Constitutional Court of Germany.
[22] *See* U.S. CONST.
[23] *See e.g.*, U.S. CONST. amend. 1–10.
[24] U.S. CONST. art. VI, cl. 2.

invalid by the Supreme Court.[25] The Supreme Court of the United States is the highest court in the country and the final court of appeal.[26] It is "charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution."[27] Among the Constitution's provisions is the Fourteenth Amendment. Ratified in 1868, its first section, known as the Due Process Clause, provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[28]

On its face, the Due Process Clause protects citizens' procedural rights. Over time, it has also been interpreted to protect other unenumerated, substantive rights. "Substantive due process," as it is known, has not been explicitly defined by the Court, but is sometimes explained as the principle that certain fundamental rights should be—and through the Fifth and Fourteenth Amendment's Due Process Clauses in fact *are*—protected from government interference.[29] Commentators have said that "[s]ubstantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose."[30] Some Justices do not believe that substantive due process exists and is instead merely a creation of the Court to justify judicial action that would otherwise be unsupported by the Constitution's text.[31] Other justices have used substantive due process to establish constitutional protections of personal, private actions relating to everything from marriage to child rearing to education.[32]

When reviewing a state action that infringes upon a personal right or liberty, the Court engages in a range of analytical tests which balance the state's interests against an individual's rights. At one end of the spectrum of review lies rational basis review, which asks whether the interest the government seeks to further through legislation is legitimate and whether the means of the legislation are rationally related to achieving that legitimate government

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[25] *See* Marbury v. Madison, 5 U.S. 137 (1803) (establishing "judicial review" or the power of the courts to invalidate legislation that is inconsistent with the provisions of the Constitution).

[26] *About the Court*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/about.aspx (last visited Oct. 29, 2022).

[27] *Id.*

[28] U.S. CONST. amend. XIV, § 1.

[29] *Substantive Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/substantive_due_process (last visited Oct. 14, 2022).

[30] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

[31] *See e.g.*, Perry v. New Hampshire, 565 U.S. 228, 249 (2012) (Thomas, J., concurring) ("In my view those cases [decided on substantive due process grounds] are wrongly decided because the Fourteenth Amendment's Due Process Clause is not a 'secret repository of substantive guarantees against "unfairness."'" (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting))).

[32] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

interest. Rational basis review is a relatively easy test to overcome. On the other end of the spectrum sits strict scrutiny, which, as the name implies, presents a stricter test and a much higher bar for the state to clear. Under strict scrutiny analysis, the Court asks whether the interest the government seeks to further through legislation is compelling and whether the legislation is narrowly tailored to achieve that compelling interest.[33]

With this context in mind, we will examine the United States' two major abortion decisions before *Dobbs*: *Roe v. Wade*[34] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[35]

ii. Roe v. Wade

Roe focused on a Texas statute banning abortion in all cases except where the procedure was necessary to save the mother's life.[36] Similar laws were in place in most states when the Supreme Court heard *Roe*.[37] The law made it illegal for doctors to provide abortions.[38] While the law did not directly regulate a woman's actions, the prohibition on the medical procedure effectively prevented women from obtaining abortions.

Three plaintiffs brought suit in *Roe*. The first was a single woman, Jane Roe, who had been pregnant at the start of the litigation. The second was a married couple, the Does; Mrs. Doe had been forced to discontinue using birth control for medical reasons and was advised by her doctor to avoid a pregnancy.[39] Both Jane Roe and Mrs. Doe wanted to be able to terminate their pregnancies (Roe's real pregnancy in the present and Doe's hypothetical future pregnancy) with the assistance of a licensed, competent medical professional.[40] The third plaintiff was an abortion provider and licensed physician who had two prosecutions pending against him for violating the Texas law.[41]

Roe asked whether the Texas law infringed "a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy."[42] Justice

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[33] For a more in-depth discussion of the different standards of review courts impose when reviewing a law's constitutionality, see R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PENN. J. CONST. L. 225 (2002).

[34] Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[35] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[36] TEX. PENAL CODE ANN., arts. 1191–94, 1196 (West 1973); *Roe*, 410 U.S. at 117–19.

[37] *Roe*, 410 U.S. at 118.

[38] *Id.* at 117–18, 125–36.

[39] *Id.* at 121.

[40] *Id.* at 120–21.

[41] *Id.*

[42] *Id.* at 129.

Blackmun, writing for the majority, identified two theories put forward by the petitioners by which the Court might find a right to abortion: either the right to abortion existed within "the concept of personal 'liberty' embodied in the Fourth Amendment's Due Process Clause" or within "personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras."[43] The majority ultimately held that the right to abortion was a "fundamental right" protected by the right to privacy.[44] A right to privacy could be found in the First, Fourth, Fifth, and Ninth Amendments, as well as within the Fourteenth Amendment's "concept of liberty."[45]

Though Justice Blackmun acknowledged that the potential harm a woman might suffer by denying her access to abortion was extreme,[46] he rejected the petitioners' claims that the right to abortion was absolute.[47] Instead, the right to abortion had to be weighed against state interests in protecting a woman's health, maintaining medical practice standards, and protecting potential life–and, "[a]t some point in the pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."[48] To outline when, exactly, each of the state's respective interests become "compelling," the Court created a trimester system.[49]

During the first three months of pregnancy, the state could not interfere with the right of a woman to consult with her doctor and decide whether to obtain an abortion.[50] During the next three months, a state might regulate abortion access in ways reasonably related to maternal health.[51] Only the interest in protecting the health of the mother was strong enough to justify legislation at this point in the pregnancy.[52] During the last trimester—or "the stage subsequent to [fetal] viability"—states could regulate or even prohibit abortion "in promoting its interest in the potentiality of human life," as long as the law allowed for exceptions to a total ban on abortions in cases where the life or

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[43] *Id.*

[44] *Id.* at 152–54.

[45] *Id.* at 152.

[46] Justice Blackmun identified several harms that could befall a woman if the state were allowed to deny her an abortion: having to become a mother or have more children "may force upon the woman a distressful life and future" and "[p]sychological harm may be imminent;" having to take care of a child—especially an unwanted child—could cause the mother distress and cause both mental and physical harm; and, in some cases, the woman might face the "difficulties and continuing stigma of unwed motherhood." *Id.* at 153.

[47] *Id.* at 154.

[48] *Id.*

[49] *Id.* at 163–65.

[50] *Id.* at 163.

[51] *Id.* at 163–64.

[52] The Court effectively applied a slightly modified version of rational basis review here; states had a legitimate interest in protecting the mother's health—and *just* in protecting the mother's health—during the second semester and could pass regulations reasonably related to achieving that interest.

health of the mother was at risk.[53] As the fetus developed, so did the strength of the state's interest and its powers to regulate abortion. The Court did not recognize any interests of the fetus itself.[54]

In a concurring opinion, Justice Stewart criticized Justice Blackmun's assertion that the right to abortion stemmed from the right to privacy; he noted that all of the cases Justice Blackmun cited as establishing a right to privacy were actually substantive due process cases protecting a right to *liberty*.[55] Those cases were about government interference with a personal *choice*—whether or not to marry someone of a different race, whether or not to send your children to a private school, whether or not to have children at all; they were not about government intrusion into a protected, private space.[56] Despite Justice Blackmun's repeated claim that abortion fell within a right to privacy, his own written opinion supported the idea that the right to abortion stemmed from the substantive right to liberty. Justice Stewart concluded that "the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment."[57]

The Court struck down the Texas law.[58] The Court's approach to abortion—and its conclusions about where the right to abortion can actually be found within the Constitution—evolved in its next major abortion case, *Casey*.

iii. Planned Parenthood of Southeastern Pennsylvania v. Casey

In *Casey*, the Court considered a series of procedural requirements women needed to satisfy before being permitted to receive an abortion: 1) a woman had to provide her informed consent to an abortion procedure at least 24 hours before the procedure and the doctor had to tell the woman specific information about the abortion that included warnings on how the procedure could be detrimental to her health; 2) a married woman had to sign a statement saying she

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[53] *Id.* at 164–65. Here, the Court seemed to subject the government to strict scrutiny, and empower it to pass that test, all in the same sentence. The state's interest in protecting potential life was compelling and banning abortion (i.e., banning the destruction of potential life), though a broad legislative mandate, was a narrowly drawn way to achieve that interest.

[54] *See id.* at 159 ("We need not resolve the difficult question of when life begins."); *see also id.* at 162 ("[T]he unborn have never been recognized in the law as persons in the whole sense.").

[55] *See id.* at 167–72.

[56] *Id.*

[57] *Id.* at 170 (Stewart, J., concurring). Even Justice Rehnquist, who, dissenting, did not find a right to abortion, felt that if such a right did exist, it would stem from liberty interests and not from a right to privacy. *See id.* at 172 (Rehnquist, J., dissenting).

[58] *Id.* at 166 (majority opinion).

had told her husband she was getting an abortion; and 3) minors had to get consent to obtain an abortion from at least one of their parents or undergo a judicial bypass.[59]

The Court did not reach a majority consensus. Instead, a plurality of three Justices created the controlling doctrine: Justices Kennedy, Souter, and O'Connor.[60] The plurality began their opinion with the following: "*Liberty* finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early states, that definition of *liberty* is still questioned."[61] The right to abortion was clearly framed from the outset as a natural consequence of the right to liberty found in the Fourteenth Amendment.[62] The plurality then reaffirmed what they believed to be the core holding of *Roe*:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[63]

There are notable differences between what *Casey* calls the essential holding in *Roe* and *Roe*'s actual essential holding. *Roe* held that the state could not interfere *at all* with a woman's right to choose within the first three months of

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[59] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[60] *Id.* at 843–44. Justices Blackmun and Stevens concurred in the judgment. *Id.* at 911–12 (Stevens, J., concurring in part and dissenting in part); *id.* at 922 (Blackmun, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justices White, Thomas, and Scalia dissented; they would have overturned *Roe*. *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part) ("We believe *Roe* was wrongly decided, and that it can and should be overruled.").

[61] *Id.* at 844 (emphasis added) (citation omitted).

[62] The right to privacy is only mentioned twice in the controlling opinion: once as it related to private conversations between a patient and their doctor, and once in relation to the spousal notification provision, where the Court found that a woman does not give up her right to individual privacy by becoming married. *Id.* at 883, 896.

[63] *Id.* at 846.

her pregnancy.[64] Whether or not a state's interference was "undue" did not factor into the equation.[65] During the second trimester, states could regulate abortion access if their regulations furthered their interest in protecting the mother's health; again, whether the regulations placed "a substantial obstacle" in the path of a woman seeking an abortion was not the relevant question—the question was whether the regulation was reasonably related to that particular state interest.[66] These new standards—the "undue burden" and "substantial obstacle" tests[67]—which do not appear anywhere in *Roe*, simultaneously limited a woman's ability to obtain an abortion and expanded the state's ability to regulate abortion.

The plurality justified this discrepancy by rejecting the trimester framework.[68] *Roe*, the plurality believed, was inconsistent with itself; if the state had important and legitimate interests in protecting the "potentiality of life," why should it be forbidden from acting in accordance with that interest for two-thirds of the pregnancy?[69] Though the trimester framework was "erected to ensure that [a] woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact . . . the trimester approach is [not] necessary to accomplish this objective."[70] *Roe*'s trimester system was "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy."[71]

Instead of using a trimester system to regulate state interference with the right to abortion, the plurality imposed the undue burden test: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[72] The Court ultimately held that the waiting period requirement, the specific information requirement, and the parental notification requirement did *not* pose an undue burden on a woman seeking an abortion.[73] Only the spousal notification was struck down as invalid under the Court's new test.[74]

Ultimately, *Casey* represented a fundamental shift in American abortion jurisprudence. First, it cemented the right to abortion as both a right based in

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[64] Roe v. Wade, 410 U.S. 113, 163 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[65] *Id.*

[66] *Id.* at 164.

[67] *Casey*, 505 U.S. at 877–78.

[68] *Id.* at 878.

[69] *Id.* at 871.

[70] *Id.* at 872.

[71] *Id.* at 876.

[72] *Id.* at 874.

[73] *Id.* at 882–85, 887, 889.

[74] *Id.* at 898. Because of the widespread nature of domestic violence, the spousal notification provision was "likely to prevent a significant number of women from obtaining an abortion." *Id.* at 893.

the Fourteenth Amendment's right to liberty and as a *limited* right. Second, it shifted the balance between a woman's right to choose and the state's interest in protecting potential life, with the state gaining more power and leverage over women than the Court in *Roe* had been willing to bestow upon it.

B. Mexico

i. The Political Constitution of the United Mexican States

The Political Constitution of the United Mexican States, otherwise known as the "Constitution of 1917," was drafted towards the end of a bloody uprising.[75] Leaders of the prevailing faction sought to incorporate the values and ideals of the Mexican Revolution—better economic and social conditions for the masses—into their new constitution.[76] Since its inception, the Constitution of 1917 has included a right to free secular schooling,[77] a right to an eight-hour workday,[78] a right to a living wage,[79] and a right to equal pay for equal work for men and women.[80] As relevant to this Note, the Constitution was amended in 1983 to include an affirmative right to health care.[81]

This structure of rights differs from the U.S. Constitution, which outlines its rights and privileges more vaguely. For example, to find a right to equal pay for equal work in the U.S. Constitution, one would have to derive that right from the right to be free from sex-based discrimination, which in turn is derived from the Fourteenth Amendment's Equal Protection Clause. In contrast, the Constitution of 1917's provisions are explicit and detailed. From the time of its inception through today, the Constitution of 1917 was and remains "one of the most progressive constitutional and legislative documents" in the world.[82]

The Supreme Court of Justice of the Nation, like the United States Supreme Court, serves as the head of the Mexican judicial system and functions

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[75] For more on the Mexican Revolution (1910–1920), see GILBERT JOSEPH & JURGEN BUCHENAU, MEXICO'S ONCE AND FUTURE REVOLUTION (2013).

[76] L.S. Rowe, *Foreword* to H.N. Branch, *The Mexican Constitution of 1917 Compared with the Constitution of 1857*, 71 ANNALS AM. ACAD. POL. & SOC. SCI., at iv (Supp. 1917).

[77] Constitución Política de los Estados Unidos Mexicanos [CP], art. 3, Diario Oficial de la Federación [DOF] 05-02-1927, última reforma DOF 28-05-2021.

[78] *Id.* at art. 123(A)(I).

[79] *Id.* at art. 123(A)(V)(c).

[80] *Id.* at art. 123(A)(V)(a).

[81] *Id.* at art. 4.

[82] Michael Widener, *Centennial of the Mexican Constitution*, YALE L. SCH.: LILLIAN GOLDMAN L. LIBR. (Apr. 2, 2017, 9:02 AM), https://library.law.yale.edu/news/centennial-mexican-constitution.

as a court of last resort.[83] The Court consists of eleven members: five justices who sit in the First Chamber, five justices who sit in the Second Chamber, and a presiding chief justice who sits in neither chamber but oversees Full Court decisions.[84] The First Chamber hears civil and criminal cases, while the Second Chamber hears cases involving labor and administrative law.[85] The Mexican Supreme Court is charged with "the defense of the Mexican Constitution and the protection of human rights through constitutional review."[86] Article 1 of the Constitution of 1917 directs courts to interpret the rights guaranteed in the document "in favor of the broader protection of people at all times."[87]

The Supreme Court defends human rights through *amparo* review. There are two types of *amparo* review: direct and indirect. Direct *amparo* ("AD" for *amparo directo*) applies only to the final result of a specific trial and can only alter specific trial outcomes. Indirect *amparo* ("AI" for *amparo indirecto*) applies more broadly, and AI decisions may strike down entire laws or invalidate other state acts as inconsistent with the Mexican Constitution.[88] Though AI *can* be used to strike down laws, an AI judgment rendered by the Mexican Supreme Court is not binding precedent unless either eight out of the Court's eleven justices sign on to the opinion or the Court "set[s] case law by five consecutive uninterrupted decisions" of either chamber.[89] In other words, the Court may hold that a specific constitutional right exists or was violated, but if only a simple majority of the Full Court (say, six out of eleven justices) signs on to that opinion, then the plaintiff in the AI proceeding *alone* has that constitutional right or is entitled to that remedy for a violation of a constitutional right; lower courts do not have to implement the same reasoning or outcome in similar cases that come before them.[90]

Adding to this procedural complication, the Court publishes its binding precedent in the *Semanario Judicial de la Federación* irregularly and incompletely.[91] Unlike the United States Supreme Court, which makes its full opinions available at the same time it officially announces the case's outcome,[92]

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[83] SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, SUPREME COURT OF MEXICO: A VISITOR'S GUIDE 11 (2019), https://www.scjn.gob.mx/sites/default/files/pagina/documentos/2019-10/SCJNVisitorsGuide-sept2019.pdf [hereinafter SUPREME COURT OF MEXICO: A VISITOR'S GUIDE].

[84] *Id.* at 10.

[85] *Id.*

[86] *Id.* at 11.

[87] Constitución Política de los Estados Unidos Mexicanos [CP], art. 1., Diario Oficial de la Federación [DOF] 05-02-1927, última reforma DOF 28-05-2021.

[88] SUPREME COURT OF MEXICO: A VISITOR'S GUIDE, *supra* note 83, at 11.

[89] *Id.*

[90] *Id.*

[91] José María Serna de la Garza, *The Concept of* Jurisprudencia *in Mexican Law*, 1 MEXICAN L. REV. 131, 145 (2009).

[92] *See Publication of Supreme Court Opinions*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/opinions/info_opinions.aspx (last visited Oct. 29, 2022).

the Mexican Supreme Court often delays publishing opinions for several months after the judgment is announced—if it publishes the opinion in full at all.[93]

With this understanding in mind, we will examine the Mexican Supreme Court's most recent constitutional decisions regarding abortion.

ii. September 2021 Decisions

In September 2021, the Mexican Supreme Court handed down a series of binding rulings that it called "landmark decisions at the vanguard for reproductive rights worldwide."[94] These three decisions "established the strongest protections for the right to terminate a pregnancy . . . in Latin America to date."[95]

On September 7th, 2021, in *AI 148/2017*, the Supreme Court struck down a complete criminal ban on abortion in Coahuila.[96] The unanimous decision held that women have a right to choose whether to terminate their pregnancies without facing criminal charges. Though the Court acknowledged that a fetus is entitled to increasing levels of protection as the pregnancy progresses, overall, it is unconstitutional to completely criminalize abortion. Absolute criminal bans on abortion ignore a woman's right to reproductive freedom.[97] Additionally, a woman's right to reproductive freedom means she is entitled to legal, safe, and *free* abortion in the early stages of pregnancy; the government must provide abortions to women at no cost.[98] The Court claimed that this decision went "further, even, than the emblematic *Roe v. Wade*" because it recognized that access to abortion must be free in order to truly guarantee the right to health; otherwise, economic barriers could prevent a woman from fully exercising her right to choose.[99]

In the second decision, jointly resolving *AI 106/2018* and *AI 107/2018*, the Court held that Mexican states could not "establish a right to life from the

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[93] Serna de la Garza, *supra* note 91.

[94] Press Release, Suprema Corte de Justicia de la Nación, *Mexican Supreme Court: Landmark Decisions at the Vanguard for Reproductive Rights Worldwide* (Oct. 1, 2021), https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6606 [hereinafter Press Release: Mexico Reproductive Rights Decisions].

[95] *Id.*

[96] This law subjected both women who procured abortions and the medical professionals who gave them abortions to criminal punishment. *See* Press Release, Suprema Corte de Justicia de la Nación, *Supreme Corte Declara Inconstitucional la Criminalización Total Del Aborto* [*Supreme Court Declares Unconstitutional the Total Criminalization of Abortion*] (Sep. 7, 2021), https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6579.

[97] *Id.*

[98] Press Release: Mexico Reproductive Rights Decisions, *supra* note 94.

[99] *Id.*

moment of conception."[100] Only the Constitution can establish what constitutes a "person."[101] Furthermore, the Court held that states cannot grant fetuses the same rights and protections as actual living persons because granting a fetus full personhood under the law could limit women's access to abortion.[102]

Finally, in the third decision, *AI 54/2018*, the Court struck down a law that gave state medical practitioners expansive rights to conscientious objection, reasoning that such a right, without limits, could interfere with a patient's right to healthcare.[103] The Court noted that potential for interference was especially true in the context of abortion rights as conscientious objection could be used to deny women access to the free, safe abortions they were now legally entitled to early in gestation.[104]

This Note cannot complete an in-depth analysis of these cases at this time, as no reliable English translation of the September 2021 decisions is available as of the time of publication. However, a recent, nonbinding AD decision which greatly expands on the correlation between the constitutionally guaranteed right to health and the right to abortion, translated into English by scholars at Harvard Law School, will serve as a proxy for the Court's reasoning in the September 2021 decisions.

iii. Non-Binding Decision: AD 1388/2015

The plaintiff in this AD proceeding was Jane Doe who, as a 41-year-old overweight recent gastric bypass surgery patient, was considered high-risk when she became pregnant.[105] Doe was aware that continuing her pregnancy posed a severe risk to her health, and she repeatedly asked the state-run hospital's doctors to terminate her pregnancy. They refused.[106] She eventually filed a formal written request to terminate the pregnancy with the state health agency.[107] Before they replied to her request, Doe obtained an abortion elsewhere.[108] Several days after her private abortion, the state formally denied her written request to terminate her pregnancy.[109] She challenged the denial in

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[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] AD 1388/2015, ¶ 8 (Mex.), *translated in Motion for Constitutional Relief Under Amparo Proceedings in Review 1388/2015*, THE PETRIE-FLOM CTR. FOR HEALTH L. POL'Y, BIOTECHNOLOGY, & BIOETHICS AT HARV. L. SCH., https://petrieflom.law.harvard.edu/assets/publications/AR_1388-2015._Tradux_FINAL.pdf (last visited Oct. 17, 2022) [hereinafter *AD 1388/2015*].
[106] *Id.* ¶ 6.
[107] *Id.*
[108] *Id.* ¶ 7.
[109] *Id.* ¶ 8.

court, arguing that denying her an abortion, when continuing the pregnancy would likely put her life at risk, constituted a violation of her Article 4 right to health.[110]

The five justices of the First Chamber considered Doe's AD proceeding and handed down their opinion on May 15, 2019.[111] The justices unanimously agreed that Doe's right to health had been violated when the health agency denied her request for an abortion.[112] As recompense, the Court held that Doe was entitled to have the health agency's decision denying her an abortion invalidated and to have any physical or mental health care costs associated with her private abortion covered by the health agency.[113] All but one justice signed on to Justice Norma Lucía Piña Hernández's majority opinion, which called for sweeping changes to Mexico's approach to abortion.[114]

Justice Hernández maintained that the right to health should be "understood as the enjoyment of the highest attainable standard of physical, mental and social wellbeing."[115] The right to health, therefore, includes the right to access healthcare services. Such a right also imposes a positive duty on the state to provide the healthcare services necessary for citizens to reach that highest attainable standard of health.[116] This right to health and the accompanying duty imposed on the state is broad; it must include the right of women to "access [] the widest possible range of sexual and reproductive healthcare services, including those associated with pregnancy during all its stages" and "the adoption of measures to make the termination of pregnancy possible, available, safe and accessible when the continuation of the pregnancy endangers women's health in its broadest sense."[117]

The Court considered "health in its broadest sense" intertwined with the general ideas of wellbeing and personal satisfaction as well as "with the rights to life, dignity, autonomy, freedom to freely develop one's personality. . . equality, intimacy, privacy and the right to live without cruel, inhuman or degrading treatment."[118] Preventing a woman from accessing safe, legal, and free abortions could impact her life both in terms of her physical wellbeing and in terms of her level of satisfaction with her life—it could negatively impact her career, her family, her mental health, and her own view of herself.[119] The Court believed that "health" should be considered in light of how it impacts the whole person; pregnancy, and the decision of whether to terminate

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[110] *Id.* ¶ 9.
[111] *Id.* at 1.
[112] *Id.* ¶ 86.
[113] *Id.* ¶ 108–13.
[114] *See id.* at 50.
[115] *Id.* ¶ 51.
[116] *Id.* ¶ 53–55.
[117] *Id.* ¶ 55.
[118] *Id.* ¶ 55–56.
[119] *Id.* ¶ 69–73.

a pregnancy, impacts and involves the whole person.[120] The right to terminate a pregnancy when continuing such a pregnancy threatens the woman's well-being, therefore, falls under the Article 4's broad right to health and other constitutional guarantees.[121]

After finding that the right to terminate a pregnancy for health reasons is a right guaranteed by the Constitution of 1917, the First Chamber also found that the state has an affirmative duty to provide all healthcare services related to reproductive health.[122] As such, hospitals "cannot deny or hinder women's access to the interruption of pregnancy based on health because this procedure is necessary to preserve, restore or protect the latter."[123] Women are entitled to abortions when "there is a probability that an adverse result will be generated for the woman's wellbeing."[124] The healthcare system *must* provide women with safe, free abortions when their health—in the broadest sense of the word—would be negatively impacted by being forced to carry a child to term.

Because this was an AD proceeding rather than an AI proceeding, the judgment only impacted Jane Doe.[125] The opinion's promises of broad access to abortion did not come to fruition as a result of her case. But the September 2021 abortion decisions, as AI decisions, *have* changed the state of abortion law in Mexico, by decriminalizing abortion and guaranteeing free access to abortion services for all.[126] There are several similarities between this ruling and the reported holdings of the Mexican Supreme Court's September 2021 abortion decisions. First, the Doe opinion acknowledges a right to abortion in some circumstances; the September 2021 decisions "recognized a constitutional right to… abortion services at the initial stages of pregnancy" and in some other circumstances.[127] Second, the Doe opinion acknowledges that inability to access abortion—either because abortions are not free or because practitioners refuse to perform the procedure—violates the Constitution of

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[120] *Id.* ¶ 73.

[121] Constitución Política de los Estados Unidos Mexicanos [CP], art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014. The explicit constitutional rights alluded to in this decision include: the right to equality and nondiscrimination (art. 1; art. 4); the right to privacy (art. 16); and the right to decide when and how many children to have (art. 4). *Id.* Implied rights alluded to in the Constitution include but are not limited to: the right to self-determination (from right to family planning (art. 4)); the right to a healthy environment for purposes of self-development (art. 4); the right to culture (art. 4); the right to choose one's own occupation (art. 5); and the rights to expression, opinion, and consciousness (art. 6; art. 7). *Id.*

[122] AD 1388/2015, *supra* note 105, ¶ 83.

[123] *Id.*

[124] *Id.* ¶ 91.

[125] *See* SUPREME COURT OF MEXICO: A VISITOR'S GUIDE, *supra* note 83, at 11.

[126] *See id.*; Press Release: Mexico Reproductive Rights Decisions, *supra* note 94.

[127] Press Release: Mexico Reproductive Rights Decisions, *supra* note 94.

1917;[128] the September 2021 decisions held that abortions must be provided by the state for no cost and that healthcare providers could not refuse to perform abortions on moral grounds.[129] Though the questions addressed in *AD 1388/2015* are not the same as the ones considered in the Full Court's September 2021 cases, the similarities in the outcomes and in the values promogulated by all these opinions means that Jane Doe's case sheds light on the likely reasoning of the Full Court in the yet untranslated September 2021 cases.

C. Canada

i. The Canadian Charter of Rights and Freedoms

Incorporated into the Constitution of Canada in 1982, the Canadian Charter of Rights and Freedoms (the Charter) "protects basic rights and freedoms that are essential to keeping Canada a free and democratic society."[130] In addition to Canada's Constitution and Bill of Rights, the rights guaranteed in the Charter serve as the supreme law of the land.[131] All other laws must be consistent with the Charter, or else the Supreme Court of Canada may invalidate them.[132] The Charter is "a powerful force for progress, protection, compassion and fairness."[133] The foundational document includes such rights as freedom of conscience and religion, the right to vote, the right to be free from cruel and unusual punishment, and the right to equal protection under the law without discrimination.[134] It also provides in Section 7 that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[135]

Like the United States Supreme Court, the Supreme Court of Canada is the country's final court of appeal.[136] It has the power "to consider important questions of law such as the constitutionality . . . of federal or provincial legislation."[137] The Court believes that its role in interpreting the constitutionality of legislation alleged to violate the Charter "is not to solve nor seek to solve…

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[128] AD 1388/2015, *supra* note 105, ¶ 75.

[129] Press Release: Mexico Reproductive Rights Decisions, *supra* note 94.

[130] *Learn about the Charter*, GOV'T OF CAN. (Apr. 5, 2022), https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/learn-apprend.html.

[131] *Id*.

[132] *Id*.

[133] *Id*.

[134] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, §§ 2, 3, 12, 15 (UK).

[135] *Id*. § 7.

[136] *Role of the Court*, SUP. CT. OF CAN. (Aug. 23, 2017), https://www.scc-csc.ca/court-cour/role-eng.aspx.

[137] *Id*.

[the] issue, but simply to measure the content of [the legislation] against the *Charter*."[138] This differs from the United States Supreme Court, which does occasionally attempt to solve the issues before it rather than return the question to the legislature; the promulgation of the trimester system in *Roe* and the undue burden test in *Casey* are examples of this.

The Supreme Court of Canada uses specific analytical tools in interpreting Section 7 of the Charter. First, the "Court has held consistently that the proper technique for the interpretation of *Charter* provisions is to pursue a 'purposive' analysis of the right guaranteed;" the Court must consider what interests the Charter should protect in interpreting its provisions.[139] Second, Section 7 contains three distinct rights: life, liberty, and security of the person.[140] These "are independent interests, each of which must be given independent significance by the Court."[141] Third, after finding that legislation infringes upon any one of the three rights enumerated by Section 7, the Court will determine "whether any infringement of that interest accords with the principles of fundamental justice."[142] If the infringements are manifestly unfair, they are not in accordance with the principles of fundamental justice.[143]

Even if legislation infringes upon Section 7 and is not in accordance with the principles of fundamental justice, "Section 1 of the Charter can potentially be used to 'salvage' a legislative provision which breaches" Section 7.[144] Section 1 of the Charter states that the Charter guarantees the rights "set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[145] To determine whether an infringement of a guaranteed right is a "reasonable limit" on that freedom, the Court conducts a two-part test: First, is the purpose of the legislation sufficiently important to justify overriding a guaranteed right or freedom? Second, are the means used by the legislature in overriding the guaranteed right or freedom "reasonable and demonstrably justified in a free and democratic society?"[146]

This second question is often referred to as a proportionality analysis. To determine whether the means of the legislation are proportional to the legislation's objective, the Court considers three things: First, whether the means are "rational, fair, and not arbitrary."[147] Second, whether the means have a

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[138] R. v. Morgentaler, [1988] 1. S.C.R. 30, 138 (Can.).

[139] *Id.* at 52.

[140] *Id. See also* Canadian Charter of Rights and Freedoms, § 7.

[141] *Morgentaler*, 1 S.C.R. at 52. *See also* Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, 204 (Can.).

[142] *Morgentaler*, 1. S.C.R. at 52.

[143] *Id.* at 72.

[144] *Id.* at 73.

[145] Canadian Charter of Rights and Freedoms, § 1.

[146] *Morgentaler*, 1. S.C.R. at 73.

[147] *Id.* at 74.

minimal impact on the right or freedom.[148] Third, whether the effects of the limitation are proportional to the purpose of the legislation.[149]

With that context in mind, we will examine Canada's landmark abortion decision: *R. v. Morgentaler*.

ii. R v. Morgentaler

In *Morgentaler*, the Court reviewed Section 251 of the Criminal Code.[150] Section 251 criminalized abortion for both women seeking abortions[151] and doctors seeking to perform abortions.[152] The provision provided a defense, or exception, to the rule: the ban on abortions did not apply to qualified medical practitioners who performed abortions at accredited or approved hospitals[153] or to women who received an abortion from a qualified medical practitioner at an accredited or approved hospital.[154] Before women could undergo the procedure under those conditions, they had to appear before a therapeutic abortion committee at the hospital and receive a certificate stating that "in [the committee's] opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health."[155] The petitioners were doctors who had opened an abortion clinic in Toronto that provided abortions to women without complying with the conditions of Section 251's exception.[156] They contended that Section 251 violated Section 7 of the Charter, and, "basing [their] argument largely on American constitutional theories . . . submitted that the right to 'life, liberty and security of the person' is a wide-ranging right to control one's own life and to promote one's individual autonomy."[157]

The question in *Morgentaler* was "whether the abortion provisions . . . infringe the 'right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice' as formulated in" Section 7 of the Charter.[158] The majority opinion, written by Chief Justice Dickson, began by declaring that the Court need not "explore the broadest implications" of Section 7 and that only the right to security of the person applied in the present case.[159]

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[148] *Id*.
[149] *Id*.
[150] *Id*. at 45.
[151] Criminal Code, R.S.C. 1970, c C-34, § 251(2) (Can.).
[152] *Id*. § 251(1).
[153] *Id*. § 251(4)(a).
[154] *Id*. § 251(4)(b).
[155] *Id*. § 251(4)(c).
[156] R. v. Morgentaler, [1988] 1. S.C.R. 30, 50 (Can.).
[157] *Id*. at 51.
[158] *Id*. at 45.
[159] *Id*. at 51.

The right to security of the person includes the right to physical integrity[160] but is not limited to bodily security. It also includes the right to be free from state-imposed psychological trauma.[161] Because the Court had previously held that interfering with a person's bodily integrity and causing them unnecessary psychological stress was a violation of the right to security of the person, Chief Justice Dickon concluded that Section 251 infringed on Section 7, saying:

> At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecisions of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman . . . to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person.[162]

Notably, Chief Justice Dickson declined to comment on whether the Charter implicitly contained a right to an abortion.[163]

The Court next analyzed whether the infringement was in accordance with principles of fundamental justice. Chief Justice Dickson found that the procedural safeguards—or lack thereof—in Section 251 were "manifestly unfair."[164] The hoops subsections 4(b) and 4(c) required women to jump through in order to qualify for an abortion without threat of prosecution "would in practice prevent the woman from gaining the benefit of the defence."[165] The Court explained that 58.5% of hospitals in the country either did not have a large enough medical staff or did not have the treatment capabilities necessary to establish a therapeutic abortion committee, and even if hospitals had the capability to establish committees, they were under no obligation to do so or to provide abortions.[166] Though the provisions of Section 251 seemed neutral on their face, in practice, the law made it difficult for women who might qualify for an abortion under the listed exceptions of Section 251 to actually obtain

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[160] R. v. Mills, [1986] 1 S.C.R. 863, 919 (Can.).
[161] *Morgentaler*, 1. S.C.R. at 55.
[162] *Id.* at 56–57.
[163] *See id.*
[164] *Id.* at 72.
[165] *Id.* at 70–71.
[166] *Id.* at 66.

one. The structure of the law itself was not "in accordance with principles of fundamental justice."[167]

The Court then conducted the proportionality analysis necessary to determine whether Section 1 of the Charter might save the legislation if it the restrictions imposed by the law could be "demonstrably justified in a free and democratic society."[168] The Court found that the primary purpose of Section 251 was to protect the life and health of pregnant women; protecting the "interests" of the fetus were a secondary objective.[169] Both were valid and appropriate legislative interests, but the Court held that the means in achieving those goals were not proportionate.[170] The procedures governing access to abortion were arbitrary and unfair, the infringement on the right to security of the person was greater than necessary, and the impact of Section 251 on Section 7 rights was not proportional to the goal of protecting a woman's health and life.[171] In fact, the Court felt that the effect of Section 251—making it more difficult for women to access abortion—was actually *contrary* to its legislative purpose.[172]

In his dissent, Justice McIntyre accused Chief Justice Dickson of establishing a fundamental right to abortion through the right to security of the person, though Chief Justice Dickson did not explicitly say as much.[173] Justice Wilson based his entire concurrence on the premise that Section 7 did, definitively, grant women a right to abortion.[174] Unlike the majority's opinion, however, Justice Wilson believed that the right within Section 7 at issue in this case was the right to liberty.[175] In Justice Wilson's view, the right to liberty should—to some extent—protect a person's autonomy and the right to make personal decisions about the course of their own private lives.[176] The decision of whether to terminate a pregnancy or carry a fetus to term would fall within those kinds of protected personal decisions, as that decision carries with it economic, social, and psychological implications and questions that the woman must answer for herself as a "whole person."[177]

The Court struck down Section 251 as inconsistent with the Charter, leaving Canada with no national laws regulating abortion.[178] But did *Morgentaler* leave Canada with a well-established right to abortion? Despite a concurring opinion finding a right to abortion within Section 7's right to liberty and a

[167] *Id.* at 76.
[168] *Id.* at 73; Canadian Charter of Rights and Freedoms, § 1.
[169] *Morgentaler*, 1 S.C.R. at 74.
[170] *Id.* at 75.
[171] *Id.* at 76.
[172] *Id.* at 75–76.
[173] *Id.* at 142 (McIntyre, J. dissenting).
[174] *Id.* at 161–84 (Wilson, J., concurring).
[175] *Id.* at 163.
[176] *Id.* at 166.
[177] *Id.* at 171.
[178] *Id.* at 79–80 (majority opinion).

dissent insisting that the majority overstepped its bounds and established a right to abortion, Chief Justice Dickson refused to rule on that matter in his majority opinion. Instead, *Morgentaler* merely found that the regulations set out by Section 251 were a violation of the right to security of the person.[179] But consider: what sort of law regulating abortion could be upheld under the scrutiny of the Court if this law could not? Could *any* abortion regulation withstand an application of the reasoning and analysis of *Morgentaler*?

No laws were ever passed to replace Section 251. Even today, almost 40 years after *Morgentaler*, Canada has none of the traditional legal barriers to abortion.[180] The right to security of the person——and, in the mind of at least one justice, the right to liberty—has protected a woman's ability to procure an abortion for over a generation.

D. The Council of Europe

i. The European Convention on Human Rights

Entered into force on September 3, 1953,[181] the European Convention on Human Rights (the Convention) is a treaty between the nations of the Council of Europe intended to maintain and further the "fundamental freedoms which are the foundation of justice and peace in the world" and which are necessary in keeping free and democratic societies.[182] Forty-six member states have made a legal commitment to protect the basic rights articulated in the document.[183] Among those rights are the right to life,[184] the prohibition of torture,[185] and the right to respect for "private and family life."[186]

Citizens of member states bring claims arising from violations of the Convention against their home countries.[187] These claims are adjudicated by the European Court of Human Rights (ECHR).[188] In total, the ECHR has forty-

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[179] *Id.* at 51.

[180] GUTTMACHER INST., *supra* note 13.

[181] CONSULTATIVE ASSEMBLY OF THE COUNCIL OF EUR., *Recommendation 183 on the Establishment of the European Court of Human Rights*, 10th Sess., (1958). *See also Details of Treaty 005*, COUNCIL OF EUR., https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005 (last visited Oct. 16, 2022).

[182] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

[183] *46 Member States*, COUNCIL OF EUR., https://www.coe.int/en/web/portal/46-members-states (last visited Oct. 16, 2022).

[184] ECHR, *supra* note 182, at art. 2.

[185] *Id.* at art. 3.

[186] *Id.* at art. 8.

[187] *Id.* at art. 34.

[188] *Id.* at art. 32.

six judges, one for (but not necessarily from) each member state.[189] However, the judges only oversee cases as either a single judge, in a committee of three judges, in chambers of seven judges, or in Grand Chambers of seventeen judges.[190] Serious questions involving the interpretation of the Convention may be referred to the Grand Chamber.[191] The ECHR's decisions are legally binding on the member states.[192]

When reviewing an alleged violation of Article 8's right to private life, the ECHR conducts an analysis similar to the Canadian Supreme Court's method of interpreting the Charter. First, the ECHR considers whether the state action violates or is contrary to any of the positive or negative obligations Article 8 imposes on the member states.[193] If it finds an interference with the right to private life, the ECHR next asks whether the interference was in accordance with the state's law and was necessary in a democratic society.[194] Article 8 allows official, state-sanctioned interferences under these conditions if the government is pursuing a legitimate aim.[195] The ECHR typically defers to the states in determining what constitutes a "legitimate aim;" for example, "the protection of . . . morals" is considered a legitimate aim.[196] Finally, the ECHR considers whether the violation of the right to private life is necessary and proportionate to the government's legitimate aim.[197] It is not entirely clear how the ECHR conducts a fact-specific proportionally test. Sometimes the ECHR adopts a "priority to rights" approach, where the state's reason for the interference "must be 'relevant and sufficient,' [and the] need for the interference must be 'convincingly established.'"[198] Other times, the ECHR has used a "balancing" approach, which does not put as high burden on the states to justify their violation of the Convention.[199]

With this context in mind, we will examine one of the ECHR's more recent decisions on abortion: *A, B and C v. Ireland*.[200]

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[189] *Id*. at art. 20.
[190] *Id*. at art. 26.
[191] *Id*. at art. 30.
[192] *Id*. at art. 46.
[193] A, B and C v. Ireland, 2010-VI Eur. Ct. H.R. 185, ¶ 216 (2010).
[194] ECHR, *supra* note 182, at art. 8.
[195] *A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 222.
[196] *Id*. ¶ 223; STEVEN GREER, THE EXCEPTIONS TO ARTICLES 8 TO 11 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14–15 (1997).
[197] GREER, *supra* note 196.
[198] *Id*.
[199] *Id*.
[200] *A, B and C*, 2010-VI Eur. Ct. H.R. 185.

ii. A, B and C v. Ireland

While Ireland's constitutional ban on abortion was overturned by referendum in May 2018,[201] when this case was heard in 2010, Article 40.3.3 of the Irish Constitution read: "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."[202] The Irish Supreme Court had interpreted this provision to mean that *only* in instances of an actual and immediate threat to the *life* of the mother could she get an abortion.[203] In cases where a woman's *health* was at risk if she continued the pregnancy, but death was not imminent, she was not entitled to an abortion.[204] Neither the Supreme Court nor the legislature had established any official protocols or procedures through which a woman could prove that continuing her pregnancy posed a risk to her life, and thereby gain access to abortion services.[205]

The three plaintiffs—A, B, and C—were residents of Ireland.[206] A was an unmarried, unemployed, recovering alcoholic suffering from depression who unintentionally became pregnant. She had four other children living in foster care over whom she was attempting to regain custody, and a history of depression.[207] B was also unmarried and became unintentionally pregnant after the morning-after pill failed.[208] Both women believed that, given their life circumstances, they would not be able to take care of a baby.[209] A was particularly concerned about what an unwanted pregnancy would do to her mental health and her sobriety.[210] Both women traveled to England to procure abortions early in their pregnancy.[211]

C suffered from a rare form of cancer for which she had undergone three years of chemotherapy.[212] Before the treatment, her doctor "advised that it was not possible to predict the effect of pregnancy on her cancer and that, if she did become pregnant, it would be dangerous for the foetus if she were to

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[201] *Irish Abortion Referendum: Ireland Overturns Abortion Ban*, BBC NEWS (May 26, 2018), https://www.bbc.com/news/world-europe-44256152.

[202] *What is the Eighth Amendment?*, IRISH COUNCIL FOR CIV. LIBERTIES, https://www.iccl.ie/her-rights/what-is-the-eighth (last visited Oct. 16, 2022). *See supra* note 11 for the new version of Article 40.3.3.

[203] *See* Att'y Gen. v. X [1992] IESC 1 [1992] 1 IR 1 (Ir.) (establishing a right to abortion when the pregnant woman's life is at risk, including by suicide).

[204] *Id*.

[205] *A, B and C*, 2010-VI Eur. Ct. H.R. ¶¶ 253–54.

[206] *Id*. ¶ 11.

[207] *Id*. ¶ 14.

[208] *Id*. ¶ 19.

[209] *Id*. ¶¶ 14, 19.

[210] *Id*. ¶ 14.

[211] *Id*. ¶¶ 13, 18.

[212] *Id*. ¶ 23.

have chemotherapy during the first trimester."[213] C became pregnant while in remission. She grew concerned about the impact the pregnancy could have on her health and life, as well as what impact the cancer and chemotherapy could have on the fetus.[214] C also traveled to England to have an abortion.[215] A, B, and C all suffered medical complications following their abortions abroad.[216]

The three women alleged that Ireland's ban on abortion violated the Convention.[217] A, B, and C alleged that their rights under Article 3 (prohibition on torture) and Article 8 (right to private life and private family life) had been violated.[218] C claimed that in her case, given the uncertainty of her position medically, Article 2 (right to life) had also been violated.[219]

The ECHR began by summarily dismissing the applicant's claims as to Article 2 and Article 3, finding them "manifestly ill-founded."[220] C's right to life was not threatened because, despite her argument that "abortion was not available in Ireland even in life-threatening situations" due to Ireland's failure to outline procedures for establishing that continuing pregnancy threatened the mother's life in some way, nothing stopped C from obtaining an abortion elsewhere.[221] There was "no . . . relevant risk" to her life because Ireland imposed no legal barriers to traveling abroad for an abortion.[222] As to Article 3, which dictates that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment,"[223] the ECHR found that even though traveling for an abortion "was both psychologically and physically arduous for each of the applicants," the experience did not rise to the "minimum level of severity… depend[ing] on all the circumstances of the case, such as duration of the treatment, its physical or mental effects," necessary to constitute a true violation of Article 3's prohibition on torture.[224]

A, B, and C's Article 8 claims required more attention and analysis. Article 8 says, in part, that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[225] Article 8 has been broadly interpreted by the ECHR to encompass a right to personal autonomy and a

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[213] *Id*.
[214] *Id*. ¶ 24–25.
[215] *Id*. ¶ 22.
[216] *Id*. ¶¶ 16, 21, 26.
[217] *Id*. ¶¶ 113–14.
[218] *Id*. ¶¶ 160, 167.
[219] *Id*. ¶ 157.
[220] *Id*. ¶¶ 159, 165.
[221] *Id*. ¶¶ 157–58.
[222] *Id*. ¶ 158.
[223] ECHR, *supra* note 182, at art. 3.
[224] *A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 164. Under the Convention, torture is "deliberate inhuman treatment causing very serious and cruel suffering." *Prohibition of Torture*, COUNCIL OF EUR., https://www.coe.int/en/web/echr-toolkit/interdiction-de-la-torture#main-content (last visited Oct. 16, 2022).
[225] ECHR, *supra* note 182, at art. 8.

right to physical and psychological integrity.[226] A and B argued that the right to privacy should grant them the right to abortion for "reasons of health and/or well-being, and C argued that her "inability to establish her eligibility for a lawful abortion" caused an interference with her right to private life and family life.[227] Though abortion touches on the sphere of private life, the ECHR found that Article 8 "cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman's private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus."[228] Article 8 therefore does not establish an affirmative right to abortion, but, because of the broad scope of Article 8, some interferences with a woman's ability to terminate her pregnancy could constitute a violation of the right to private life. The ECHR found that Ireland's abortion ban was an interference of all three plaintiffs' Article 8 rights.[229]

After establishing that there was an interference with the plaintiffs' rights, the ECHR determined that the interference was in accordance with Irish law.[230] As the ban was part of the Irish Constitution, it was in accordance with Irish law; the plaintiffs conceded as much.[231] The next step in the analysis involved examining whether the ban on abortion in all circumstances except to save the mother's life furthered a legitimate aim.[232] Again, the answer seemed obvious. Ireland's ban on abortion "was based on profound moral values concerning the nature of life,"[233] and protecting morality is written into Article 8 as justifiable grounds for interference with the right to privacy.[234] The plaintiffs argued that attitudes in Ireland had changed since the abortion ban was added to the Constitution in 1983, citing several public opinion polls, but the ECHR did not find the proposed evidence of overarching societal change compelling.[235]

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[226] *A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 216.

[227] *Id.* ¶ 214.

[228] *Id.* ¶ 213. The ECHR declined to discuss in any detail the rights or interests of the fetus, instead pointing to a previous decision, Vo v. France, 2004-VIII Eur. Ct. H.R. 67, ¶ 80 (holding that "the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention and . . . if the unborn do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests" but also noting that "[t]he Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child.").

[229] *A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 214.

[230] *Id.* ¶ 219.

[231] *Id.* ¶¶ 219–21.

[232] *Id.* ¶¶ 222–28.

[233] *Id.* ¶ 222. Ireland is majority Catholic. *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion*, CENT. STAT. OFF. (Oct. 12, 2017, 11:00 AM) (Ir.), https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/. See *supra* note 6 for the Catholic Church's views on abortion.

[234] ECHR, *supra* note 182, at art. 8.

[235] *A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 223.

The ECHR affords a wide margin to states seeking to protect the morality of their country, as "[s]tate authorities are in principle in a better position than the international judge to give an opinion, on the 'exact content of the requirements of morals' in their country, as well as on the necessity of a restriction intended to meet them."[236] Even though most member states of the Council of Europe had more liberal abortion laws than Ireland, Ireland would still enjoy some deference due to the deeply "profound" nature of moral values in general and specifically involving abortion.[237]

The ECHR applied a balancing approach to determine whether the abortion ban was proportional to the legitimate aim of preserving morality.[238] Because Irish law did not prohibit women from traveling abroad to obtain abortions, the judges felt that a balance between the women's interest in their private and family lives and the state's interest in upholding an important moral value was well struck.[239] Though women could not get abortions specifically *in* Ireland, their actual ability to terminate a pregnancy was not fully impeded, as women could travel abroad to undergo the procedure.[240] A and B lost their Article 8 claims.[241]

The ECHR felt that C, on the other hand, was in an entirely different position.[242] Her specific claim that Ireland should have a procedural mechanism by which to establish that her life was at risk to prove she was entitled to an abortion had merit.[243] Granting a woman a right to abortion when necessary to save her life without outlining how she might establish that right created "substantial uncertainty"[244] and "a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and the reality of its practical implementation."[245] Ireland had a positive obligation under Article 8 to secure respect for the right to abortion in life-threatening circumstances.[246] Failure to establish a clear path forward for women to obtain abortions lawfully when they met the requisite criteria amounted to a violation of the Convention.[247] C won her claim, and Ireland was directed to create procedures to ensure that women who wanted to terminate their pregnancies because of an imminent threat to their life could do so.[248]

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[236] *Id*. ¶ 223.
[237] *Id*. ¶¶ 223–26.
[238] *Id*. ¶¶ 229–30.
[239] *Id*. ¶ 241.
[240] *Id*.
[241] *Id*. ¶ 242.
[242] *Id*. ¶¶ 243, 250–54, 257.
[243] *Id*. ¶¶ 246.
[244] *Id*. ¶ 254.
[245] *Id*. ¶ 264.
[246] *Id*. ¶ 267.
[247] *Id*. ¶¶ 267–68.
[248] *Id*. ¶¶ 265–67.

This case left women living in Council of Europe states in an uncertain position regarding their right to abortion. The ECHR deliberately declined to recognize a right to abortion under Article 8's broad right to respect for private life.[249] It also deliberately declined to recognize a fetal right to life under Article 2's right to life.[250] At a minimum, the decision suggests that member states may enact virtually any abortion ban as long as the state created clear procedures for establishing qualifications for exceptions to the ban and did not legally prevent women from traveling elsewhere to obtain an abortion.

E. Germany

i. The Basic Law for the Federal Republic of Germany

Adopted in the aftermath of World War II, the Basic Law for the Federal Republic of Germany was "inspired by the determination to promote world peace."[251] The 1949 document restructured the German government[252] and articulated new rights and freedoms guaranteed to all German people.[253] Whereas the U.S. Constitution begins by outlining the structure and role of the government before defining the rights the Constitution guarantees citizens,[254] the Basic Law *begins* with "Basic Rights."[255] The first protected right—the first provision in the entire constitution—is the inviolable right to human dignity and an affirmative duty of the German government to protect and respect that dignity.[256] Other rights in the Basic Law include a right to freely develop one's personality and a right to life and physical integrity.[257]

The Federal Constitutional Court of Germany ("FCC") is responsible for interpreting and enforcing the Basic Law.[258] It is a specialized court that only decides constitutional issues.[259] Established in 1951, "[i]ts decisions are final

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[249] *Id.* ¶ 213.

[250] *See id.* ¶ 222.

[251] Grundgesetz [GG] [Basic Law] [Constitution], pmbl. (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/.

[252] In the beginning, the Basic Law only applied to West Germany. When East Germany rejoined the German Republic in 1990, the parliaments of both East and West Germany voted to make the Basic Law the government constitution for the re-unified government. *Constitution of the Federal Republic of Germany*, FED. MINISTRY OF THE INTERIOR & CMTY., https://www.bmi.bund.de/EN/topics/constitution/constitutional-issues/constitutional-issues.html (last visited Oct. 16, 2022).

[253] Grundgesetz [GG] [Basic Law], arts. 1–19 (Ger.).

[254] *See* U.S. CONST.

[255] Grundgesetz [GG] [Basic Law], §1 (Ger.).

[256] *Id.* at art. 1.

[257] *Id.* at art. 2.

[258] *Id.* at arts. 92–93.

[259] Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 840 (1991).

and binding on all other state organs."[260] Like the Supreme Court of Canada,[261] it considers its role in reviewing legislation and state policy to be limited; the FCC's only standard of review is the Basic Law and whether the state action falls within the constitutional framework.[262] Constitutional questions may come before the FCC in a number of ways. One way is at the behest of the government.[263] Unlike the United States Supreme Court, which can only hear cases on direct appeal and cannot issue advisory opinions,[264] the German state, the German federal government, and the German parliament can request the FCC review a constitutional question about any federal or state statute immediately after the statute's enactment, before a traditional legal dispute arises.[265]

The FCC uses several guiding principles to test whether legislation is in accordance with the Basic Law. First, the FCC looks to the actual text of the law; unlike jurisdictions like the United States, where some jurists give great weight the original *intention* of the framers of the U.S. Constitution, German judges are all, in theory, pure textualists.[266] They are supposedly only concerned with the text and structure of the Basic Law. That being said, the FCC also takes into account the value hierarchy of Basic Law rights.[267]

The value hierarchy of rights contemplates that certain rights within the Basic Law have more weight or significance to them based on where within the document they are articulated;[268] the hierarchy of rights is especially important when two rights are said to conflict with one another. For example, if the constitutionality of exclusionary single-gendered clubs or associations came before the FCC, the FCC would be asked to weigh the right to equality between men and women[269] against the right to the freedom of association.[270] Since the right to gender equality (Article 3) comes before the right to freedom

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[260] *The Court's Duties*, BUNDESVERFASSUNGSGERICHT, https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Aufgaben/aufgaben_node.html (last visited Oct. 16, 2022).

[261] *Role of the Court*, *supra* note 136.

[262] *The Court's Duties*, *supra* note 260.

[263] Grundgesetz [GG] [Basic Law], art. 93(1) (Ger.).

[264] *See* U.S. CONST. art. III.

[265] Kommers, *supra* note 259, at 840–42.

[266] *Id.* at 844–45.

[267] *See id.* at 855–56. The FCC also generally considers proportionality but did not conduct a proportionality analysis in either *Abortion I* or *Abortion II*, so the FCC's approach to proportionality will not be discussed in this Note. For a discussion of the FCC's proportionality test, see Andrej Lang, *Proportionality Analysis by the German Federal Constitutional Court*, *in* PROPORTIONALITY IN ACTION: COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE 22, 36–38 (Mordechai Kremnitzer et al. eds., 2020).

[268] Kommers, *supra* note 259, at 855–56, 860.

[269] Grundgesetz [GG] [Basic Law], art. 3 (Ger.).

[270] *Id.* at art. 9.

of association (Article 9), the right to gender equality would, in theory, take precedence under the value hierarchy of rights.

With this context in mind, we will examine Germany's two major abortion decisions: *Abortion I*[271] and *Abortion II*.[272]

ii. Abortion I

In 1974, the German national legislature passed a series of amendments to the country's Penal Code, including §§ 218–219, which made it a crime to "interrupt[] a pregnancy after the 13th day following conception."[273] Women who terminated their pregnancies could face up to a year in prison; doctors who performed the abortion could be incarcerated for up to three years.[274] 193 members of the German parliament and five state governments asked the FCC to review the law.[275] The plaintiffs were not concerned that the law criminalized abortions. Rather, they found § 218(a)'s *exception* to the crime by permitting an abortion for any reason within the first twelve weeks of pregnancy troubling.[276] The petitioners argued that allowing unrestricted access to abortion during the first twelve weeks of pregnancy violated the legislature's duty under the Basic Law to protect human dignity and life.[277] They believed the legislature had a positive duty to protect unborn life and could not enact a law explicitly allowing its destruction.[278]

The FCC agreed.[279] At issue was not just "the legal treatment of the interruption of pregnancy," but "the protection of human life, one of the central values of every legal order."[280] The rights to human dignity and to life, the first two rights outlined in the Basic Law, were a "reaction to the 'destruction of life unworthy of life,' to the 'final solution' and 'liquidations,' which were

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[271] *Abortion I*, *supra* note 14.

[272] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvF 2/90, May 28, 1993, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/1993/05/fs19930528_2bvf000290en.pdf?__blob=publicationFile&v=2 [hereinafter *Abortion II*].

[273] *Abortion I*, *supra* note 14, at 611–12.

[274] *Id.* at 611.

[275] *Id.* at 607–09.

[276] *Id.* at 622. § 218(a) stated in full: "An interruption of pregnancy performed by a physician with the consent of the pregnant woman is not punishable under § 218 if no more than twelve weeks have elapsed since conception." *Id.* at 611. § 218(b) also allowed women to obtain abortions after this point if their lives or health were in danger and in cases where genetic testing revealed a serious fetal anomaly, if the abortion was performed within the first 22 weeks of pregnancy. *Id.* at 611–12.

[277] *Id.* at 622.

[278] *Id.* at 624–25.

[279] *Id.* at 642–43.

[280] *Id.* at 637.

carried out by the National Socialistic Regime as measures of state."[281] These values and rights were of the utmost importance; they signified the new German government's complete revocation of the previous regime and its newfound commitment to world peace and progress.[282]

The FCC found that from a biological standpoint, human life begins when the fertilized egg attaches to the wall of the uterus, approximately fourteen days after conception.[283] In their view, the development of the fetus was continuous and gradual from that point on, with no real tangible demarcation points; the development of life could not be divided into stages.[284] This was a deliberate rejection of the U.S. Supreme Court's reasoning in *Roe*, which divided development into trimesters and declared viability the point at which fetal life had some legal significance.[285]

Even birth did not constitute a significant point in the development of human life in the eyes of the FCC, since "the phenomena of consciousness which are specific to the human personality . . . appear for the first time a rather long time after birth."[286] Because life developed slowly and continuously after implantation, the legal protections of Article 2—the right to life—applied to and protected fetuses from that point forward. The FCC reasoned:

> The right to life is guaranteed to everyone who "lives"; no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life. "Everyone" in the sense of Article 2, Paragraph 2, Sentence 1,[287] of the Basic Law is "everyone living"; expressed in another way: every life possessing human individuality; "everyone" also includes the yet unborn human being.[288]

Article 2, therefore, prevented direct attacks on developing life.

Having established that developing life was entitled to the same Article 2 protections as life after birth, the FCC next outlined what responsibilities and duties that finding imposed on the state. First, it reiterated that Article 2 did, in fact, create a positive obligation for Germany; it was the duty of the state

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[281] *Id.*

[282] *Id.* at 637–42.

[283] *See id.* at 609–10, 614. Hence § 218's criminalization of abortion *after* 13 days post-conception.

[284] *Id.* at 638.

[285] *Id.* at 667 (stating that *Roe*'s holding "would, according to German constitutional law, go too far indeed").

[286] *Id.* at 638.

[287] "Every person shall have the right to life and physical integrity." Grundgesetz [GG] [Basic Law], art. 2 (Ger.).

[288] *Abortion I*, *supra* note 14, at 638.

to protect every human life.[289] Though that directive was not explicitly laid out in the text of Article 2, it could be "directly deduced" from the provision.[290] That duty could also be found in Article 1, Paragraph 1, of the Basic Law, which explicitly places an obligation on the state to protect human dignity.[291] The FCC found these two provisions created a comprehensive duty of the state "to take a position protecting and promoting . . . life, that is to say, it must, above all, preserve it even against illegal attacks by others."[292] That duty included protecting fetuses from their mothers.[293]

Despite its powerful statement on the necessity of a fetal right to life under the Basic Law, the FCC acknowledged that women had rights which could conflict with the rights of the unborn.[294] Just as Article 2 protected fetuses, it also protected the mother's interest in obtaining an abortion. While Paragraph 2 of Article 2 states that "[e]very person shall have the right to life and physical integrity," Paragraph 1 states that "[e]very person shall have the right to free development of his personality *insofar as he does not violate the rights of others or offend against the constitutional order or the moral law*."[295] Whether to have children clearly fell within a woman's right to develop her personality, but the FCC emphasized that that right was not absolute, and that terminating a pregnancy would violate the right of the fetus to live.[296] The right to life was absolute, and the "protection of life of the child *en ventre sa mere* [in utero] takes precedence as a matter of principle for the entire duration of the pregnancy over the right of the pregnant woman to self-determination and may not be placed in question for any particular time."[297] Unlike other decisions analyzed in this Note, there was no balancing the interests of the mother against the interests of the fetus.

The FCC struck down the legislature's new exception to the criminalization of abortion.[298] It also reaffirmed that the state could criminally punish women and doctors for procuring or providing an abortion, respectively.[299] However, the FCC also held that there were certain situations where criminalization would not be appropriate: in cases of severe fetal deformity, in cases where the woman's life or health were in danger, and in cases of "social or general emergency."[300] The "social or general emergency" exception allowed

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[289] *Id.* at 641.
[290] *Id.*
[291] *Id.*
[292] *Id.* at 642.
[293] *Id.*
[294] *Id.* at 643.
[295] Grundgesetz [GG] [Basic Law], art. 2 (Ger.) (emphasis added).
[296] *Abortion I*, *supra* note 14, at 643.
[297] *Id.* at 605.
[298] *Id.* at 662–63.
[299] *Id.* at 649.
[300] *See id.* at 648.

women to obtain abortions when they faced "conflicts of such difficulty that, beyond a definite measure, a sacrifice by the pregnant woman in favor of the unborn life cannot be compelled."[301] This final exception was so broad that while abortion was undeniably *illegal* in Germany following this decision, it was not completely *inaccessible*. It was not necessarily difficult for a woman to find a doctor who would agree that she had a "social or general emergency" necessitating an abortion.[302]

iii. Abortion II

The FCC handed down *Abortion II* almost twenty years after *Abortion I*.[303] In *Abortion II*, the FCC held that the federal legislature could choose to decriminalize abortions during the first twelve weeks of pregnancy as long as women underwent some form of counseling before getting the abortion.[304] Abortion had to remain illegal, because the state could not under its Article 2 obligations sanction terminating a pregnancy.[305] But the state did not necessarily have to penalize women or doctors for a first-trimester abortion. The state could—and indeed *had to*—take other measures to dissuade women from terminating their pregnancies.[306] Criminalization did not have to be among those prophylactic measures.

For the purposes of this Note, the important outcome of *Abortion II* is that the FCC considered two new constitutional provisions as potentially supporting a woman's right to terminate her pregnancy, in addition to the already acknowledged right to develop her personality freely: (1) the right to her dignity under Article 1 and (2) the right to her life and physical inviolability under Article 2.[307] Still, neither of these additional competing legal values altered the FCC's stance on abortion or fetal life. Reaffirming *Abortion I*, the FCC held that "a termination must be regarded for the duration of the pregnancy as fundamentally wrong and thus forbidden by law. If there were no such prohibition, control over the unborn's right to life . . . would be handed over to the free, legally unbound decision of a third party."[308]

Unlike its American counterpart, *Casey*, *Abortion II* did not completely overhaul the framework for analyzing the abortion question in Germany. It reaffirmed the FCC's *actual* original holding: that fetal life must take precedence at all stages of pregnancy, but that in some circumstances, when the

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[301] *Id.*

[302] *See generally* Rachel Rebouché, *Comparative Pragmatism*, 72 MD. L. REV. 85 (2012).

[303] *Abortion II*, *supra* note 272.

[304] *Id.* ¶¶ 185, 267.

[305] *Id.* ¶ 267.

[306] *Id.* ¶ 162.

[307] *Id.* ¶ 153.

[308] *Id.* ¶ 156 (citation omitted).

burden of carrying a pregnancy to term was unjustifiable, criminalizing abortion would not be appropriate.[309] In replacing the trimester system with the undue burden test, the U.S. Supreme Court granted states increasing regulatory power over a woman's right to choose.[310] Allowing—but still morally condemning—abortions in the first trimester after a woman goes through dissuasive counseling opened another route to abortion for women in Germany, but it did not fundamentally shift the balance of rights at play in abortion cases in the same way that *Casey* did. For this reason, many legal and feminist scholars have observed that despite a formal recognition of the right to abortion in the United States after *Roe* and *Casey*, that right "[was] unrealizable for many women due to restrictive state and federal laws," whereas in Germany, "early abortion is widely available," despite the formal recognition of a fetal right to life.[311]

III. ANALYSIS OF THE COMPETING RIGHTS

A. Individual Rights Favoring a Right to Abortion

i. Right to Liberty

The first constitutional guarantee that supports a right to abortion is the right to liberty. This right takes different forms in the jurisdictions discussed in this Note. Strictly examining the texts of each jurisdiction's governing documents, the U.S. Constitution and the Canadian Charter of Rights and Freedoms both contain explicit guarantees of a right to liberty;[312] in the German Basic Law, liberty takes the form of the right to develop one's personality freely;[313] and in the Mexican Constitution, a general liberty interest can be derived from, among others, the rights to a healthy environment for one's personal development, to family planning, and to choose one's own occupation.[314] But courts, in interpreting these documents, have expanded this liberty right further. The United States has defined liberty as a comprehensive right, "a rational continuum which, broadly speaking, includes a freedom from all substantive arbitrary impositions and purposeless restraints."[315] Mexico has conceived a right to build a "life project," or the right to "personal fulfillment based on the options that a persons have [sic] to lead their life and reach the

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[309] *Id.* ¶¶ 156–62.

[310] *See* discussion *supra* Part II(A)(iii).

[311] *E.g.*, Rebouché, *supra* note 302, at 86.

[312] U.S. CONST. amend. XIV, § 1; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 7 (UK).

[313] Grundgesetz [GG] [Basic Law], art. 2 (Ger.).

[314] Constitución Política de los Estados Unidos Mexicanos [CP], arts. 4–6, Diario Oficial de la Federación [DOF] 05-02-1927, última reforma DOF 28-05-2021.

[315] Poe v. Ullman, 367 U.S. 497, 543 (1961).

destiny they have proposed."[316] In all, the right to liberty can best be defined as it was by Justice Wilson of the Canadian Supreme Court in *Morgentaler*: the right to liberty is a right to make decisions about the course of one's life and to have the state respect those choices.[317]

The inherent breadth of the right to liberty naturally encompasses a right to abortion. If liberty endows us with the right to determine the course of our lives, to make decisions for ourselves, then women must have the right to choose whether to continue a pregnancy; "[f]ew decisions are . . . more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy."[318] A right to liberty is the strongest source for a right to abortion. The only thing a woman seeking an abortion under the right to liberty needs to prove is that her ability to make a choice about her personal life—i.e., her liberty—is being unduly interfered with. She does not need to prove that being forced to carry the fetus to term would put her life at risk or potentially damage her physical or mental health. She does not need to prove that extenuating circumstances or hardships in her personal life necessitate an abortion. She merely needs to assert that, by right, she ought to be able to decide for herself whether to continue the pregnancy and that the state is stopping her from exercising that right to choose. Barring any gestational limitations (which this Note discusses below), jurisdictions where the right to abortion is predicated on the right to liberty allow women to access abortion services for any reason. This makes it the most comprehensive and protective source for a right to abortion.

Though the right to liberty allows women to exercise a right to abortion as a matter of choice, without necessitating any other justification, it is subject to limitations. As alluded to above, the right to obtain an abortion for any reason does not extend throughout the entire duration of the pregnancy in any of the jurisdictions we have discussed.[319] Like many rights, the right to liberty is not absolute and uninfringeable.

For example, the U.S. Supreme Court acknowledged that abortion "is an act fraught with consequences for others" and was therefore subject to some level of regulation by the state.[320] Immediately following *Roe*, this meant that a woman could exercise her right to abortion, unrestricted, in the first trimester

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[316] AD 1388/2015, *supra* note 105, ¶ 70.

[317] *Morgentaler*, 1. S.C.R. at 166–67.

[318] *Id.* at 172 (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)).

[319] From a practical standpoint, Canada would be an exception to this rule, since there are no laws restricting access to abortion at all in Canada. That being said, there is also no *right* to abortion in Canada. So, while women may theoretically be able to obtain an abortion at any stage of the pregnancy, they are not legally *entitled* to do so.

[320] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

of her pregnancy.[321] *Roe* represents the most autonomy women were entitled to exercise in deciding whether to obtain an abortion in the United States. The Court diminished that autonomy in *Casey*, allowing states to place obstacles—as long as they were not *substantial* obstacles—in the path of a woman seeking an abortion.[322] Still, states could not force a woman to justify her choice to terminate her pregnancy for a specific reason before the point of fetal viability.[323]

Even with limits on when women can obtain abortions, the right to abortion is strongest when rooted in the right to liberty. Furthermore, applying the right to liberty in abortion cases appears to have broad appeal; all of the cases discussed in this Note either based their decisions explicitly on a right to liberty, made arguments rooted in a respect for liberty, or, if no right to abortion was found, at least acknowledged in some respect that a woman's personal liberty was at stake in deciding against that right.[324] These jurisdictions' shared democratic values, expressed differently across different constitutional landscapes, led every court to the same conclusion: the right to liberty suggests a right to abortion.

ii. Right to Bodily Integrity

The right to bodily integrity may also serve as the basis for the right to abortion. More concrete in its conception than the right to liberty (which can be nebulous), the right to bodily integrity is exactly what it sounds like—a right to security and control over one's own person. *Morgentaler* was decided on these grounds;[325] the Canadian Charter of Rights and Freedoms contains a right to security of the person, which amounts to a right to physical integrity.[326] The Canadian Supreme Court found that not only did preventing a woman from "submit[ting] to a generally safe medical procedure that might

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[321] Roe v. Wade, 410 U.S. 113, 163 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[322] *Casey*, 505 U.S. at 877–78.

[323] *See id.* at 878 (summarizing the holding of the plurality). All of the restrictions upheld in *Casey* impacted *how* (or the manner in which) a woman might obtain an abortion, not *why* she might get one. *Id.*

[324] *Casey* was decided on liberty grounds, *see supra* Part II(A)(iii); *Roe* and *Morgentaler* had concurring opinions based on the right to liberty, *see supra* Parts II(A)(ii), II(C)(ii); Mexico's *AD 1388/2015* decision leaned heavily on the idea of a life project, *see supra* Part II(B)(ii)–(iii); and both FCC cases acknowledged that the woman's right to self-determination was the right in direct conflict with the fetal right to life, *see supra* Parts II(E)(ii)–(iii). As for *A, B and C v. Ireland*, see *supra* Part II(D)(ii) (and the majority opinion in *Roe*, *see supra* Part II(A)(ii)). A discussion of whether privacy rights are actually *liberty* rights in the abortion context will follow. *See infra* Part III(A)(iii).

[325] R. v. Morgentaler, [1988] 1. S.C.R. 30, 56 (Can.).

[326] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 7 (UK).

be of clear benefit" constitute "a profound interference with a woman's body,"[327] but preventing or delaying her from obtaining an abortion could be "potentially [physically] devastating."[328] Abortion is a medical procedure; abortions—and pregnancies—necessarily involve concerns of the body.

The concept of bodily integrity also appears several times in *Casey* as a potential consideration or justification for finding a right to abortion, in both the plurality opinion and in Justices Stevens's and Blackmun's concurrences.[329] Only Justice Blackmun addresses in some detail how the right to bodily integrity might protect a right to abortion, arguing that forcing a woman to carry a fetus to term could cause her physical harm, thereby imposing "physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts."[330]

The right to bodily integrity creates a relatively strong presumption in favor of a right to abortion. If a woman has a right to control her body, it follows that she should have a right to submit to voluntary medical procedures or to decide whether to subject her body to the strains of pregnancy and labor. The exact strength of this argument is difficult to measure, however. The U.S. Supreme Court relied on a right to bodily integrity only tangentially, and the Canadian Supreme Court refused to establish a specific right to abortion through the right to security of the person in writing, though that may have been the ultimate effect of *Morgentaler* regardless.

The analysis of the right to bodily integrity as a basis for abortion cannot end there. The right to bodily integrity "is not restricted to physical integrity"[331]—it may also protect a right to mental security and a right to be free from cruel treatment. These sub-rights of the right to bodily integrity have also played an important role in various courts' analyses in abortion decisions.

a. Right to Mental Security and Freedom from "Cruel Treatment"

A majority of the opinions discussed in this Note acknowledge that being forced to carry an unwanted pregnancy to term could result in severe mental distress.[332] In *Roe*, Justice Blackmun was particularly cognizant of the imminent psychological harm facing women who wanted but were prohibited from

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[327] *Morgentaler*, 1. S.C.R. at 56–57.

[328] *Id.* at 58.

[329] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849, 857, 896 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *id.* at 915 (Stevens, J., concurring); *id.* at 926–27 (Blackmun, J., concurring).

[330] *Id.* at 927 (Blackmun, J., concurring).

[331] *Morgentaler*, 1. S.C.R. at 55.

[332] *See* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *AD 1388/2015*, *supra* note 105; *Morgentaler*, 1. S.C.R. 30; A, B and C v. Ireland, 2010-VI Eur. Ct. H.R. 185 (2010).

obtaining an abortion.[333] The Mexican Supreme Court was especially worried that forcing motherhood upon women could damage not only their physical health but also their overall well-being; well-being, to that Court, was "what it means for each woman to *be well* . . . not only the quantity of life, but particularly the quality of that life, and how women feel about their wellbeing."[334]

The ECHR in *A, B and C* and the Canadian Supreme Court in *Morgentaler* gave freedom from unnecessary mental anguish the most attention, to opposite ends. The ECHR acknowledged that being denied an abortion in Ireland and thereby forced to travel abroad for abortions was psychologically arduous, but ultimately found that the impact on the petitioners' mental health did not rise to the "minimum level of severity"[335] necessary to cause a breach of Article 3's prohibition on "torture or inhuman or degrading treatment."[336]

The *Morgentaler* Court, on the other hand, was deeply perturbed by the mental and emotional stress Canada's abortion regulations might inflict on women, citing studies and expert testimony on the psychological impact forcing women to wait for an abortion could cause.[337] To the Court, having to wait for approval from a therapeutic abortion committee before being allowed to obtain an abortion amounted to "psychological trauma" even in the women who were eventually successful in their pursuit of abortions.[338] Though, again, the majority in *Morgentaler* refused to answer whether an absolute right to abortion exists under the Charter,[339] if the regulations at issue in that case were so severe they constituted unjustifiable mental trauma, it is difficult to imagine regulation might survive the Court's inquiry. Certainly, being required to travel to another country for an abortion, which the ECHR was willing to allow,[340] would be unacceptable to the Canadian Supreme Court.

A right to be free from psychological trauma or cruel or degrading treatment supports a right to abortion. However, because what constitutes severe psychological harm is subjective and difficult to define, rooting the right to abortion in the right to be free from mental distress or cruel treatment ultimately creates a less comprehensive constitutional protection than the previously discussed approaches to abortion rights.

iii. Right to Privacy

The right to privacy is the most difficult to discuss within the abortion context because it is often unclear whether a right to *privacy* or a right *to make*

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[333] *Roe*, 410 U.S. at 153. *See also supra* note 42.
[334] *AD 1388/2015*, *supra* note 105, ¶ 74 (footnote omitted).
[335] *A, B and C*, 2010-VI Eur. Ct. H.R. ¶¶ 163–64.
[336] ECHR, *supra* note 182, at art. 3.
[337] *Morgentaler*, 1. S.C.R. at 60.
[338] *Id.* at 63.
[339] *See* discussion *supra*, Part II(C)(ii).
[340] *A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 241.

decisions about one's *private life* is at the center of a given court's analysis. In other words, in abortion cases, is it really one's privacy that is being threatened, or is one's liberty to make choices at stake?

This critique of using the right to privacy as the basis for finding a right to abortion first appeared in Justice Stewart's concurrence in *Roe*. Justice Blackmun, in the majority opinion, insisted that the right to abortion was rooted in a right to privacy, but all the cases he cited as supporting that conclusion were really *liberty* cases, not privacy cases.[341] Justice Stewart pointed this out, and cited the same line of case law in his concurrence to demonstrate that the right to abortion comes from the Fourteenth Amendment's substantive right to liberty.[342]

A similar problem arises in *A, B and C*. The ECHR found that Ireland's complete and total ban on abortion, which forced women to travel abroad to undergo an abortion procedure, infringed Article 8's "right to respect for [a person's] private and family life."[343] Though Article 8 is couched in terms of privacy, it has been interpreted as a "broad concept which encompasses, *inter alia*, the right to personal autonomy and personal development."[344] Autonomy and personal development are concepts more often associated with liberty than with privacy. In both cases, though the decisions were framed in terms of privacy, an in-depth look at the courts' reasonings reveals a concern for the freedom to make decisions and choices about one's personal life—which is encompassed by the right to liberty. Nevertheless, we may take courts at their word for the purposes of this Note. If a court or judge insists they are basing their opinion on a right to privacy, then we may proceed in our analysis as if that opinion is rooted in the right to privacy.

The right to privacy is a relatively weak basis for the right to abortion because, even more so than the right to liberty, the right to privacy is not absolute, especially in the abortion context.[345] According to the ECHR and the U.S. Supreme Court, a woman is not *alone* in deciding whether to terminate her pregnancy.[346] Though both courts explicitly refused to rule on when life begins,[347] both decided that when a woman is pregnant, she "cannot be

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[341] *See supra* pp. 205–06.

[342] Roe v. Wade, 410 U.S. 113, 169–70 (1973) (Stewart, J., concurring), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[343] ECHR, *supra* note 182, at art. 8; *see supra* pp. 223–26.

[344] *A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 212.

[345] *See, e.g.*, *Roe*, 410 U.S. at 154 ("We . . . conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

[346] *Id.* at 159; *see also A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 213 ("[W]henever a woman is pregnant, her private life becomes closely connected with the developing foetus.").

[347] *Roe*, 410 U.S. at 159 ("We need not resolve the difficult question of when life beings."); *A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 213 (pointing to a previous decision, Vo v. France, 2004-VIII Eur. Ct. H.R. 67, ¶ 80, which stated that "the unborn child is not regarded as a 'person' directly protected by Article 2 of the Convention and . . . if the unborn do

isolated in her privacy"—the implication being that there is another person, the fetus, involved in the decision.[348] The involvement of someone else in the decision strips the woman of some degree of protection the right to privacy would normally afford her.

The FCC, in *Abortion I*, also acknowledged that the right to privacy might protect a woman's choice to terminate her pregnancy were she *alone* in making that decision, stating:

> Pregnancy belongs to the sphere of intimacy of the woman, the protection of which is constitutionally guaranteed . . . . Were the embryo to be considered only as a part of the maternal organism the interruption of pregnancy would remain in the area of the private structuring of one's life, where the legislature is forbidden to encroach.[349]

As long as courts give some value to the notion of the fetus as a separate entity, it is difficult to argue that the decision to terminate a pregnancy is a truly private one. For this reason, in addition to the problem of whether privacy is even the real right at issue in abortion cases, the right to privacy does not provide strong support for finding a right to abortion.

iv. Right to Life

Finally, we turn to the right to life. The right to life protects a right to abortion in both the most limited and the most absolute way. On the one hand, a woman's right to life protects her from being forced to continue a pregnancy that puts her very life at risk—but that may only occur in limited circumstances, and the risk she faces may be difficult to prove. On the other hand, none of the jurisdictions reviewed in this Note have approved an abortion regulation scheme that did not include an exception to a ban on abortion in cases where the woman's life was threatened. In fact, most mandated that such an exception exist.[350]

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have a 'right' to 'life', it is implicitly limited by the mother's rights and interests," but also noting that "[t]he Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child.").

[348] *Roe*, 410 U.S. at 159; *see also A, B and C*, 2010-VI Eur. Ct. H.R. ¶ 213 ("[W]henever a woman is pregnant, her private life becomes closely connected with the developing foetus.").

[349] *Abortion I*, *supra* note 14, at 642.

[350] Such requirements exist in the United States under *Roe* and *Casey* and in Germany under *Abortion I* and *Abortion II*. Even the Irish Supreme Court, before the constitution was amended following the 2018 referendum, held that the constitutional fetal right to life must fall when the mother's life was threatened, even if the risk to her life came from a

Mexico's *AD 1388/2015* decision contained the most robust discussion on the connection between the right to life and the right to abortion through the lens of Mexico's constitutional right to health.[351] As previously discussed, the right to health in Mexico is incredibly expansive, protecting everything from a right to physical health to a right to satisfaction with one's state of being.[352] Because the First Chamber viewed the right to life as interdependent with the rights to health, "dignity, autonomy, freedom, to freely develop one's personality, information, non-discrimination, equality, intimacy, privacy and the right to live without cruel, inhuman or degrading treatment," it is difficult to isolate the significance of the right to life in the *AD 1388/2015* decision.[353] The Mexican right to life, in this context, is significantly farther reaching than the right to life considered by other courts in abortion cases; it seems to include a right to be satisfied with the outcome of one's life as much as it does a right to actually be alive. The right to life includes the right to "live as one chooses . . . to live well . . . [and] to live without humiliation."[354] The First Chamber's application of the right to life is perhaps best thought of as an anomaly in global abortion jurisprudence—or as the right to liberty by another name.[355]

B. Individual Rights Supporting a Fetal Right to Life

i. Positive Right to Life

Only one jurisdiction examined in this Note favors a right to fetal life over a right to abortion: Germany. Haunted by the specter of the Nazi government, "to which the individual life meant little and which therefore practiced limitless abuse with its presumed right over life and death of the citizen," the FCC found that the new Basic Law required the German government to take an absolutist stance to protect life in every stage of development.[356] If it held

likelihood that she would commit suicide. *See generally* Att'y Gen. v. X [1992] IESC 1 [1992] 1 IR 1 (Ir.).

[351] *AD 1388/2015*, *supra* note 105, ¶ 68 ("The right to life, in its broadest sense, must be understood as a right interdependent with the right to health.").

[352] *Id.* ¶¶ 51–52.

[353] *Id.* ¶ 56.

[354] *Id.* at 31.

[355] According to the First Chamber, Mexico's right to a life project, which it defined as "personal fulfillment based on the options that a persons have to lead their life and reach the destiny they have proposed," technically derives from its right to life. *Id.* at 32. But the concept of a life project so clearly falls into the category of a liberty right that it was discussed under that heading in this Note instead.

[356] *Abortion I*, *supra* note 14, at 638.

otherwise, or provided developing fetal life with lesser protections, "security of human existence . . . would be incomplete."[357]

This Note has previously established that a right to life generally weighs in favor of a right to abortion. What differentiates the right to life guaranteed by the other jurisdictions from the right to life guaranteed by the Basic Law is that, in other jurisdictions, the right to life is not a positive right.[358] In the United States, for example, the right to life prevents state interference with a general right to be alive but does not require that the state take affirmative action to actually protect someone's life.[359] In the abortion context, the American right to life manifested as a command that states may not prevent women from obtaining an abortion if the pregnancy threatens their life. It is not a requirement that the state *provides* an abortion to a woman whose life is at stake.[360] Without a positive obligation on the state to actively intercede to protect life, it seems the right to life is not strong enough to support an all-encompassing fetal right to life.

The inverse is true in Germany. To protect life, the state *must prohibit* abortions.[361] Under the value hierarchy theory of German law, no rights are more important than the right to human dignity and the right to life.[362] Those rights must be enforced to the fullest possible extent.

Even then, the positive obligation placed on the state to protect fetal life by the Basic Law is not, in practical terms, absolute. In *Abortion I*, the FCC outlined four major exceptions where forcing a woman to carry the fetus to term is non-exactable: where the woman's life or health is danger, where the pregnancy results from an illegal act (like rape), in cases of severe fetal deformity, and in cases of general social need.[363] Though this framework was not nearly as permissive as *Roe*'s trimester framework, it provided for a fairly expansive set of exceptions to the abortion ban. After *Abortion* II, those exceptions widened when the FCC held that the legislature could allow a woman to obtain an abortion—without facing criminal charges—within the first

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[357] *Id.*

[358] Grundgesetz [GG] [Basic Law], art. 1(2) (Ger.). *See also Abortion I*, *supra* note 14, at 641 (holding that a positive right to life could be "deduced" from Article 2 and also stemmed from the positive obligations on the state to protect human dignity found in Article 1).

[359] *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (holding that a municipality and its police department could not be held liable for failing to enforce a restraining order even when failure to enforce that restraining order led to the deaths of three children).

[360] *Cf. AD 1388/2015*, *supra* note 105, ¶ 104 (holding that "in the specific case of termination of pregnancy for health reasons, the State has the obligation to provide healthcare services and appropriate medical treatment to prevent women from continuing – against her will – with a pregnancy that places her at risk of suffering a health impairment").

[361] *Abortion I*, *supra* note 14, at 641–42; *Abortion II*, *supra* note 272, ¶ 267.

[362] Kommers, *supra* note 259, at 855–56, 860.

[363] *Abortion I*, *supra* note 14, at 648.

trimester without having to prove she was in a position where forcing her to carry the fetus to term would be non-exactable.[364]

The effect of these rulings is that while abortion is illegal and morally condemned in Germany, it is relatively accessible.[365] A fetus's fundamental positive right to life is not as absolute or preeminent as the FCC's prose would have a reader believe.

IV. CONCLUSION

The global abortion landscape has undergone rapid changes in the last few years. In 2018, the people of Ireland voted to remove a fetal right to life from its constitution.[366] In 2020, Poland's Constitutional Court struck down the exception to its abortion ban that over 98% of women in Poland seeking an abortion used to access the procedure.[367] That same year, Argentina and New Zealand's legislatures legalized elective abortion during the early stages of pregnancy.[368] In 2021, Mexico's Supreme Court decriminalized abortion and created new protections to the right to abortion that it claimed surpassed *Roe v. Wade*.[369]

As courts are asked to determine whether their constitutions protect a woman's right to choose—or, in the inverse, whether their constitutions explicitly protect a fetal right to life—they should consider that some rights weigh more heavily in favor of one party over the other. The rights to liberty, bodily integrity, privacy, and life weigh in favor of finding a constitutional right to abortion. The right to liberty provides the strongest foundation for a woman's right to choose whether to terminate her pregnancy. Every jurisdiction examined in this Note—despite the cultural and constitutional differences between them—recognized the protection a right to liberty should afford women in deciding whether to obtain an abortion. On the other hand, a positive right to life supports a right to fetal life. But neither the right to liberty nor the positive right to life support their respective positions on abortion absolutely. In both cases, the other party's rights may necessitate a limitation;

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[364] *Abortion II*, *supra* note 272, ¶ 185.

[365] *See* Rebouché, *supra* note 302.

[366] *Irish Abortion Referendum: Ireland Overturns Abortion Ban*, *supra* note 201.

[367] *Poland Abortion: Top Court Bans Almost All Terminations*, BBC NEWS (Oct. 23, 2020), https://www.bbc.com/news/world-europe-54642108.

[368] Kevin Sieff et al., *Abortion Rights Advocates Throughout Latin American Draw Inspiration from Argentina Vote*, WASH. POST (Dec. 30, 2020), https://www.washingtonpost.com/world/the_americas/argentina-abortion-legal-fernandez-senate-vote/2020/12/28/4a6d77d4-492a-11eb-a9f4-0e668b9772ba_story.html; *New Zealand Passes Law Decriminalizing Abortion*, BBC NEWS (Mar. 18, 2020), https://www.bbc.com/news/world-asia-51955148.

[369] Press Release: Mexico Reproductive Rights Decisions, *supra* note 94.

courts must engage in a balancing act between a woman's rights and the potential rights of the fetus.

V. EPILOGUE: IS DOBBS CONSISTENT WITH THE GLOBAL UNDERSTANDING OF WHAT IT MEANS TO HAVE CERTAIN CONSTITUTIONAL RIGHTS IN A FREE AND DEMOCRATIC SOCIETY?

In June 2022, the United States Supreme Court overruled *Roe* and *Casey* in *Dobbs v. Jackson Women's Health Organization*.[370] In contrast with nearly fifty years of the Court's precedent, the majority opinion, penned by Justice Samuel Alito, found no support for a right to abortion in the United States Constitution.[371] Was such a conclusion consistent with the global understanding of what it means to have certain constitutional rights in a free and democratic society? No. In not finding support for a right to abortion in the U.S. Constitution, the majority ignores several constitutional rights that other jurisdictions explored in this paper have found *do* provide a basis for a right to abortion: the rights to liberty, bodily integrity, and life.

First, this Note concluded that a constitutional right to liberty most strongly weighed in favor of a right to abortion. Justice Alito concluded that finding the right to abortion "is an aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment" was a "bold assertion."[372]

As previously discussed, "liberty" can be a nebulous term that, in and of itself, "provides little guidance."[373] Rather than viewing liberty broadly or in an evolving, global, modern context, the majority in *Dobbs* takes its precedential directive to ask whether a right invoked under the Due Process Clause's right to liberty is "deeply rooted in [American] history and tradition" to an extreme.[374] Justice Alito's survey of history led him to conclude that abortion was widely outlawed and criminalized from the time *Roe* was handed down back to the thirteenth century.[375] Because abortion had been prohibited from medieval times to the height of the women's movement, there could be no fundamental right to it.[376]

Certainly, the United States Supreme Court is entitled to determine how the United States' own constitution should be interpreted. But Justice Alito's

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[370] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[371] *Id.* at 2284 ("[A] right [to abortion] has no basis in the Constitution's text or in our Nation's history.").

[372] *Id.* at 2246.

[373] *Id.* at 2235.

[374] *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[375] *Id.* at 2249–54.

[376] *Id.* at 2253–54 ("[A]n unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973 . . . 'Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that] practice.'" (citation omitted)).

near religious deference to historical practice, without serious consideration for how centuries of *de jure* and *de facto* gender inequality shaped the common law and the legislation in place at the time *Roe* was decided,[377] leaves the United States in a Dark Ages almost more literal than proverbial in terms of its approach to interpreting the right to liberty. Refusing to even consider that liberty may encompass a right to abortion puts the United States wildly out of step with similar international jurisdictions.

Second, the *Dobbs* majority ignores the right to bodily integrity. Though American abortion jurisprudence has never relied heavily on the right to bodily integrity,[378] the majority does not consider bodily integrity *at all*.[379] This highlights a failure of the Court's analysis, unique in the global abortion context. Unlike every other case explored in this Note, *Dobbs* does not consider the physical and psychological damage that may result from forcing women to carry unwanted pregnancies to term. It does not consider the consequences of its decision on women. Worst of all, it does not consider that women may have constitutional rights—like the right to bodily integrity—that protect them from those consequences. Throughout this Note, the debate over abortion has been framed as a balancing act between the rights of the fetus and the rights of the pregnant woman. *Dobbs* frames the issue as a matter of states' rights,[380] leaving all considerations of the woman and her right to bodily integrity out of the equation.

Third, *Dobbs* does not positively affirm that a pregnant mother has a right to life. This Note previously characterized the constitutional right to life as the right that "protects a right to abortion in both the most limited and the most absolute way."[381] Though the majority notes that the Mississippi law at issue includes an exception to its fifteen-week abortion ban "in a medical emergency,"[382] it does not mandate that abortion bans contain such an exception in the same way *Roe* did.[383] This is important because abortion regulations are now subject to rational basis review; "[s]tates may regulate abortion for legitimate reasons" and such regulations are "entitled to a 'strong presumption of

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[377] Justice Alito waves away these concerns by noting that women gained the right to vote over fifty years prior to *Roe*, *id.* at 2260, the implication being that if they were not in favor of such laws, enfranchised women should have simply changed them. This ignores both African American women's continued struggle for the right to vote and the ongoing fight for true legal gender equality, which did not come to a head until the same era as *Roe*. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (holding for the first time that gender-based discrimination violated the Equal Protection Clause).

[378] *See* discussion *supra* Part III(A)(ii).

[379] *Contra Dobbs*, 142 S. Ct. 2228, 2328 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (examining the interaction between the right to bodily integrity and the right to abortion).

[380] *See id.* at 2279, 2284 (majority opinion).

[381] *See supra* p. 238.

[382] *Dobbs*, 142 S. Ct. at 2243 (quoting MISS. CODE ANN. § 41-41-191(4)(b) (2018)).

[383] Roe v. Wade, 410 U.S. 113, 164 (1973), *overruled by* Dobbs, 142 S. Ct. 2228 (2022).

validity.'"[384] The Court identifies both protecting the life or health of the mother and protecting prenatal life at all stages of gestational development as legitimate state interests.[385] Without clear direction from the Court to protect the life of the mother, when those two legitimate interests come into direct conflict with one another, is it not up to the state to choose which interest should win out under rational basis review? Allowing a woman to die in order to save the fetus is, undeniably, rationally related to the legitimate interest in protecting prenatal life.

Dobbs may very well allow states to direct a woman to give up her life for a fetus. In taking this position, the United States stands virtually alone in the developed world,[386] and certainly far apart from the other jurisdictions explored in this Note. Even if courts go on to strike down abortion bans that do not have exceptions for when the life of the mother is at risk, if a woman dying of pregnancy complications must go to court to litigate her right to live, it is already too late.

In all, *Dobbs* is inconsistent with other jurisdictions' holdings that certain rights—like the right to liberty, the right to bodily integrity, and the right to life—provide a strong presumption for finding that their constitutions protect a fundamental right to abortion. While various understandings of what the right to liberty means in the abortion context converge on a near universal understanding among other jurisdictions, the United States has strayed from that shared idea. Despite sharing similar fundamental structures of government, comparable commitments to the values of democracy and human rights, and kindred constitutional rights with Mexico, Canada, the Council of Europe, and Germany, the United States now stands alone in its interpretation of those constitutional rights.

The dissenters put it best: "In light of . . . worldwide liberalization of abortion laws, it is American States that will become international outliers after" the *Dobbs* decision.[387]

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[384] *Dobbs*, 142 S. Ct. at 2283–84 (quoting Heller v. Doe, 509 U.S. 312, 319 (1993)).
[385] *Id.* at 2284.
[386] *See* GUTTMACHER INST., *supra* note 13.
[387] *Dobbs*, 142 S. Ct. at 2341 (Breyer, Sotomayor, & Kagan, JJ., dissenting).