



PART VIII

.....

OVERLAPPING  
RIGHTS

.....



CHAPTER 51

.....

**THE CONSTITUTIONALIZATION  
OF ABORTION**

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COMPARATIVE constitutional study of abortion has generally focused on the decisions of a few influential jurisdictions, particularly Germany and the United States, where constitutional frameworks begin from dramatically divergent premises—protecting, respectively, unborn life and decisional autonomy.<sup>1</sup> Some comparative studies are dynamic, observing that

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<sup>1</sup> See eg Mary Ann Glendon, *Abortion and Divorce in Western Law* (1987); Donald P. Kommers, ‘Autonomy, Dignity and Abortion’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (2011), 441–58 (discussing Ireland, Germany, and the United States). See also Norman Dorsen, Michel Rosenfeld, Andrés Sajó, and Susanne Baer, *Comparative Constitutionalism: Cases and Materials* (2nd edn, 2010), 539–64 (discussing the United States, Canada, Germany, Poland, and Mexico); Vicki C. Jackson and Mark V. Tushnet, *Comparative Constitutional Law* (2nd edn, 2006), 2–139, 196–210 (discussing Canada, Germany, Ireland, and the United States). Comparative studies of abortion legislation are more comprehensive. See eg Albin Eser and Hans-Georg Koch, *Abortion and the Law: From International Comparison to Legal Policy* (2005); Reed Boland and Laura Katzive, ‘Developments in Laws on Induced Abortion: 1998–2007’ (2008) 34 *International Family Planning Perspectives* 110; see also Anika Rahman, Laura Katzive, and Stanley K. Henshaw, ‘A Global Review of Laws on Induced Abortion, 1985–1997’ (1998) 24 *International Family Planning Perspectives* 56.

constitutional doctrine in Germany and the United States has evolved to allow forms of abortion regulation that share more in common than the divergent constitutional frameworks authorizing them would suggest.<sup>2</sup>

This chapter analyzes constitutional decisions concerning abortion in the United States and Germany, their evolution over time, and their influence across jurisdictions. But rather than assume the existence of constitutional law on abortion—as so much of the literature does—the chapter asks how abortion was constitutionalized.<sup>3</sup> Examining the conflicts, within and across borders, that led to the first judicial decisions addressing the constitutionality of abortion laws in the 1970s sheds light on questions that prompted the birth of this body of law, and continue to shape its growth. The first constitutional decisions on abortion grew out of debates over women's citizenship, engendering doctrine that to this day is haunted by 'the woman question,' conflicted about whether government may or must control women's decisions about motherhood. Attention to this question in turn sheds light on the relationship of constitutional politics and constitutional law: it demonstrates how political conflict shapes constitutional law and constitutional law endeavors to shape political conflict.<sup>4</sup>

Constitutional decisions on abortion began in an era when a transnational women's movement was beginning to contest the terms of women's citizenship, eliciting diverse forms of reaction, both supportive and resisting. As I show, the woman question haunts the abortion decisions, where it is initially addressed by indirection, and over time comes to occupy a more visible role, whether as an express concern of doctrine, or as a problematic nested inside of the growing body of law articulating a constitutional obligation to protect unborn life.

The body of constitutional law on abortion that has grown up since the 1970s is concerned with the propriety, necessity, and feasibility of controlling women's agency in decisions concerning motherhood. Some courts have insisted that government should respect women's decisions about motherhood, while many others have insisted that protecting unborn life requires government to control women's decisions about motherhood. Over the decades a growing number of courts have allowed government to protect life by persuading (rather than coercing) women to assume the role of motherhood. Across Europe, a growing number of jurisdictions are now giving women the final word in decisions about abortion—on the constitutional ground that it is the best way to protect unborn life. These remarkable developments suggest deep conflict about whether law should and can control women's agency in

<sup>2</sup> See eg Richard E. Levy and Alexander Somek, 'Paradoxical Parallels in the American and German Abortion Decisions' (2001) 9 *Tulane Journal of International and Comparative Law* 109; Udo Werner, 'The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis' (1996) 18 *Loyola of Los Angeles International and Comparative Law Review* 571. For dynamic accounts attentive to transnational influence, see Federico Fabbrini, 'The European Court of Human Rights, the EU Charter of Fundamental Rights and the Right to Abortion: *Roe v Wade* on the Other Side of the Atlantic?' (2011) 18 *Columbia Journal of European Law* 1; Sjeff Gevers, 'Abortion Legislation and the Future of the "Counseling Model"' (2006) 13 *European Journal of Health Law* 27.

<sup>3</sup> One comparative study that begins by investigating the political origins of the first constitutional decisions on abortion is Machteld Nijsten, *Abortion and Constitutional Law: A Comparative European-American Study* (1990).

<sup>4</sup> On the relationship of law and politics in the abortion cases, see Reva B. Siegel, 'Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same Sex Marriage' (2011) 9 *International Journal of Constitutional Law* (forthcoming). See also Linda Greenhouse and Reva B. Siegel, 'Before (and After) *Roe v Wade*: New Questions About Backlash' (2011) 120 *Yale Law Journal* 2028; Robert Post and Reva B. Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash' (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 373; and Reva B. Siegel, 'Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*' (2008) 117 *Yale Law Journal* 1694.

decisions about motherhood. Reading the cases with attention to this conflict identifies questions that courts are grappling with in the latest generation of abortion decisions, illuminating ambiguities in the normative basis of constitutional frameworks and in their practical architecture.

At the same time, this approach to the abortion cases offers a fascinating vantage point on constitutional decision-making in the face of persistent social conflict. On one familiar view, constitutional adjudication raises the stakes of the abortion debate because it requires courts to choose between competing principles, and so inhibits compromise and incites polarization. But this chapter offers a more complicated story in which escalating political conflict precipitates constitutional adjudication, and, over time, constitutional adjudication endeavors to mediate political conflict. Recent judicial decisions on abortion seem to appreciate the tenacity of the abortion conflict, and in varying ways have come to internalize its implications for constitutional adjudication. Judgments frequently integrate opposing normative perspectives into one constitutional framework, in order to channel conflict that courts lack power to settle. Rather than endeavoring to impose values, courts often employ techniques that inform politics with constitutional value, just as recent abortion legislation aspires to shape judicial reasoning about constitutional matters. These judicial and legislative frameworks endeavor to vindicate contested constitutional values by means that preserve social cohesion.

This chapter's interest in the conflicts that engendered the constitutionalization of abortion shapes its focus. The chapter does not systematically compare abortion legislation worldwide<sup>5</sup> or investigate social practices concerning its enforcement. The chapter considers legislation for the purpose of exploring the roots and dynamic logic of constitutional law. These same interests shape its coverage of constitutional doctrine. The chapter's focus is on the development in national constitutions of broad normative frameworks concerning abortion.

The chapter proceeds in three sections. Section I briefly considers developments in the 1960s and 1970s, a time when reformers of many kinds persuaded legislatures around the world to liberalize access to abortion; when a mobilizing feminist movement first claimed that repeal of abortion restrictions was required as a matter of justice for women; when those who sought to preserve abortion's criminalization began to mobilize against change in the name of a 'right to life'; and when courts in five nations first issued judgments explaining what forms of abortion regulation their respective constitutions required or allowed.

Section II examines key constitutional decisions in the United States and Germany which together illustrate differences and similarities in the logic of constitutionalization. In the 1970s, courts in both jurisdictions struck down abortion laws and provided guidelines for future legislation, reasoning from very different constitutional norms. In 1973, the US Supreme Court interpreted its Constitution to require legislatures to respect the decision of a woman and her physician whether to terminate a pregnancy, as long as the fetus was not viable;<sup>6</sup> in 1975, the West German Federal Constitutional Court interpreted its Basic Law to require legislatures to protect unborn life, by prohibiting abortion in all cases except those that would impose extraordinary burdens on the pregnant woman.<sup>7</sup> In the 1990s, commentators observe, in the midst of domestic political conflict, each court significantly modified its judgment, to allow access to abortion after abortion-dissuasive counseling. Less remarked upon is the way that

<sup>5</sup> For comparative literature on abortion legislation, see n 1.

<sup>6</sup> *Roe v Wade* 410 US 113 (1973).

<sup>7</sup> BVerfGE 1 (1975), translated in John D. Gorby and Robert E. Jonas, 'West German Abortion Decision: A Contrast to *Roe v Wade*' (1976) 9 *John Marshall Journal of Practice & Procedure* 605 (the *Abortion I* case).

the reasoning of the courts in the 1990s was shaped by constitutional struggles of the preceding decades. I consider in particular how the view of women as citizens expressed in the US and German abortion opinions of the 1970s and 1990s evolved.

Section III looks to the logic of constitutional law today, considering how several dominant frameworks address the woman question. Some jurisdictions now require constitutional protections for women's dignity and welfare in government regulation of abortion of a kind unheard of before the modern women's movement. Many jurisdictions require constitutional protection for unborn life, providing for these purposes detailed judgments about what legislatures may or must do in regulating women's conduct. Perhaps the most remarkable aspect of this story is how understanding of this recently articulated duty to protect unborn life has evolved: over time and across jurisdictions, the constitutional duty to protect unborn life has been articulated in terms that increasingly acknowledge, accommodate, and even respect women citizens as autonomous agents—even in matters concerning motherhood. A growing number of jurisdictions now invoke the constitutional duty to protect unborn life as reason for giving women the final word in decisions concerning abortion.

## I. FROM CONSTITUTIONAL POLITICS TO CONSTITUTIONAL LAW

In the mid-twentieth century, abortion laws around the world varied greatly. Some countries allowed abortion on request; others criminalized abortion except to save the life of the pregnant woman. Between these extremes, countries permitted abortion on various 'indications' (therapeutic, eugenic, juridical (rape), and socio-economic), subject to different procedures and requirements.<sup>8</sup> From 1967 to 1977, at least 42 jurisdictions changed their abortion laws, with the vast majority expanding the legal indications for abortion.<sup>9</sup> It was during this same period that courts in the United States, Canada, and Europe began to review laws regulating abortion for conformity with their constitutions.<sup>10</sup>

Comparativists who have addressed the constitutionalization of the abortion debate as an historically specific development have tended to equate constitutionalization with adjudication or judicialization.<sup>11</sup> Some commentary in this vein views judicialization of abortion as accelerating polarization or backlash.<sup>12</sup> But at least one constitutional comparativist has located the dynamics of polarization and constitutionalization of the abortion debate in politics<sup>13</sup>—an approach that my own work on the history of abortion conflict in the United States

<sup>8</sup> Ruth Roemer, 'Abortion Law: The Approaches of Different Nations' (1967) 57 *American Journal of Public Health* 1906, 1908–18.

<sup>9</sup> Rebecca J. Cook and Bernard M. Dickens, 'A Decade of International Change in Abortion Law: 1967–1977' (1978) 68 *American Journal of Public Health* 637, 643–4. See also Ruth Roemer, 'Abortion Law Reform and Repeal: Legislative and Judicial Developments' (1971) 61 *American Journal of Public Health* 500, 504–5.

<sup>10</sup> Nijsten (n 3).

<sup>11</sup> See Glendon (n 1), 45; Kim Lane Scheppelle, 'Constitutionalizing Abortion' in Marianne Githens and Dorothy McBride Stetson (eds), *Abortion Politics: Public Policy in Cross-Cultural Perspective* (1996), 29–54.

<sup>12</sup> This theme recurs but it is not clearly developed in the literature, see Glendon (n 1), 45; Scheppelle (n 11), 29–30; Donald P. Kommers, 'The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?' (1994) 10 *Contemporary Journal of Health Law and Policy* 1, 31 (limiting claim to US judicialization).

<sup>13</sup> Nijsten (n 3), 1, 228, 232.

inclines me to adopt.<sup>14</sup> Although the matter plainly deserves further investigation, the record suggests that shifts in the form of political debate about abortion prompted and shaped subsequent constitutional litigation over the practice

In the 1960s, abortion was not generally understood as presenting constitutional questions. Arguments for liberalizing access to abortion were couched in practical and policy-based terms. In Western Europe and North America, where abortion was criminally banned but available when authorized by doctors for particular indications, poor women often relied on illegal and unsafe providers; critics argued that criminalization imposed health harms on women that were unequally distributed by class.<sup>15</sup> A different kind of public health concern arose in the 1960s as pregnant women who sought to become mothers discovered that they had been exposed to drugs or illness known to cause developmental harms to the unborn (eg thalidomide, measles).<sup>16</sup> Doctors endeavoring to care for their women patients worried about erratically enforced criminal abortion laws, and sought freedom in which to practice their profession.<sup>17</sup> In some jurisdictions, advocates for liberalization raised concerns about overpopulation—a concern that could take eugenic or environmental forms.<sup>18</sup>

These arguments for liberalizing abortion laws on public health, professional, and populationist grounds were not initially expressed or understood in constitutional terms. But youth movements challenging traditional sexual mores and a newly mobilizing women's movement advanced very different kinds of arguments for liberalizing access to abortion.<sup>19</sup>

By 1971, feminists on both sides of the Atlantic were calling for complete repeal of laws criminalizing abortion. They used 'speak-out' strategies to publicize their claims, conducting 'self-incrimination' campaigns in which women 'outed' themselves as having had abortions, and so exposed themselves to criminal prosecution—asserting, through these acts of civil disobedience, a claim to dignity, in defiance of custom and criminal law. In France, 343 women drew international attention by declaring that they had had abortions in a public manifesto that appeared in *Le Nouvel Observateur* in April 1971.<sup>20</sup> The text of the manifesto, written by Simone de Beauvoir and signed by many prominent French women, called for an end to secrecy and silence and demanded access to free birth control and to abortion services.<sup>21</sup> Two months after the release of the French manifesto, Aktion 218, a women's organization in West Germany named after the Penal Code Section criminalizing abortion, followed the French example, publishing abortion stories and the names of 374 German women in *Der Stern* in a

<sup>14</sup> On the relationship of constitutional politics and constitutional law, see n 4.

<sup>15</sup> See Dagmar Herzog, *Sexuality in Europe: A Twentieth-Century History* (2011), 156, 159; Greenhouse and Siegel (n 4), 2036.

<sup>16</sup> See Herzog (n 15), 156; Greenhouse and Siegel (n 4), 2037; Christopher Tietze, 'Abortion in Europe' (1967) 57 *American Journal of Public Health* 1923, 1926.

<sup>17</sup> Nijsten (n 3), 29–33.

<sup>18</sup> Greenhouse and Siegel (n 4), 2038–9; Nijsten (n 3), 33.

<sup>19</sup> Greenhouse and Siegel (n 4), 3029–46; Herzog (n 15), 156–60; Nijsten (n 3), 30; Reva B. Siegel, 'Roe's Roots: The Women's Rights Claims that Engendered Roe' (2010) 90 *Boston University Law Review* 1875. See also Myra Marx Ferree, William Anthony Gamson, Jürgen Gerhards, and Dieter Rucht, *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* (2002), 131–53; Dorothy McBride Stetson (ed), *Abortion Politics, Women's Movements, and the Democratic State: A Comparative Study of State Feminism* (2003); Joni Lovenduski and Joyce Outshoorn (eds), *The New Politics of Abortion* (1986).

<sup>20</sup> 'La liste des 343 françaises qui ont le courage de signer le manifest "je me suis fait avorter"' ['The list of 343 French women who have the courage to sign the manifesto "I have had an abortion"'] *Le Nouvel Observateur*, April 5, 1971, at 5 (author's translation).

<sup>21</sup> See Herzog (n 15), 156.

statement asserting that the law criminalizing abortion subjected women to ‘degrading and life-threatening circumstances’, coerced women, and ‘branded them as criminals.’<sup>22</sup> Within months, women in Italy undertook their own self-incrimination campaign, releasing on August 4, 1971 a statement that women signed, acknowledging that they had had an abortion, and calling for abolition of the crime, on the ground that abortion should be ‘available for each class’ and that motherhood should be a ‘free, conscious choice.’<sup>23</sup> Women in the United States also joined in, with a petition, on the model of the French campaign, published in the spring 1972 edition of *Ms Magazine*.<sup>24</sup>

Feminists changed the shape of the debate about abortion. Public health advocates and others who sought to liberalize access to abortion in the 1960s argued for incremental reform on the indications model, which they defended by appeal to shared values (health, class equity). By contrast, feminists sought categorical change—repeal of laws criminalizing abortion—which they justified on symbolic as well as practical grounds.

Feminists protested the criminalization of abortion as a symptom of a social order that devalued and disempowered women, and asserted that repeal of laws criminalizing abortion was a necessary first step in women’s emancipation. In 1969, Betty Friedan, president of the National Organization for Women, mobilized these arguments in a call for the repeal of laws criminalizing abortion:<sup>25</sup>

Women are denigrated in this country, because women are not deciding the conditions of their own society and their own lives. Women are not taken seriously as people. Women are not seen seriously as people. So this is the new name of the game on the question of abortion: that women’s voices are heard.

... [W]omen are the ones who therefore must decide, and what we are in the process of doing, it seems to me, is realizing that there are certain rights that have never been defined as rights, that are essential to equality for women, and they were not defined in the Constitution of this, or any country, when that Constitution was written only by men. The right of woman to control her reproductive process must be established as a basic and valuable human civil right not to be denied or abridged by the state.<sup>26</sup>

Friedan insisted:

there is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process. . . . The real sexual revolution is the emergence of women from passivity, from *thingness*, to full self-determination, to full dignity. . . .<sup>27</sup>

<sup>22</sup> Wir haben abgetrieben! [We Aborted] *Stern* (Hamburg), June 6, 1971 at 16 (author’s translation). See also Alice Schwarzer (ed), *Frauen gegen den §218. 18 Protokolle, aufgezeichnet von Alice Schwarzer* [Women Against §218: Eighteen Interviews, Recorded by Alice Schwarzer] (1971), 146 (author’s translation).

<sup>23</sup> ‘Anche in Italia “autodenunce” per l’aborto’, *Liberazione Notizie*, August 4, 1971, reprinted at *Even in Italy ‘autoenunce’ for abortion*, available at <[http://old.radicali.it/search\\_view.php?id=44852&lang=&cms=](http://old.radicali.it/search_view.php?id=44852&lang=&cms=)>. See Herzog (n 15), 159 n 24; Marina Calloni, ‘Debates and Controversies on Abortion in Italy’ in Stetson (n 19), 181.

<sup>24</sup> Barbaralee D. Diamonstein, ‘We Have Had Abortions’, *Ms Magazine*, Spring 1972, 34; cf Siegel, ‘Roe’s Roots’ (n 19), 1880, 1885. For the language of some of the manifestos, see Siegel, ‘Dignity and Sexuality’ (n 4), ms at 7 (on file with author).

<sup>25</sup> Betty Friedan, President, National Organization for Women, Address at the First National Conference on Abortion Laws: Abortion: A Woman’s Civil Right (February 1969), reprinted in Linda Greenhouse and Reva B. Siegel (eds), *Before Roe v Wade: Voices that Shaped the Abortion Debate Before the Supreme Court’s Ruling* (2010), 38.

<sup>26</sup> Greenhouse and Siegel (n 25), 39.

<sup>27</sup> *Ibid* 39–40.



Long shrouded in silence, the practice of abortion was now the object of political struggle, and increasingly a site of fundamental rights claims premised on the understanding that the regulation of abortion defined the standing of citizens and the nature and values of the polity. French feminists challenging the criminalization of abortion appealed to the ideals and traditions of the French revolutionary founding.<sup>28</sup> A leaflet spread in Vienna, Austria announced: ‘The fight against the law prohibiting abortions is part of the fight for the women’s right of self-determination, for their equal rights, in the law, in the public, at the places of work and within the families!’<sup>29</sup>

Growing calls for liberalization of abortion law provoked countermobilization in defense of the status quo. Opponents of abortion reform, often led by lay and clerical leaders of the Catholic Church who mobilized before feminists even entered the debate,<sup>30</sup> tended also to employ a categorical and symbolic style of politics. In the United States, for example, the Catholic Church created a national organization in 1967 designed to block any relaxation of criminal restrictions on abortion;<sup>31</sup> that same year, Church leaders mobilized parishioners against passage of an indications law in New York by invoking a God-given ‘right of innocent human beings to life’ and equating incremental reform of the law criminalizing abortion with murder and genocide.<sup>32</sup>

In West Germany, conservative Catholic opponents of abortion reform invoked Nazism.<sup>33</sup> As in the United States, conservative Catholics argued that incremental reform of abortion law would put in jeopardy the moral fabric of the nation. In 1970, the Central Committee of German Catholics, an association of Catholic lay persons, objected that ‘the respect of human life is not subject to compromise’, and warned that ‘A state that denies to becoming life the protection of law puts life in general in danger. It thereby puts its own inner legitimacy at stake...’<sup>34</sup> Catholic opponents of decriminalization, like feminist proponents, tied abortion to fundamental questions of human dignity.<sup>35</sup> The Central Committee of German Catholics argued that decriminalizing abortion would violate West German constitutional guarantees of dignity: ‘If becoming life is not protected, including with the means of the criminal law, unconditional fundamental principles of a society founded on human dignity are not assured for long.’<sup>36</sup> As the West German Parliament considered liberalizing access, the conference of German Catholic Bishops called for a suit challenging the constitutionality of the abortion reform legislation if enacted,<sup>37</sup> and Robert Spaemann, a Catholic philosopher and public intellectual, observed in 1974 that the proposed abortion liberalization ‘would, in the eyes of many

<sup>28</sup> Jean C. Robinson, ‘Gendering the Abortion Debate: The French Case’ in Stetson (n 19), 86, 88.

<sup>29</sup> Maria Mesner, ‘Political Culture and the Abortion Conflict: A Comparison of Austria and the United States’ in David F. Good and Ruth Wodak (eds), *From World War to Waldheim: Culture and Politics in Austria and the United States* (1999), 187–209, 196 (citing Maria Mesner, *Frauensache? Zur Auseinandersetzung um den Schwangerschaftsabbruch in Österreich nach 1945* (1994), 207).

<sup>30</sup> Greenhouse and Siegel (n 4), 2048–52 (United States); Anne Egger and Bill Rolston (eds), *Abortion in the New Europe: A Comparative Handbook* (1994), 33, 40 (Britain and Austria).

<sup>31</sup> Greenhouse and Siegel (n 4), 2046–51, 2077–9.

<sup>32</sup> *Ibid.* 2049. See generally Greenhouse and Siegel (n 25), 69–115 (surveying religious and secular arguments against abortion reform in the United States in the decade before *Roe*).

<sup>33</sup> Dagmar Herzog, *Sex After Fascism: Memory and Morality in Twentieth Century Germany* (2005), 225; Lewis Joachim Edinger, *West German Politics* (1986), 281.

<sup>34</sup> Manfred Spieker, *Kirche und Abtreibung in Deutschland: Ursachen und Verlauf eines Konflikts* (2nd edn, 2008), 22 (author’s translation).

<sup>35</sup> Siegel, ‘Dignity and Sexuality’ (n 4), ms at 9, 16, 19–20; Spieker (n 34), 23.

<sup>36</sup> Spieker (n 34), 22–3.

<sup>37</sup> Edinger (n 33), 282.

citizens of our country, violate the legitimacy of the State at its very foundations for the first time since 1949... With the periodic model our State would, to them, cease to be a Rechtsstaat.<sup>38</sup>

During the 1970s, these national and transnational debates led to the enactment of legislation in a number of countries that liberalized access to abortion, either on the indications model (doctors given authority to perform abortion upon verification of conditions satisfying a therapeutic, juridical, or social indication) or periodic model (women allowed to obtain abortion during a specified period, often in the first 10 to 12 weeks of pregnancy). But conflict over the new laws spilled out of the legislative arena, and those frustrated in politics increasingly brought their claims to court,<sup>39</sup> where conflict was readily intelligible as a *constitutional* conflict because it had *already* been expressed as an argument about justice and the fundamental character of the polity.

In the 1970s, courts in the United States, France, the Federal Republic of Germany, Austria, and Italy reviewed for the first time the constitutionality of abortion laws.<sup>40</sup> As Machteld Nijsten has observed, ‘The European courts had no discretionary power in deciding the issue: In Germany, France and Austria, the courts were seized under the power of abstract review, and as such they served as a political instrument for the defeated opposition in Parliament.’<sup>41</sup> In the United States and Italy courts struck down laws criminalizing abortion, in France and Austria courts upheld laws liberalizing access to abortion, while in the Federal Republic of Germany, the Federal Constitutional Court declared unconstitutional legislation allowing abortion in the early weeks of pregnancy.

## II. FOUNDATIONAL FRAMEWORKS AND THEIR EVOLUTION: UNITED STATES AND GERMANY

Much attention has been devoted to the 1970s decisions of the US and West German courts because there is such a dramatic difference in their normative frameworks: the US case struck down legislation criminalizing abortion in order to protect decisional autonomy, while the West German case struck down legislation legalizing access to abortion in order to protect

<sup>38</sup> Robert Spaemann, *Kein Recht Auf Leben?: Argumente zur Grundsatzdiskussion um die Reform des §218* (1974), 10 (author’s translation). For a history of Catholic Church opposition to reform in the years leading up to the Court’s ruling, see Hermann Tallen, *Die Auseinandersetzung über §218 StGB* (1977).

<sup>39</sup> Nijsten (n 3), 232.

<sup>40</sup> In the United States, movements seeking repeal of abortion legislation began litigation in a number of states in a quest to move federal courts to address the constitutionality of restrictions on abortion, ultimately prevailing in January of 1973 in the Supreme Court. *Roe* (n 6). See Siegel (n 19), 1884–94. Over two years (1974–75), four courts in Western Europe issued judgments on the constitutionality of the legal regulation of abortion: *Abortion I* (n 7), Judgment of October 11, 1974, Verfassungsgerichtshof [1974] Erklärungen des Verfassungsgerichtshof 221, translated and reprinted in Mauro Cappelletti and William Cohen, *Comparative Constitutional Law: Cases and Materials* (1979), 615 (Austria); Judgment of January 15, 1975, Conseil constitutionnel, 1975 DS Jur 529, translated and reprinted in Cappelletti and Cohen, *ibid* 577 (France); Judgment of February 18, 1975, Corte costituzionale [Rac uff corte cost] 201, 98 Foro It I 515, translated and reprinted in Cappelletti and Cohen, *ibid* 612 (Italy). See Nijsten (n 3), 232. See also Donald P. Kommers, ‘Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective’ (1985) 3 *Brigham Young University Law Review* 371, 371–2.

<sup>41</sup> Nijsten (n 3), 232. See also n 34 and accompanying text.

unborn life.<sup>42</sup> Each judgment provided a framework to ensure that future abortion legislation would respect constitutional values. Decisions in the 1990s reaffirmed these constitutional frameworks, in the course of moderating them.

Commentators have attributed the difference in constitutional concern animating the 1970s judgments to differences in constitutional or political culture.<sup>43</sup> For example, Gerald Neuman contrasts the US and German legal systems in their willingness to recognize a constitutional duty of protection and to impose affirmative obligations on the state.<sup>44</sup> Donald Kommers points to differences in political culture, asserting that US constitutional law expresses a

vision of personhood [that] is partial to the city perceived as private realm in which the individual is alone, isolated, and in competition with his fellows, while the [German] vision is partial to the city perceived as a public realm where individual and community are bound together in reciprocity.

Given these differences in political culture, Kommers reasons, the ‘authority of the community, as represented by the state, to define the liberty interest of mothers and unborn life finds a more congenial abode in the German than in American constitutional law.’<sup>45</sup>

Practices of comparison may exaggerate intergroup differences and occlude intragroup conflicts. Differences in political culture could well have made the West German judgment more acceptable in West Germany than it would have been in the United States; but polls showed widespread disagreement with the West German Court’s decision to strike down the new abortion legislation.<sup>46</sup> Comparative constitutional inquiry can consider how judicial decisions respond to political conflict, and not simply to political culture.<sup>47</sup> In the United States and the Federal Republic of Germany, courts issued constitutional judgments on abortion after protracted debate over whether to liberalize access to abortion—a debate joined in the years immediately preceding the judgments by a mobilizing feminist movement calling for repeal of the criminal law.<sup>48</sup> Close comparative analysis of how this conflict shaped the judgments, or how the judgments aspired to shape this conflict is beyond the scope of this chapter. But a few observations about the relation of the judgments and the conflict suggest that further comparative inquiry of this kind would be fruitful.

<sup>42</sup> See n 1. For an early example, Donald P. Kommers, ‘Abortion and the Constitution: United States and West Germany’ (1977) 25 *American Journal of Comparative Law* 255, 276–85.

<sup>43</sup> Commentators do not generally look to constitutional text to explain the divergent approaches of the US and German courts; constitutions do not begin expressly to address abortion until after the decisions of the 1970s. See eg Republic of Ireland, Eighth Amendment of the Constitution Act, 1983, 1983 Acts of the Oireachtas, October 7, 1983 (amending Irish Constitution, Art 40.3.3).

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.

<sup>44</sup> See Gerald L. Neuman, ‘Casey in the Mirror: Abortion, Abuse, and the Right to Protection in the United States and Germany’ (1995) 43 *American Journal of Comparative Law* 273, 274.

<sup>45</sup> Kommers (n 1), 452–3 (describing the United States as a liberal democracy and Germany as a social democracy).

<sup>46</sup> Simone Mantei, *Nein und Ja zur Abtreibung: Die Evangelische Kirche in der Reformdebatte um §218 StGB (1970–1976)* (2004), 448 (author’s translation); Edinger (n 33), 283; Siegel, ‘Dignity and Sexuality’ (n 4), [TAN 56–58].

<sup>47</sup> See eg Levy and Somek (n 2); Nijsten (n 3); Siegel, ‘Dignity and Sexuality’ (n 4); see also Ferree, Gamson, Gerhards, and Rucht (n 19).

<sup>48</sup> See sources in n 19 (feminist advocates of liberalization); nn 30–38 (opponents of liberalization).

In what follows, I show that in the first round of decisions constitutionalizing abortion, each court responded to feminist claims. And the response of each court changed over time. By the 1990s, the autonomy claims of women came to play a more significant role in the abortion cases of *each* nation. The inquiry illustrates how constitutional judgments about the agency of women citizens are nested within constitutional protections for life, and how these judgments evolved in the late twentieth century.

## 1. The 1970s

In 1973, the US Supreme Court struck down a nineteenth-century criminal law that banned abortion except to save a woman's life, as well as a twentieth-century law that permitted abortion on the basis of more expansive indications. *Roe v Wade*<sup>49</sup> held that the constitutional right to privacy (a liberty right protected by the Fourteenth Amendment) encompassed a woman's decision in consultation with her physician whether to terminate a pregnancy. At the same time, the Court recognized that the privacy right 'is not absolute... at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.'<sup>50</sup> To coordinate the right and its regulation, the Court set forth a 'trimester framework' that allowed increasing regulation of women's abortion decision over the course of a pregnancy, permitting restrictions on abortion to protect unborn life only at the point of viability (when a fetus is deemed capable of surviving outside a woman's womb).<sup>51</sup>

*Roe* responded both to public health and feminist claims. The decision offered an account, unprecedented in constitutional law, of the physical and emotional harms to women that criminal abortion laws inflict, and declared that the law's imposition of these harms on women a matter of constitutional concern: "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."<sup>52</sup> The Court declared these harms constitutionally significant after years of public health reporting and feminist testimony, on the street and in court, about the ways that criminalization of abortion harms women.<sup>53</sup>

Even so, the Court's opinion in *Roe* seems mainly responsive to public health arguments, and at best only indirectly responsive to feminist claims. While the appellant's brief in *Roe* argued that the Texas law banning abortion 'severely impinges [a woman's] dignity, her life plan and often her marital relationship',<sup>54</sup> the *Roe* decision focused much more clearly on the *doctor's* autonomy than on his patients', repeating statements of this kind:

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.<sup>55</sup>

As importantly, the Court's account of the harms to women that criminal abortion laws inflict focused on the physical and psychological difficulties of pregnancy that 'a woman and her responsible physician necessarily will consider in consultation.'<sup>56</sup> The Court's account of harms did not speak in the register of citizenship or status about the injury to a woman's dignity in

<sup>49</sup> Greenhouse and Siegel (n 25), 256–8.

<sup>50</sup> *Ibid* 155.

<sup>51</sup> *Ibid* 164–5.

<sup>52</sup> See *Roe* (n 6), 153.

<sup>53</sup> See Section I; Siegel (n 19), 1885–94.

<sup>54</sup> Brief for Appellants, *Roe v Wade* 410 US 113 (1973), (No 70-18) 1971 WL 128054, reprinted in Greenhouse and Siegel (n 25), 230, 234.

<sup>55</sup> *Roe* (n 6), 153. Siegel (n 19), 1897.

<sup>56</sup> *Roe* (n 6), 153.

being coerced by government to bear a child and to become a mother.<sup>57</sup> The opinion's discussion of the state's interest in restricting abortion to protect potential life makes no mention of these concerns.<sup>58</sup>

By contrast, the 1975 decision of the German Federal Constitutional Court was much more explicit in its engagement with feminist claims. The West German Court held that a 1974 law, which decriminalized abortion during the first 12 weeks of pregnancy for women provided abortion-dissuasive counseling, violated the Basic Law: 'The life which is developing in the womb of the mother is an independent legal value which enjoys the protection of the Constitution.'<sup>59</sup> The Court reasoned that the duty of the state to protect unborn life was derived from the Basic Law's protection for life and for dignity: 'Where human life exists, human dignity is present to it.'<sup>60</sup>

The Federal Constitutional Court warned the legislature not to 'acquiesce' in popular beliefs about abortion that might have developed in response to 'passionate discussion of the abortion problematic.'<sup>61</sup> The Court expressly and rather brusquely dismissed the Parliament's efforts to devise a framework that respected the dignity of women *and* of the unborn:

The opinion expressed in the Federal Parliament during the third deliberation on the Statute to Reform the Penal Law, the effect of which is to propose the precedence for a particular time 'of the right to self-determination of the woman which flows from human dignity vis-à-vis all others, including the child's right to life'... is not reconcilable with the value ordering of the Basic Law.<sup>62</sup>

Given the overriding importance of the dignity of human life, the Court concluded, 'the legal order may not make the woman's right to self-determination the sole guideline of its rule-making. The state must proceed, as a matter of principle, from a duty to carry the pregnancy to term.'<sup>63</sup>

Thus, the Federal Constitutional Court engaged with feminist dignity and autonomy arguments for decriminalizing abortion by striking down legislation enacted in response to them as unconstitutional in principle, and, further, by recognizing a constitutional duty to protect life that requires law to enforce the maternal role and responsibilities of women.

Judgments about the maternal role and responsibilities of women are nested throughout the opinion's account of the constitutional duty to protect life. The duty to protect life was 'entrusted by nature in the first place to the protection of the mother. To reawaken and, if required to strengthen the maternal duty to protect, where it is lost, should be the principal goal of the endeavors of the state by the protection of life'; the duty to protect life obliged government to 'strengthen the readiness of the expectant mother to accept the pregnancy as her own responsibility.'<sup>64</sup> Having established that government had a duty to protect life enforceable against pregnant women, the Court distinguished between the 'normal' burdens of motherhood, which the duty to protect life obliged government to exact by law, and extraordinary burdens of motherhood, such as those posing a threat to a woman's life or health, which are non-exactable by law.<sup>65</sup> The Court reasoned that when a pregnant woman faced difficulties

<sup>57</sup> See Siegel (n 19), 1899.

<sup>58</sup> Reva B. Siegel, 'Reasoning From the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) 44 *Stanford Law Review* 261, 275-7.

<sup>59</sup> *Abortion I* (n 7), 605.

<sup>60</sup> *Ibid* 641 (citing Arts 2(2)(1) and 1(1)(2)).

<sup>61</sup> *Ibid* 661. See also *ibid* 662.

<sup>62</sup> *Ibid* 643 (citing German Federal Parliament, Seventh Election Period, 96th Sess, Stenographic Reports, 6492).

<sup>63</sup> *Ibid* 644.

<sup>64</sup> *Ibid* 644.

<sup>65</sup> *Ibid* 647.

other than the 'normal' burdens of motherhood, her 'decision for an interruption of pregnancy can attain the rank of a decision of conscience worthy of consideration', and in these circumstances it would be inappropriate to use criminal law or 'external compulsion where respect for the sphere of personality of the human being demands fuller inner freedom of decision.'<sup>66</sup> By contrast, women who 'decline pregnancy because they are not willing to take on the renunciation and the natural motherly duties bound up with it' may decide 'upon an interruption of pregnancy without having a reason which is worthy of esteem within the value order of the constitution.'<sup>67</sup> The Court recognized a woman's concern about continuing a pregnancy that posed a threat to her life or grave risk to her health as respect-worthy, hence warranting an exemption from legal compulsion. The Court authorized the legislature to permit abortion on the basis of other analogously non-exactable indications.<sup>68</sup>

Even in these cases the state may not be content merely to examine, and if the occasion arises, to certify that the statutory prerequisites for an abortion free of punishment are present. Rather, the state will also be expected to offer counseling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, to encourage her to continue the pregnancy...<sup>69</sup>

## 2. The 1990s

In the 1990s, acting under different forms of political pressure, the US and German courts each revisited their judgments of the 1970s, reaffirming and modifying them.<sup>70</sup> Each court continued to reason from its original premises, yet did so in ways that gave far greater recognition to women's autonomy in making decisions about motherhood.

The Supreme Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v Casey*<sup>71</sup> analyzed the constitutionality of a Pennsylvania statute that imposed a 24-hour waiting period before abortions could be performed, required a woman seeking an abortion to receive certain information designed to persuade her to choose childbirth over abortion, required a minor to obtain parental consent, and required a woman seeking an abortion to provide notice to her spouse.<sup>72</sup> The Court reaffirmed what it termed the central principle of *Roe*: 'the woman's right to terminate her pregnancy before viability'.<sup>73</sup> But the *Casey* Court rejected *Roe*'s trimester framework and announced that it would allow government regulation for the purpose of protecting potential life *throughout* the term of a pregnancy, *as long as* the

<sup>66</sup> Ibid.      <sup>67</sup> Ibid 653.

<sup>68</sup> Ibid 624, 647–8. The Court gave the legislature discretion whether to allow abortion on eugenic, rape, and social emergency indications. Ibid.

<sup>69</sup> Ibid 649.

<sup>70</sup> East Germany allowed abortion during the first 12 weeks of pregnancy as West Germany did not, and so, in the 1990s, the abortion issue became entangled in negotiations over reunification, leading to the enactment of more liberal abortion legislation. See Peter H. Merkl, *German Unification in the European Context* (1993), 176–80.

In the United States, abortion became entangled in the competition of the national political parties for voters. Even before *Roe*, leaders of the Republican Party changed position on abortion to attract Catholics who had historically voted with the Democratic Party, as well as Americans opposed to feminist understandings of the family. By the late 1980s, a majority of Republican voters opposed abortion, and the party had reshaped the composition of the Supreme Court in ways that threatened *Roe*. Greenhouse and Siegel (n 4); Post and Siegel (n 4).

For an account of the changing political context of the 1990s and renewed feminist and Catholic mobilization in Germany and the United States, see Ferree, Gamson, Gerhards, and Rucht (n 19), 39–43.

<sup>71</sup> 505 US 833 (1992).      <sup>72</sup> Ibid 844.      <sup>73</sup> Ibid 871.

law did not impose an ‘undue burden’ on the pregnant woman’s decision whether to bear a child. To determine whether regulation imposed an undue burden the Court announced it would ask whether the statute has ‘the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’<sup>74</sup>

Even as the Court revised the *Roe* trimester framework to allow restrictions on abortion throughout pregnancy, it restated the constitutional basis of the abortion right in terms that gave far more recognition to women’s decisional autonomy. *Casey*’s ‘undue burden’ framework allowed government to deter abortion, but only by means that inform, rather than block, a woman’s choice about whether to end a pregnancy: ‘What is at stake is the woman’s right to make the ultimate decision.’<sup>75</sup>

At the same time, *Casey* emphasized, in ways *Roe* did not, that constitutional protections for decisions about abortion vindicate women’s dignity, their liberty, and their equality as citizens.<sup>76</sup> The portion of the plurality opinion attributed to Justice Kennedy invoked dignity to explain why the Constitution protects decisions regarding family life: ‘These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.’<sup>77</sup> Protecting women’s authority to make their own decisions about motherhood simultaneously vindicates constitutional values of equality as well as liberty. Reaffirming the abortion right, *Casey* locates its constitutional basis in evolving views of women’s citizenship that give to women, rather than the state, primary authority in making decisions about their roles:

Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>78</sup>

In *Casey*, the Court applied the undue burden standard and upheld all of Pennsylvania’s regulations, except for the provision requiring a woman to inform her spouse before she could end a pregnancy—which the Court characterized as inconsistent with modern understandings of women as equal citizens.<sup>79</sup>

In striking down the spousal notice provision, the Court again invoked liberty and equality values, explaining how women’s standing as citizens had evolved with changing understandings of women’s roles:

<sup>74</sup> Ibid 877. <sup>75</sup> Ibid 877.

<sup>76</sup> See Siegel, ‘Dignity and the Politics of Protection’ (n 4), 1735–66, 1773–80. For an account tracing these arguments from the 1970s to the US Supreme Court’s most recent abortion decision, see Siegel (n 19). See also Siegel, ‘Dignity and Sexuality’ (n 4) (analyzing competing claims about dignity and abortion historically and transnationally). Since *Casey*, scholars in the United States have increasingly discussed the abortion right as grounded in equality as well as liberty. See Reva B. Siegel, ‘Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression’ (2007) 56 *Emory Law Journal* 815.

<sup>77</sup> Ibid 851 (O’Connor, Kennedy, Souter JJ, Joint Opinion).

<sup>78</sup> Ibid 852 (O’Connor, Kennedy, Souter JJ, Joint Opinion); ibid 856 (O’Connor, Kennedy, Souter JJ, Joint Opinion):

for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

The opinion ties constitutional protection for women’s abortion decision to the understanding, forged in the Court’s sex discrimination cases, that government cannot use law to enforce traditional sex roles on women.

<sup>79</sup> *Casey* (n 71), 893–8.

Only one generation has passed since this Court observed that ‘woman is still regarded as the center of home and family life’, with attendant ‘special responsibilities’ that precluded full and independent legal status under the Constitution. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children.<sup>80</sup>

*Casey* protected women’s dignity in making the very decisions about motherhood that the Federal Constitutional Court held were governed by natural duty—as, for example when the German Court reasoned that women who ‘decline pregnancy because they are not willing to take on the renunciation and the natural motherly duties bound up with it’ may decide ‘upon an interruption of pregnancy without having a reason which is worthy of esteem within the value order of the constitution.’<sup>81</sup>

In 1990s, the Federal Constitutional Court would reaffirm this understanding, but in a framework that indirectly afforded far greater recognition to women’s autonomy in making decisions about motherhood. The reunification of Germany required reconciling the law of East Germany, which allowed women to make their own decisions about abortion in early pregnancy with the law of West Germany, which did not.<sup>82</sup> The German Parliament enacted legislation that allowed women to make their own decisions about abortion in the first 12 weeks of pregnancy after participating in a counseling process designed to persuade them to carry the pregnancy to term—a form of regulation presented as more effective in deterring abortion than a criminal ban and respecting both ‘the high value of unborn life and the self-determination of the woman.’<sup>83</sup> The Federal Constitutional Court invalidated the legislation, but shifted ground as it did so.

The Court reaffirmed that protection for the unborn vis-à-vis its mother is only possible if the legislature forbids a woman to terminate her pregnancy.<sup>84</sup> The legislature was obliged to use the criminal law to demarcate obligations exactable of the woman, in order clearly to communicate the scope of the duty to protect—an obligation bearing not only on the pregnant woman herself, but also on others in a position to support her in carrying the pregnancy to term.<sup>85</sup> But the legislature was not obliged to protect unborn life through the threat of criminal sanction itself. The legislature could devise a scheme of counseling to persuade pregnant women to carry to term, and as long as the counseling was effective to that end, could even decide to dispense with the threat of criminal punishment ‘in view of the openness necessary for counseling to be effective.’<sup>86</sup> The legislature could base its protection concept

on the assumption—at least in the early phase of pregnancy—that effective protection of unborn human life is only possible *with* the support of the mother. . . . The secrecy pertaining to the unborn, its helplessness and dependence and its unique link to its mother would appear to justify the view that the state’s chances of protecting it are better if it works together with the mother.<sup>87</sup>

The Court presented this new account of the state’s duty of protection as in ‘conformity with the respect owed to a woman and future mother,’<sup>88</sup> observing that the counseling concept endeavors to exact what the pregnant woman owes ‘without degrading her to a mere object of protection’ and ‘respects her as an autonomous person by trying to win her over as an ally in the protection of the unborn.’<sup>89</sup> While the Court presented the decision as requiring legislative

<sup>80</sup> Ibid 896–8 (citation omitted).      <sup>81</sup> *Abortion I* (n 7) at 653; see nn 63–8.      <sup>82</sup> See n 70.

<sup>83</sup> See 88 BVerfGE 203 (1993), [36]–[37] available at <[http://www.bverfg.de/entscheidungen/fs19930528\\_2bvfo00290en.html](http://www.bverfg.de/entscheidungen/fs19930528_2bvfo00290en.html)> (the *Abortion II* case) (official court translation).

<sup>84</sup> Ibid [149].      <sup>85</sup> Ibid [173]–[174]; see also *ibid* [170]–[172].      <sup>86</sup> Ibid [178].

<sup>87</sup> Ibid [183].      <sup>88</sup> Ibid [185].      <sup>89</sup> Ibid [214].



adherence to its 1975 judgment, the Court's willingness to accept the substitution of counseling for threat of criminal prosecution augured a new view of the citizen-subject that abortion regulation addresses, and a transformed understanding of the constitutional duty to protect unborn life. In this emergent view, women citizens are persons who exercise autonomy even as to the ways they inhabit family roles; that exercise of autonomy is sufficiently respect-worthy that women would be degraded were abortion law to treat them as a mere object or instrument for protecting unborn life.

In the wake of the 1993 decision, abortion remains criminally prohibited except under restricted indications, but a woman who completes counseling can receive a certificate granting her immunity from prosecution for an abortion during the first 12 weeks of pregnancy.<sup>90</sup> In this new framework, Catholic lay groups are involved in counseling, and where necessary, issuing abortion certificates and providing the sex education required by law, although this has been the subject of much and extended controversy.<sup>91</sup>

### III. CONTEMPORARY CONSTITUTIONAL FRAMEWORKS

As we have seen, courts in the United States and Germany imposed different frameworks on the regulation of abortion designed to vindicate competing constitutional values; but within two decades, courts in each nation had reaffirmed and modified those frameworks to give greater recognition to women's agency in the abortion decision, while simultaneously emphasizing the importance of protecting unborn life. The 1990s cases reject the view that constitutionalization of abortion is a 'zero-sum game', and present frameworks that vindicate competing constitutional values, endeavoring to mediate conflicts among them.

Today, we can see constitutionalization of abortion taking several forms. Some jurisdictions require government to respect women's dignity in making decisions about abortion, and consequently require legislators to provide women control, for all or some period of pregnancy, over the decision whether to become a mother. Many jurisdictions require constitutional protection for unborn life, criminalizing abortion while permitting exceptions on an indications basis to protect women's physical or emotional welfare, but not their autonomy. Yet other jurisdictions protect unborn life through counseling regimes that are result-open; these jurisdictions begin by recognizing women's autonomy for the putatively instrumental reason that it is the best method of managing the modern female citizen, and then come to embrace protecting women's dignity as a concurrent constitutional aim of depenalizing abortion.

In what follows, I explore these three forms of constitutionalization, in order of their historical emergence, and briefly illustrate with contemporary examples. The forms are distinguishable along several dimensions. As will become apparent, the frameworks of review that jurisdictions have adopted vary in the *constitutional values* that courts expect abortion legislation to vindicate (eg respecting women's dignity, protecting unborn life, protecting women's welfare), and the *legislative regimes* associated historically and symbolically with the vindication of these constitutional values (eg 'periodic' regimes which allow abortion at a woman's

<sup>90</sup> See German Penal Code (StGB), para 218a; in English available at <[http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#StGB\\_000P218](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGB_000P218)>.

<sup>91</sup> Mary Anne Case, 'Perfectionism and Fundamentalism in the Application of the German Abortion Laws' in Susan H. Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (2009) 93, 96; Nanette Funk, 'Abortion Counselling and the 1995 German Abortion Law' (1996-97) 12 *Connecticut Journal of International Law* 33.

request for a period of pregnancy; ‘indications’ regimes which prohibit abortion except on indications determined by a third party; and ‘result-open’ dissuasive counseling regimes which allow a woman to make the ultimate decision after she is counseled against abortion). Historical and symbolic ties between constitutional values and particular legislative abortion regimes have endowed those regimes with powerful social meaning, even as enforcement of abortion legislation may provide women access in striking variance. Finally, there is variance within these forms in the *judicial constraints* courts impose on representative government (do courts allow, require, or prohibit legislation vindicating particular constitutional values?). In some cases, these differences in judicial constraint seem connected to the values the case law vindicates; but in others they suggest an interesting story about the interaction of courts and representative government in the articulation of constitutional law.

There are other expressions of this evolving relationship between courts and legislatures. Over the decades, constitutions have been amended to address abortion more or less directly, and statutes have been enacted that include constitutionalized preambles, either in response to antecedent constitutional law or in an effort to call into being new bodies of constitutional law. With the growth of legislative constitutionalism in abortion regulation, the boundaries between constitutional law and politics grow ever blurrier.

## 1. Respecting Women’s Dignity: Periodic Legislation

This approach, originating in the United States, constitutionalizes the regulation of abortion with attention to women’s autonomy and welfare. It is associated with periodic legislation which coordinates values of decisional autonomy and protecting life by giving women control over the abortion decision, often for an initial period of the pregnancy, thereafter allowing restrictions on abortion except on limited indications (eg for life or health).

This approach begins in court decisions but now also finds expression in constitutionalized preambles. In South Africa, for example, the preamble to a statute allowing abortion on request in the first 12 weeks of pregnancy announces that it vindicates ‘the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa.’<sup>92</sup> The High Court upheld the legislation’s constitutionality in a 2004 decision: ‘the Constitution not only permits the Choice on Termination of Pregnancy Act to make a pregnant woman’s informed consent the cornerstone of its regulation of the termination of her pregnancy, but indeed requires the Choice Act to do so.’<sup>93</sup>

Legislation recently enacted in Mexico City providing for abortion on request during the first 12 weeks of pregnancy appeals to a constitutional provision that guarantees Mexican citizens the freedom to decide the number and spacing of children;<sup>94</sup> the preamble to the Mexico

<sup>92</sup> South Africa. *The Choice on Termination of Pregnancy Act, 1996* (Act No 92 of 1996).

<sup>93</sup> *Christian Lawyers Association v Minister of Health* [2004] 4 All SA 31 (T), 39. See also *ibid* 39:

The South African Constitution recognises and protects the right to termination of pregnancy or abortion in two ways, firstly under section 12(2)(a), that is, the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction, and secondly, under section 12(2)(b), that is, the right to control over one’s body.

In an earlier judgment, the law was upheld as constitutional against claims of violation of the right to life on the view that legal personhood commences only at live birth. *Christian Lawyers Association of South Africa & others v Minister of Health & others* 1998 (4) SA 113 (T).

<sup>94</sup> Constitución Política de los Estados Unidos Mexicanos, as amended, Art 4, Diario Oficial de la Federación, February 5, 1917 (Mexico) (Right to Choose Clause) (author’s translation).

City statute provides: ‘Sexual and reproductive health care is a priority. Services provided in this matter *constitute a means for the exercise of the right of all persons to decide freely, responsibly and in an informed manner on the number and spacing of children.*’<sup>95</sup> The Supreme Court of Mexico recently confirmed the constitutionality of the legislation.<sup>96</sup> The state was constitutionally permitted to decriminalize abortion.

## 2. Protecting Life/Protecting Women: Indications Legislation

Other jurisdictions follow the German tradition in constitutionalizing a duty to protect life; these jurisdictions require action in furtherance of the duty to protect, and typically require or authorize legislatures to criminalize abortion with certain exceptions or indications determined by a committee of doctors or some decision-maker other than the pregnant woman. As we have seen, constitutional judgments about women are inevitably nested within the constitutional duty to protect life, and emerge in any effort to specify the terms on which abortion is to be banned (and thus also permitted). Constitutionalization in this form has tended to incorporate gender-conventional, role-based views of women’s citizenship—for example that the burdens of pregnancy are naturally assumed by women, or by women who have consented to sex, except when such burdens exceed what is normally to be expected of women, at which point women may be exempt from penal sanction for aborting a pregnancy.<sup>97</sup>

Constitutionalization in this form is paternalist, in its conception of women as well as the unborn, reasoning about women as dependants who may deserve protection, and protecting them against injuries to their physical and emotional welfare, rather than to their autonomy. (Jurisdictions that protect unborn life by banning abortion except on third party indication typically excuse women from the duty to bear a child to protect women’s physical survival and to protect women’s physical and emotional welfare; only recently have some considered protecting women’s dignity.) Courts’ reasoning in this tradition typically permit, but do not require, abortion legislation to protect the welfare and autonomy of women citizens who are pregnant; courts may, however, hold that a constitution requires the state to allow abortion to save a woman’s life.

The Republic of Ireland, which first amended its Constitution to address abortion, expressly relates the protections it accords the life of the unborn and the life of the mother: ‘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.’<sup>98</sup> Ireland seems to construe a woman’s ‘equal right to life’ as including protection for a woman’s physical survival but not her dignity. When an adolescent woman who was pregnant by rape was enjoined from traveling abroad for an abortion, the Irish Supreme Court overturned the injunction, reasoning that the young woman’s risk of suicide satisfied the standard of a ‘real and substantial risk’ to the pregnant woman’s life.<sup>99</sup> In other words, in order to fit the case within the right to life that Ireland guarantees equally to women and the

<sup>95</sup> Mexico, Federal District, Decree Reforming the Federal District Penal Code and Amending the Federal District Health Law, Official Gazette of the Federal District No 70, April 26, 2007 (author’s translation) (emphasis added).

<sup>96</sup> *Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007*, Pleno de la Suprema Corte de Justicia de la Nación, Novena Época, August 28, 2008, available at <<http://www.informa.scjn.gob.mx/sentencia.html>>.

<sup>97</sup> On gender, see further Chapter 19.

<sup>98</sup> Republic of Ireland, Eighth Amendment of the Constitution Act, 1983 (n 43) (emphasis added).

<sup>99</sup> *Attorney General v X and others* [1992] 1 IR 1, para [44].

unborn, the Court had to efface the young women's agency—her refusal to have sex with her rapist and the consequent risk she might harm herself if compelled to bear her rapist's child; instead the Court approached the young woman's case as if it concerned a physiological risk from pregnancy. The Court explained that its Constitution's abortion clause should be interpreted in terms informed by the virtue of charity: 'not the charity which consists of giving to the deserving, for that is justice, but the charity which is also called mercy.'<sup>100</sup>

In 1985 the Spanish Constitutional Court declared that its Constitution protected the life of the unborn, in the tradition of the first West German judgment, yet declared that it was constitutional for the legislature to allow abortion on several indications, including rape. In discussing the justification for the indication for rape, the Spanish Court emphasized that in such a case 'gestation was caused by an act . . . harming to a maximum degree her [a woman's] personal dignity and the free development of her personality', emphasizing that 'the woman's dignity requires that she cannot be considered as a mere instrument'.<sup>101</sup> Even so, the Court reasoned that the exceptions to Spain's abortion law were constitutionally *permitted*, not required, and emphasized that the legislation was enacted for the purpose of protecting unborn life.<sup>102</sup>

A more recent decision of the Colombian Supreme Court interpreting a constitution understood to protect unborn life offers a striking contrast. The Colombian Court held that a statute banning abortion was constitutionally *required* to contain exceptions for certain indications in light of 'the constitutional importance of the bearer of the rights . . . the pregnant woman'.<sup>103</sup> '[W]hen the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race.'<sup>104</sup> '[A] criminal law that prohibits abortion in all circumstances *extinguishes the woman's fundamental rights*, and thereby *violates her dignity* by reducing her to a mere receptacle for the fetus, *without rights or interests of constitutional relevance worthy of protection*.'<sup>105</sup>

Thus, the Colombian Court held that the legislature was constitutionally obliged, and not merely permitted, to include indications in its abortion law. The Court explained that failure to allow for abortion in cases of rape would be in 'complete disregard for human dignity and the right to the free development of the pregnant woman *whose pregnancy is not the result of a free and conscious decision*, but the result of arbitrary, criminal acts against her in violation of her autonomy.'<sup>106</sup> 'A woman's right to dignity prohibits her treatment as a mere instrument for reproduction, and her consent is therefore essential to the fundamental, life-changing decision to give birth to another person.'<sup>107</sup> By this same reasoning, however, the legislature *was*

<sup>100</sup> Ibid para 32 (citing *McGee v Attorney General* [1974] IR 284, 318–19).

<sup>101</sup> Tribunal Constitucional, STC 53/1985, Pt 11(b), April 11, 1985, 1985-49 Boletín de Jurisprudencia Constitucional 515 (Spain), available at <[http://www.boe.es/aeboe/consultas/bases\\_datos/doc.php?coleccion=tc&id=SENTENCIA-1985-0053](http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-1985-0053)>. Official court translation available at <<http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC531985en.aspx>>.

<sup>102</sup> See eg *ibid*, Pt 9: 'We are required to consider whether legislation [sic] is *constitutionally permitted* to use a different technique [to protect unborn life], by means of which punishability is specifically excluded for certain offences.' A dissenting judgment objects that the majority employs rights rhetoric without conferring rights 'despite the rhetorical claims to the contrary, it totally ignores the fundamental rights of physical and moral integrity and that of privacy enshrined in the Constitution, and to which pregnant women are indeed entitled.' *Ibid*, dissenting opinion of Senior Judge Francisco Rubio Llorente (no paragraph numbering in the judgment).

<sup>103</sup> Corte Constitucional (Constitutional Court), May 10, 2006, Sentencia C-355/2006, 25, *Gaceta de la Corte Constitucional* (Colombia) (partial translation is available in *Women's Link Worldwide*, C-355/2006: *Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia* (2007)).

<sup>104</sup> *Ibid* 36.

<sup>105</sup> *Ibid* 50 (emphasis added).

<sup>106</sup> *Ibid* 51 (emphasis added).

<sup>107</sup> *Ibid* 53.

allowed to criminalize abortion in cases of consensual sex, as long as the legislature provided exceptions for women's life, health, and cases of fetal anomaly.<sup>108</sup> This approach presumes that, for women, consent to sex *is* consent to procreation.

### 3. Protecting Life/Respecting Women: Result-Open Counseling

Yet other jurisdictions begin from a constitutional duty to protect life, and, like Germany, have begun to explore approaches for vindicating the duty to protect life that do not involve the threat of criminal prosecution. These jurisdictions constitutionally justify depenalization of abortion, coupled with abortion-dissuasive, result-open counseling, as more effective in protecting the unborn than the threat of criminal punishment. The justifications for life-protective counseling, as well as its form, are evolving over time, in ways that progressively incorporate values of women's autonomy. At a minimum, these jurisdictions recognize women as the type of modern citizens who possess autonomy of a kind that law must take into consideration if it hopes to affect their conduct; some go further and are beginning to embrace protecting women's dignity as a concurrent constitutional aim.<sup>109</sup>

Constitutional review of counseling regimes originates in the German cases. In 1975, the German Court endorsed abortion-dissuasive counseling as a mode of protecting life in cases where the legislature deemed abortion non-exactable;<sup>110</sup> in 1993, the German Court expanded that approach, reasoning that a legislature might find counseling coupled with depenalization of abortion generally more effective than the threat of criminal punishment in meeting its duty to protect life, observing that depenalization was *also* consistent with women's autonomy.<sup>111</sup>

The Hungarian Court has amplified the woman-respecting aspects of this approach. In 1998, the Hungarian Court held that it was unconstitutional for the state to make verification of a 'situation of serious crisis' indication depend *solely* on woman's signature: 'Such provisions themselves cannot secure for the foetus the level of minimum protection required by the [Constitution] . . . and in fact, they do not secure any protection, as the regulation is concerned with the mother's right to self-determination, only.'<sup>112</sup> The Court explicitly rejected this legislative scheme as a concealed version of periodic regulation,<sup>113</sup> while holding that the state could remedy the legislation through directed counseling measures or third party verification. The Court then discussed abortion-dissuasive counseling as a method of protecting unborn life that was *also* respectful of women's rights. 'In principle, such a consulting service would not . . . violate her freedom of conscience.'<sup>114</sup> While 'The state may not compel anyone to accept a situation which sows discord within, or is irreconcilable with the fundamental convictions which mould that person's identity' obligatory participation in counseling violates neither principle 'having particular regard to the fact that she [the pregnant woman] is only obligated

<sup>108</sup> Ibid 54–7.

<sup>109</sup> For discussion of counseling and its normative bases as a 'third model' in abortion regulation (supplemental to periodic/indication models), see Eser and Koch (n 1); for analysis of the counseling framework attentive to its gendered premises, see Ruth Rubio-Marin, 'Constitutional Framing: Abortion and Symbolism in Constitutional Law' (2009 draft). For discussion of counseling in the United States see Siegel, 'Dignity and the Politics of Protection' (n 4).

<sup>110</sup> See text accompanying n 69.

<sup>111</sup> See text accompanying nn 83, 89.

<sup>112</sup> Alkotmánybíróság (Constitutional Court), Decision 48/1998 (XI.23), Official Gazette (Magyar Közlöny) MK 1998/105 (Hungary), Section III, Pt (3)(d) (p 26), official court translation available at <[http://www.mkab.hu/admin/data/file/710\\_48\\_1998.pdf](http://www.mkab.hu/admin/data/file/710_48_1998.pdf)>

<sup>113</sup> Ibid Section III, Pt (3)(c) (p 24).

<sup>114</sup> Ibid Section IV, Pt (2)(a) (p 34).

to participate without any [further] obligation . . . [A]s far as *its outcome is concerned, the consultation*—while clearly focusing on the protection of the fetus—*must be open*.<sup>115</sup>

Portugal has taken further steps in this direction.<sup>116</sup> In upholding legislation that allowed abortion during the first ten weeks of pregnancy after a waiting period and result-open counseling, the Portuguese Constitutional Court emphasized that the new law was an effective means of protecting life. However, a counseling regime the Court upheld was not expressly dissuasive.<sup>117</sup> Strikingly, the recent Portuguese decision employed the reasoning of the 1993 German decision to dispense with the need for expressly dissuasive counseling of the kind mandated by the 1993 German decision. As it did so, the Portuguese decision invoked women's dignity as a justification for result-open counseling.<sup>118</sup> The Portuguese case thus features emergent elements of women's rights, both as to justification and as to legislative form. But the constitutional framework yet remains at some distance from the women's dignity-periodic access cases of jurisdictions such as the United States and South Africa. The Portuguese Court ruled that a result-open counseling framework in the early period of pregnancy is constitutionally *permitted*, not required, as it would be in a traditional woman's rights framework.

The abortion legislation Spain enacted in 2010 presses result-open counseling in ways that even more robustly associate it with protecting women's rights. The legislation allows abortion on request in the first 14 weeks, subject to counseling. Its preamble reasons in constitutional-

<sup>115</sup> Ibid Section IV, Pt 2(a) (p 35) (emphasis added).

<sup>116</sup> For rich discussion, see Rubio-Marin (n 109).

<sup>117</sup> Tribunal Constitucional, Acórdão no 75/2010, Processos nos 733/07 and 1186/07, March 26, 2010, Diário da República vol 60, at 15566 (Portugal), available at <<http://w3.tribunalconstitucional.pt/acordaos/acordaos10/1-100/7510.htm>> (author's translation).

The Court observed at 11.4.15:

Our legislature has made clear the goal of the counseling by stating that such counseling is aimed at providing the pregnant woman access to all relevant information necessary to make a free, genuine ('*consciente*'), and responsible decision.

The Court further observed that the legislation directed that the pregnant woman would receive information concerning government assistance should she carry the pregnancy to term, and stated at 11.4.15 that:

the body of information to be provided to the pregnant woman in a mandatory counseling process . . . has the objective effect of promoting in her the consciousness of the value of the life that she carries in her (or, at least, it will clearly be perceived by her as an attempt to do so) . . . The fact that the counseling process is not, expressly and ostensibly, orientational does not impose, ipso facto, its qualification as merely informative and deprived of any intention to favor a decision to carry on with the pregnancy.

<sup>118</sup> See *ibid* 11.4.16:

By abstaining, even at a communicational level, from any indication that might be felt by the woman as an external judgment imposing a particular decision, the legislator acted in line with the underlying reasoning supporting the decision not to punish abortion.

This is based on the belief that only the free adhesion of the woman to carry on with the pregnancy guarantees, at this stage, the protection of the unborn life.

...

It is objectively founded for a legislator that has decided, also for reasons of efficiency, to trust in the sense of responsibility of the pregnant woman by calling her to cooperate in the duty of protection that belongs to the State, not to create a context of decision that may run counter that purpose.

The trust in the sense of responsibility of the woman and in her predisposition to be open to the reasons contrary to abortion would not be compatible with a tutelage and paternalistic approach. The protection of the woman's dignity is also affirmed by the way in which the counseling process imposed on her takes place.

ized terms about the values the legislation is designed to vindicate, including both ‘the rights and interests of women and prenatal life’. The preamble asserts that ‘protecting prenatal life is more effective through active policies to support pregnant women and maternity’, and therefore that ‘protection of the legal right at the very beginning of pregnancy is articulated through the will of the woman, and not against it’, and directing public officials to ‘establish the conditions for adopting a free and responsible decision.’<sup>119</sup>

In the decades since the German Court’s 1993 decision, this hybrid framework has spread, legitimating result-open counseling early in pregnancy as a method of protecting unborn life,<sup>120</sup> while increasingly acknowledging, accommodating, and sometimes even explicitly respecting women’s autonomy in making decisions about motherhood.<sup>121</sup> Whether or not the fetal-protective justification for results-open counseling is accompanied by a women’s dignity-respecting justification, women are accorded the final word in decisions about whether they become mothers. Drawing elements from two disparate forms of constitutionalization, this hybrid form has transformative potential: one day it might combine community obligation to support those who nurture life with community obligation to respect their judgments. Realization of this potential depends on both expressive and practical aspects of implementation.

The emergence in the last two decades of fetal-protective justifications for providing women control over decisions concerning abortion is especially striking in light of the concurrent spread of woman-protective justifications for denying women access to abortion (eg banning or restricting abortion for the asserted purpose of protecting women from harm or coercion).<sup>122</sup> In both cases, a particular legislative regime is justified by appeal to constitutional values historically associated with an opposing form of abortion regulation: legislation that allows abortion is associated with the constitutional protection of unborn life, and legislation that restricts abortion is associated with the constitutional protection of women. Rhetorical inversions of this kind may be produced through social movement struggle, or they may emerge as movements employ the discourse of a reigning constitutional order in order to challenge it.<sup>123</sup>

After decades of conflict, a constitutional framework is emerging in Europe that allows legislators to vindicate the duty to protect unborn life by providing women dissuasive counseling and the ability to make their own decisions about abortion. Constitutionalization in this form values women as mothers first, yet addresses women as the kind of citizens who are autonomous in making decisions about motherhood, and may even warrant respect as such. The spread of constitutionalization in this form attests to passionate conflict over abortion and women’s family roles; it also suggests increasing acceptance of claims the women’s movement has advanced in the last 40 years, however controverted they remain. Jurisdictions that permit result-open counseling in satisfaction of the duty to protect unborn life express evolving understandings of women as citizens, in terms that reflect community ambivalence and assuage community division, while continuing to engender change.

<sup>119</sup> Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo (Spain) (author’s translation).

<sup>120</sup> See Eser and Koch (n 1); Gevers (n 2).

<sup>121</sup> See Rubio-Marin (n 109).

<sup>122</sup> See Siegel, ‘Dignity and the Politics of Protection’ (n 4).

<sup>123</sup> See eg Myra Max Ferree, ‘Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany’ (2003) 109 *American Journal of Sociology* 304; Siegel, ‘Dignity and the Politics of Protection’ (n 4). For similar reasons, appeals to dignity now play a significant role on both sides of the abortion debate, transnationally. See Siegel, ‘Dignity and Sexuality’ (n 4).

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