

LEARNING FROM THE PAST: HOW THE EVENTS THAT SHAPED THE CONSTITUTIONS OF THE UNITED STATES AND GERMANY PLAY OUT IN THE ABORTION CONTROVERSY

Political pundits balked, Facebook and blogs flared with renewed vim and vigor, and the vice president of the National Organization of Women seethed that it was “hate masquerading as love.”¹ The cause of all this ruckus? The Super Bowl—and not because of a bad coin toss, unwinding scandal, or “wardrobe malfunction” either.² This time the uproar was over NFL quarterback and former Heisman Trophy winner Tim Tebow.³ Tebow was featured in a privately created and funded advertisement alongside his mother, who, thanks to the controversy surrounding the ad, is now commonly known to have chosen to undertake the health and financial risks of forgoing an abortion to carry him to term and give him the opportunity of life.⁴

It almost goes without saying that abortion is a hotly disputed subject in the United States. More than thirty-five years after the Supreme Court definitively entered the debate,⁵ the controversy remains just as strong, the opposing parties equally resolute, and the arguments equally vehement.

One indication of the substantiality of the debate is the growing controversy accompanying each new judicial appointment. Since the infamous *Roe v. Wade*,⁶ Supreme Court judicial appointments have increasingly come to be dominated by candidates’ positions and

¹ Frances Kissling & Kate Michelman, *How to Be Pro-Choice on Super Bowl Sunday*, WASH. POST, Jan. 31, 2010, at B1.

² In 2004, Janet Jackson and Justin Timberlake performed at halftime for Super Bowl XXXVIII. In a performance that is now infamous, Timberlake removed a portion of Jackson’s costume, exposing a bare breast to a national audience of more than 140 million people. Keith Olbermann, *Janet Jackson’s Wardrobe Malfunction*, MSNBC.COM (Feb. 3, 2004, 1:32 PM), http://www.msnbc.msn.com/id/4147857/ns/msnbc_tv-countdown_with_keith_olbermann/. Jackson later claimed that it was a wardrobe malfunction for which she was responsible. *Id.*

³ Sally Jenkins, *Super Bowl Ad Isn’t Intolerant; Its Critics Are*, WASH. POST, Feb. 2, 2010, at D1.

⁴ The commercial, despite all of the controversy it generated, was relatively benign. It featured Ms. Tebow, holding a baby picture of her son, a football phenomenon, and reminiscing: “He almost didn’t make it into this world.” PolitiClips1, *Focus on the Family Super Bowl Commercial with Tim Tebow*, YOUTUBE (Feb. 7, 2010), <http://www.youtube.com/watch?v=xqReTDJSdhE>. She called him her “miracle baby” and claimed that her pregnancy was difficult, that she remembered “so many times when [she] almost lost him. It was so hard.” *Id.*

⁵ See *Roe v. Wade*, 410 U.S. 113 (1973).

⁶ *Id.*

jurisprudence on abortion.⁷ Most recently, pro-choice activists tried to forestall Senate confirmation of current Justice Sonia Sotomayor, who was generally a favorite among liberals, because her adjudication record did not provide solid indication of how she might vote in an anticipated case to overturn *Roe v. Wade*.⁸

But why, after the nation's highest court unambiguously held in 1973 that a fetus was not a "person" within the meaning of the Constitution,⁹ and with its preceding declaration that the State's obligation is to uphold a woman's right to privacy,¹⁰ would the debate not have begun to subside? Despite the Court's initial adjudication clearly favoring women's reproductive autonomy,¹¹ the debate has raged on, with the Court itself even coming to vacillate both in its legal reasoning and conclusions on the extent to which its commitment is to a woman's right to abortion or to a (viable) fetus's right to life.¹²

Halfway around the world, Germany has found itself in a similar predicament, this also after its highest court¹³ issued an unambiguous statement on the issue of abortion. Unlike the United States' Supreme Court, however, both the legal analysis and conclusion in the German Constitutional Court (the "*Bundesverfassungsgericht*") opinion on the matter tilted clearly in favor of the unborn, holding that the woman's right to abortion, though derived from an important constitutional right, was not absolute and, moreover, limited by the State's obligation to protect the life of the unborn.¹⁴

⁷ See, e.g., JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 221–27 (2007) (discussing the central role of judicial nominees' abortion records in the nominees' confirmation processes, highlighting those of Justice O'Connor and Chief Justice Roberts).

⁸ Charlie Savage, *Tight Lid Defined Process in Selecting a New Justice: On Abortion, No Set Path Is Seen*, N.Y. TIMES, May 28, 2009, at A1 ("[P]resident of Nara Pro-Choice America[] urged supporters to press senators to demand that Judge Sotomayor reveal her views on privacy rights before any confirmation vote," contending that "[d]iscussion about *Roe v. Wade* will—and must—be part of this nomination process . . . [C]hoice hangs in the balance on the Supreme Court as the last two major choice-related cases were decided by a 5-to-4 margin." (internal quotation marks omitted)).

⁹ *Roe*, 410 U.S. at 162.

¹⁰ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹¹ Richard E. Levy & Alexander Somek, *Paradoxical Parallels in the American and German Abortion Decisions*, 9 TUL. J. INT'L & COMP. L. 109, 117–18 (2001).

¹² See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860 (1992).

¹³ See CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 1–2 (Ralf Rogowski & Thomas Gawron eds., 2002) (providing more information on Germany's Constitutional Court, called the *Bundesverfassungsgericht* (or "BVerfG")).

¹⁴ *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975*, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 1975 (Ger.), translated in Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A*

For many Americans who adhere to a strong sense of American autonomy and subsequently do not welcome international influence, what Germany's constitution says about a woman's right to abortion and the nation's obligation to protect unborn life seems irrelevant to our own debate, except insofar as there is a recognition of commonness of plight (suffered by either unduly burdened women or unsafeguarded unborn life, depending on where one aligns herself in the abortion debate). Regardless of Americans' reticence to assess their own constitutional values in light of those of another country, the benefits of such comparison, especially with regard to fundamental human rights, cannot be denied. Donald Kommers, comparative constitutional scholar, expressed the same:

For Americans, foreign constitutional cases are particularly important because they belong to the literature of responsible freedom and limited government, a literature that is both challenging and enlightening: challenging because it forces Americans to confront cherished assumptions about themselves as a people and the deeper meaning of their public values; enlightening because the opinions and insights of foreign case law uncover truths about our own constitutional tradition that we may have only dimly perceived in the past.¹⁵

Accordingly, this Note seeks both to "challeng[e] and enlighten[]"¹⁶ Americans by comparing and contrasting both U.S. and German approaches to abortion in light of their respective constitutions and proposing that *Roe*—on account of its historical incorrectness, weak legal reasoning, and disregard for human life—and its progeny ought to be overturned.

To those ends, in Section I, this Note provides histories, albeit vastly abbreviated ones, of the constitutional drafting processes in each nation, because it is the historical backdrop against which each Constitution was drafted that sheds much-needed light on the values that are represented therein. Further, analysis of the historical settings of the respective constitutions' drafting reveals the intent behind, and indeed the very values embraced by, the Framers of each Constitution, and that analysis has consequently served to guide Justices in both Courts in matters of constitutional jurisprudence.

In Section II, this Note addresses the portions of the text of each Constitution that are relevant to the constitutional question of abortion. It further discusses how the U.S. and German Courts initially weighed

Contrast to Roe v. Wade, 9 J. MARSHALL J. PRAC. & PROC. 605, 647 (1976) [hereinafter *Abortion I Case*].

¹⁵ Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 2–3 (1994).

¹⁶ *Id.* at 3.

in on the abortion debate in light of constitutional text, if any, relevant to it. Accordingly, this Note discusses the constitutional interpretations the Supreme Court proffered in *Roe v. Wade* and in the Constitutional Court's decision of February 25, 1975, and examines briefly how the Courts have subsequently begun to alter their legal positions to accommodate public opinion on the divisive subject.

Beyond providing a mere historical comparison of abortion in the two nations, Section III of this Note proposes that, regardless of public opinion on an issue, the United States Supreme Court is compelled to interpret the Constitution not with an eye on what it anticipates public response will be, but with firm commitment to elucidate the rights that the Constitution protects and to uphold, unwaveringly, the values it embodies. For the Court to do anything less would be to betray its sworn oath to uphold the Constitution¹⁷ and would venture well beyond its constitutional limitation to "[s]ay what the law is"¹⁸ by taking upon itself the role of legislature in matters of popular opinion.¹⁹

I. CONSTITUTIONAL CONTEXTS: WHAT CONSTITUTES A CONSTITUTION?

In some ways, the Constitution of the United States and the German equivalent, called the "Basic Law,"²⁰ share a similar history. Both were drafted in response to government systems that lacked sufficient constitutional safeguards to prevent tyranny.²¹ In conjunction, both were forged in post-war years, as the abuses of the former governments of each ultimately led to complete upheaval and fresh beginnings. Additionally, both bear the influences of Christian ideology.²² Despite such likenesses, there is at least one immeasurably

¹⁷ 28 U.S.C. § 453 (2006). The oath of Justices and judges is as follows:

I, [Name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [Title] under the Constitution and laws of the United States. So help me God.

¹⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁹ Recognizing the limited role of the judiciary under the constitutional separation of powers, the Supreme Court, for almost the entire first century of its existence, generally showed deference to laws passed by Congress, "only once declin[ing] to carry out a provision of federal law." AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 211 (2005).

²⁰ John D. Gorby, *Introduction to the Translation of the Abortion Decision of the Federal Constitutional Court of the Federal Republic of Germany*, 9 J. MARSHALL J. PRAC. & PROC. 557, 563 & n.18 (1976).

²¹ *See id.* at 564 ("[B]oth constitutions were in part reactions to a system of oppression and injustice.").

²² In Germany, the already existing Christian Democratic Party played a significant role in the drafting of the Basic Law, and in the United States, the Congressional record demonstrates the influence of Christianity on the document's

significant point of deviation between the two. The U.S. Constitution responded to numerous repeat violations of civil and political liberties,²³ whereas the German Basic Law responded to the greatest violation of human rights in the history of the civilized world.²⁴ The rights declared in and protected by each have subsequently been directly affected.

Hannes Rösler, Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Germany, put it this way:

There are “classical” moments whe[n] a constitution can be established. On the one hand it can result from a revolutionary striving for civil liberties On the other hand the failure of a political system can serve as an incentive to establish constitutional individual rights and new democratic institutions, and to guarantee them by means of fixed procedures. Examples of the latter are the 1945 collapse of the “Third Reich” Whereas the historical setting of the American Constitution more closely resembles the first model, the Basic Law for the Western part of Germany was an attempt of moral cleansing through law.²⁵

Accordingly, the constitution of each served a very distinct purpose, each proclaiming substantially divergent orderings of values. In Germany, human dignity is considered the most fundamental, and valuable, right.²⁶ It therefore “occupies the position that liberty may be said to play in the American constitutional order.”²⁷

A. The History of the U.S. Constitution

The history of the birth of the United States is a rather familiar one. The colonists, who were weary of “taxation without representation,” remote and overly intrusive monarchical rule, and often complete disregard of their rights as colonists in furtherance of Mother England’s objectives, made numerous unsuccessful efforts to safeguard their freedoms from infringement by the monarchy before they ever developed the intention to assert independence. They expressed the same in what many felt had become their last resort. Having found the Crown’s

drafting. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 31–32 (2d ed. 1997) [hereinafter *CONSTITUTIONAL JURISPRUDENCE OF GERMANY*].

²³ See discussion *infra* Part I.A.

²⁴ See discussion *infra* Part I.B.

²⁵ Hannes Rösler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution—The Lüth Revolution 50 Years Ago in Comparative Perspective*, 23 *TUL. EUR. & CIV. L.F.* 1, 3–4 (2008).

²⁶ S.E. Finer et al., *Comparing Constitutions*, in *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW* 79, 83 (Mary Ann Glendon et al. eds., 3d ed. 2007) (“The German constitution is imbued with a ranked set of values of which the most basic is the principle of human dignity . . .”).

²⁷ *CONSTITUTIONAL JURISPRUDENCE OF GERMANY*, *supra* note 22, at 359.

responses to their previous efforts to be more than unsatisfactory, they were eventually moved to declare their independence.²⁸ They did so in 1776, providing a litany of grievances ranging from the Crown's failure to provide representative government for (and, as a result of that, enforcement of unfair legislation against) the colonists²⁹ to its creation and expansion of a military-enforced bureaucracy that tested the patience of even the most even-tempered men.³⁰

Nearly all of the specifically enumerated grievances were assertions of the colonists' civil and political rights: a call for representative government, a condemnation of unfair taxation, a protestation against economic sanctions, a demand for judicial due process, an outcry against unlawful use of military force, *inter alia*.³¹ They were, collectively, a public demand for liberty³² and—if their demand for liberty was not honored—an expression of their right to self-determination.³³

As the Revolutionary War makes clear, the Crown and the colonies did not reach an amicable solution, and the colonies subsequently entered into a sort of league of nations among themselves via the Articles of Confederation.³⁴ Drafted and ratified in the midst of the

²⁸ The introductory paragraphs of the Declaration declare:

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations . . . evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. —Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁹ *Id.* at paras. 3–8.

³⁰ *Id.* at para. 12 (contending that the King had “erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance”).

³¹ *Id.* at para. 13.

³² See Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country's Leading Abortion Cases*, 11 TULSA J. COMP. & INT'L L. 491, 492 (2004) (discussing the role of liberty in the United States and comparing it to the role of human rights, specifically human dignity, in Germany).

³³ “Self-determination” is a more modern term but is nonetheless applicable to the colonists who were, in effect, asserting their right to “freely determine their political status and freely pursue their economic, social and cultural development.” International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, at 53 (Dec. 16, 1966).

³⁴ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824) (“[R]eference has been made to the political situation of these States, anterior to [the Constitution's] formation. It

Revolutionary War,³⁵ the emphasis of the Articles was not on fundamental rights but on other broader governmental themes: a confederate alliance with France, a uniform currency to finance the war,³⁶ “the nature of the association of states, limits on the respective powers of the states and confederation government, the structure of the confederation government, and methods of changing, or amending, the agreement.”³⁷

A shaky experience with the Articles of Confederation led to an intense four-month long Constitutional Convention, where delegates from the various sovereign states gathered to reach resolution on a number of highly divisive issues.³⁸ James Madison considered priorities of the Convention’s attempts at solution to include the Articles’ lack of an enforcement mechanism (namely sanctions), state encroachment on the authority of the confederation, state violations of treaties, inconsistencies among the states regarding currency, and the “perverseness of particular States” that deliberately thwarted necessary uniformity among the several states.³⁹ All were political issues. Out of necessity, the delegates to the Convention met to revise the Articles.⁴⁰ As it is now commonly known (although deliberations were kept secret at the time⁴¹), instead of revising the preexisting Articles, the delegates ultimately ended up scrapping them and starting anew. The result was the Constitution of the United States of America. In the forthcoming Constitution, emphasis on rights that would today qualify as

has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true.”).

³⁵ BARBARA SILBERDICK FEINBERG, *THE ARTICLES OF CONFEDERATION: THE FIRST CONSTITUTION OF THE UNITED STATES* 24 (2002) (“Decisions about the Articles had to be postponed while military matters demanded the delegates’ attention. [The British had] captured Philadelphia, where Congress had been meeting. The delegates fled to Lancaster and then to York.”).

³⁶ *Id.* at 24.

³⁷ *Id.* at 26.

³⁸ *Id.* at 68–70.

³⁹ JAMES MADISON, *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES* (Apr., 1787), reprinted in *COLONIES TO NATION, 1763–1789: A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION*, 514–16 (Jack P. Greene ed., 1975).

⁴⁰ The recommendatory congressional act emanating from the Annapolis Convention stated that “a Convention of Delegates . . . [should meet] for the sole and express purpose of *revising the Articles of Confederation*[.] and reporting to Congress and the several Legislatures, such *alterations and provisions therein*, as shall . . . render the Federal Constitution *adequate to the exigencies of Government, and the preservation of the Union*.” THE FEDERALIST NO. 40, at 216 (James Madison) (E.H. Scott ed., 1898).

⁴¹ See *id.*; see also WALTER BERNS, *THE WRITING OF THE CONSTITUTION OF THE UNITED STATES* 16 (Am. Enter. Inst. 1985) (reflecting that the idea to keep the proceedings private was largely motivated by efforts to encourage candid discourse and debate among the delegates).

fundamental human rights⁴² is noticeably absent. Additionally absent is a proclamation of a right of privacy.⁴³

In fact, so little was the emphasis the Framers placed on human rights that the draft of the Constitution originally submitted to the States for ratification in September of 1787 was initially without any sort of declaration of fundamental individual rights.⁴⁴ It instead emphasized government structure and outlined limitations on the exercise of governmental power, both of which were more implicit of individual liberties than explicit enumerations of rights.⁴⁵ Fearing that a too-powerful federal government would eventually come to usurp the power of the States and disregard individual liberties as the Monarch had, a number of States refused to ratify the Constitution.⁴⁶ After months of intense political debate vis-à-vis such ideological conduits as *The Federalist Papers*, the Constitutional Convention produced a Bill of Rights in the fall of 1789. Two years later, the Bill of Rights had finally

⁴² “Human rights” as we understand them today did not emerge until after the Second World War, as the world searched for charges that could be made against Nazi officers who had masterminded or carried out the previously not coined “crimes against humanity.” See MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 217–18 (2004).

⁴³ Indeed, Justice Brandeis opined that one of the greatest American rights is the “right to be let alone” when he said the following:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁴⁴ JOSEPH F. MENEZ & JOHN R. VILE, *SUMMARIES OF LEADING CASES ON THE CONSTITUTION* 229 (14th ed. 2004).

⁴⁵ Alexander Hamilton contended that a bill of rights is unnecessary when a government has specifically enumerated and limited powers:

Bills of Rights, in the sense and to the extent they are contended for, are not only unnecessary, in the proposed Constitution, but would even be dangerous.—They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do?

THE FEDERALIST No. 84, at 469–70 (Alexander Hamilton) (E.H. Scott ed., 1898).

⁴⁶ Randy E. Barnett, *A Ninth Amendment for Today's Constitution*, in *THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS* 178 (David J. Bodenhamer & John W. Ely, Jr., eds., 1993) (recounting that a number of states made it clear that their ratification of the Constitution was contingent upon a forthcoming declaration of individual rights).

secured ratification from three-fourths of the States and was attached collectively as the first ten amendments to the Constitution.⁴⁷

For these and additional more obvious reasons, it is not at all surprising that there was no mention, either explicit or implicit, of unborn life anywhere in either the Constitution itself⁴⁸ or the Bill of Rights⁴⁹—no passage that would intimate what the public at large felt about the State’s role in abortion restrictions, and no precursory inquiry into when life began. For one, such a specific issue is much too detailed to have been included in the broadly framed Constitution.⁵⁰ Further, the decriminalization of abortion as a consequence of some later discovered right to privacy was surely beyond the Framers’ contemplation.

The same was true when Congress passed the Fourteenth Amendment in 1868. The Amendment was primarily a response to the egregiousness of slavery and the affronts to the dignity of an entire race of people.⁵¹ The provision consequently specifically states, “[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁵² To be sure, the direct connotation of “person” in the Amendment referred to emancipated slaves.⁵³ Political debate over abortion at the time was not substantial enough to have led to any sort of serious debate in the drafting of the Amendment over whether “any person” should encompass the unborn.

B. The German Constitution

The “Grundgesetz” (“Basic Law”) was drafted in 1949,⁵⁴ a full century and a half after the Constitution of the United States. The

⁴⁷ MENEZ & VILE, *supra* note 44, 228–29.

⁴⁸ See Raymond B. Marcin, *God’s Littlest Children and the Right to Live: The Case for a Positivist Pro-Life Overturning of Roe*, 25 J. CONTEMP. HEALTH L. & POL’Y 38, 49–51 (2008) (arguing that the reference to “Posterity” in the Preamble to the Constitution can be interpreted to include life that is not yet born).

⁴⁹ U.S. CONST. amends. I–X.

⁵⁰ The Bill of Rights does contain specific provisions, but unlike freedom from unreasonable search and seizures and freedom of speech, abortion was neither at that time, nor at any time previously, a political issue. It had not been a source of tension between the monarchy and the colonists or among the several States.

⁵¹ HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 20 (1908) (“[I]t was to secure the provisions of [the first section of the Civil Rights Bill] that the first section of the Fourteenth Amendment was incorporated into our Constitution. The first section was in fact the basis of the whole bill, the other sections merely providing the machinery for its enforcement.”).

⁵² U.S. CONST. amend. XIV.

⁵³ McAllister, *supra* note 32, at 502 (citing GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 676 (10th ed. 1980)).

⁵⁴ Brun-Otto Bryde, *Fundamental Rights as Guidelines and Inspiration: German Constitutionalism in International Perspective*, 25 WIS. INT’L L.J. 189, 194 (2007).

political and moral climate of Germany was much different in 1949 than it had been in the newly established United States in 1787.⁵⁵ The United States Constitution followed the Revolutionary War, and the German Basic Law followed the Second World War. The U.S. Framers of the Constitution had in their recent memory such things as unfair taxes, trade sanctions, overly meddlesome bureaucratic officers, and suspension of due process rights.⁵⁶ The drafters of the German Basic Law remembered very intimately death camps, human experimentation, recent attempts at genocide, infanticide, and forced abortions and euthanasia.⁵⁷ The impact of World War II was vast, engendering firm declarations and vindications of human rights the world over⁵⁸ and, more immediately, in Germany itself.

The harrowing effects of World War II are evident even in the international response to them. Nazi Germany and its allies had subjected the European continent to egregious affronts to human dignity previously unmatched in the modern civilized world. As the war came to an end, the world demanded retribution; the Nuremberg Trials ensued.⁵⁹ Throughout the trials, the world became increasingly aware of the fullness and extent of the Nazis' contempt for human rights—contempt that was so egregious that a new criminal charge for the commission of “crimes against humanity”⁶⁰ was created both to cope with the disregard of human rights and to punish Nazi officers for their offenses fully.

⁵⁵ For one, the Basic Law was drafted under the watchful eye of the Allied powers, which placed stipulations on the content of the German-drafted constitution in order for it to receive the Allies' approval. These requirements were the establishment of “democracy, federalism, and fundamental rights,” and each was given equal weight. DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 9 (1994).

⁵⁶ See *supra* notes 28–31 and accompanying text.

⁵⁷ McAllister, *supra* note 32, at 496.

⁵⁸ The drafting committee within the Commission on Human Rights of the Universal Declaration of Human Rights included representatives from the United States, France, Lebanon, China, Chile, *inter alia*, and over 50 Member States participated in the final drafting. Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1, 4 (1999); John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in *HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION* 23 (B.G. Ramcharan ed., 1979).

⁵⁹ For more on the Nuremberg Trials, see DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT* (1999) and TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992).

⁶⁰ OLIVIA SWAAK-GOLDMAN, *Crimes Against Humanity*, in 1 *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS* 145 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) (“The origin of ‘crimes against humanity’ as an independent juridical norm can be found in Article 6(c) of the Nuremberg Charter, promulgated at the conclusion of the Second World War, that included this crime within the jurisdiction of the International Military Tribunal for the Trial of the Major War Criminals.” (citations omitted)).

Further evidence of the far-reaching impact of Nazi Germany's human rights violations was the subsequent gathering of leaders and representatives from around the globe for the United Nations Commission on Human Rights,⁶¹ which ultimately produced the Universal Declaration of Human Rights.⁶² Ernest Davies, a representative from the United Kingdom and one of the Declaration's drafters, went so far as to declare "that the war by its total disregard of the most fundamental rights was *responsible* for the Declaration"⁶³ Fellow drafter Lakshmi Menon, a representative from India, similarly stated that the Declaration was "born from the need to reaffirm [human] rights after their violation during the war."⁶⁴ To publicize and immortalize their recognition of this, the drafters of the Universal Declaration of Human Rights opened the Preamble with numerous affirmations of the worth of all human beings.⁶⁵ Therein they directly attributed the "barbarous acts which have outraged the conscience of mankind" to the utter "disregard and contempt for human rights,"⁶⁶ which had been unveiled in the aftermath of the Second World War. They subsequently declared that "[the] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"⁶⁷ and that "the dignity and worth of the human person" is the very foundation of "social progress and better standards of life in larger freedom."⁶⁸

If the wounds inflicted by Nazi-led Germany had such tremendous impact on global civilized society—which, in comparison to Germany,

⁶¹ See *supra* note 58 and accompanying text.

⁶² See, e.g., Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 313 (1995–1996) ("[M]any constitutions have been directly inspired by the Universal Declaration. One author has estimated that 'no fewer than 90 national constitutions drawn up since 1948 contain statements of fundamental rights which, where they do not faithfully reproduce the provisions of the Universal Declaration, are at least inspired by it.'") (quoting Nihal Jayawickrama, *Hong Kong and the International Protection of Human Rights*, in HUMAN RIGHTS IN HONG KONG 160 (Raymond Wacks ed., 1992)); see also Evadné Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 299, 306 (2007) ("The [Basic Law] is historically linked with the UDHR, drafted at about the same time, against the backdrop of the events of the war and in the context of similar philosophical influences."); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

⁶³ JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 37 (1999) (emphasis added).

⁶⁴ *Id.* at 36.

⁶⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 71 (Dec. 10, 1948).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 72.

had only been affected tangentially—it follows that in Germany, where the violations were directly experienced, their effects would be at least as great.⁶⁹

When the Allied Powers first commissioned the West Germans to draft a constitution in July of 1948,⁷⁰ the wounds were still very fresh. Records of the Parliamentary Council provide some indication of to what extent the freshness of World War II had influenced the Basic Law's Framers. Framers often alluded to what they "ha[d] experienced in the Nazi-years"⁷¹ with clear effort to avoid any sort of repeat of those events. Further, in interpreting the Basic Law, the Court acknowledges that it can "be understood *only* in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism."⁷²

Even the structure of the Basic Law evidences this. The preamble opens with a bold acknowledgement: "Conscious of its responsibility before God and mankind, filled with the resolve . . . to serve world peace as an equal partner in a united Europe, the German people . . . has . . . enacted this Basic Law of the Federal Republic of Germany . . ."⁷³ It is somewhat counterintuitive to encounter a Constitution that begins with an explicit acknowledgement of a people's "responsibility before God and mankind,"⁷⁴ and an even greater anomaly for a Constitution to acknowledge in its Preamble a responsibility to persons beyond the borders of the country that is adopting the Constitution.

Additionally, the very placement of the German Bill of Rights in the Basic Law evinces the Basic Law's emphasis on human rights.⁷⁵ The order is notably inverted with that of the U.S. Constitution. While the U.S. Constitution attaches the Bill of Rights to the end of the Constitution as amendments to it, the German Basic Law leads off with its Bill of Rights, fully integrating them into, and in fact forming the basis of, the Basic Law.⁷⁶ Further, the very first article declares, "The

⁶⁹ See, Bryde, *supra* note 54, at 190 ("German fundamental rights theory can only be understood against the background of history."); see also *id.* at 194 ("In reaction to the horrors of Nazi Germany, [the drafters] based the new constitution on the principle of human dignity and the recognition of human rights, recognized in Article 1.").

⁷⁰ Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1308 (2008).

⁷¹ *Id.* at 1312 (citing *Dritte Sitzung des Ausschusses für Grundsatzfragen*, in 5/I DER PARLAMENTARISCHE RAT 1948–1949 28, 52 (1993)).

⁷² *Abortion I Case*, *supra* note 14, at 662 (emphasis added).

⁷³ GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at pml. (Ger.).

⁷⁴ *Id.*

⁷⁵ CURRIE, *supra* note 55, at 10–11.

⁷⁶ *Id.*

dignity of man shall be inviolable.”⁷⁷ Compare that to the first article of the United States Constitution which begins by outlining the specific—limited—powers accorded the legislative branch.⁷⁸ In sum, the Basic Law’s drafters would have been hard-pressed to demonstrate more clearly just how committed to individual, and specifically human rights, the German people were.⁷⁹

Even the makeup of the Framers of the Basic Law was different from the makeup of those who framed the Constitution of the United States. For one, in Germany, the political parties already existed, and members of the Parliamentary Council were already allied with their respective parties.⁸⁰ Each of the two largest parties, the Social Democrats and the Christian Democrats, had twenty-seven seats.⁸¹ Of those, nearly three-quarters had been personally affected by Nazi policy that had “professionally disadvantaged” them,⁸² and nearly all presumably were affected by the Nazi-era atrocities in some significant way. Regardless of political and ideological differences, however, the drafters of the Basic Law were in general alignment when it came to the importance, indeed “inviolab[ility],” of human dignity.⁸³

To be sure, the historical backdrop for the drafting of the current German equivalent is not completely dissimilar to that of the United States. It does bear some resemblance, particularly with regard to its structural safeguards against totalitarian government.⁸⁴ Politically, the Federal Republic of Germany had been overrun by the Nazi Party, and the drafters consequently wanted to set up “new democratic institutions, and to guarantee them by means of fixed procedures.”⁸⁵ But the Nazi takeover influenced more than the structure and procedure of the

⁷⁷ GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I at art. 1 (Ger.).

⁷⁸ U.S. CONST. art. I, §§ 1, 8.

⁷⁹ For a description of what the German “people” meant with regard to the drafting and ratification of the Basic Law, see Markovits, *supra* note 70, at 1309 (“[The] ‘Parliamentary Council’ elected by the legislative bodies of the *Länder* . . . succeeded in convincing the Occupation Powers that the new Basic Law should not be approved by popular referendum but by the parliaments of the West German *Länder*.”).

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *Id.* at 1309–10 (internal quotation marks omitted) (quoting Wolfram Werner, *Introduction* to 9 DER PARLAMENTARISCHE RAT 1948–1949: AKTEN AND PROTOKOLLE viii (Rupert Schick & Frederich P. Kahlenberg eds. 1996)).

⁸³ CONSTITUTIONAL JURISPRUDENCE OF GERMANY, *supra* note 22, at 301 (internal quotation marks omitted).

⁸⁴ *See* Bryde, *supra* note 54, at 194 (“In reaction to the abuse of state power, [the Basic Law’s drafters] were careful in drafting judicial safeguards against the abuse of state power, most notably creating an elaborate multi-tiered system of judicial review with a powerful Constitutional Court at the apex.”).

⁸⁵ Rösler, *supra* note 25, at 3.

democratic German government that followed in its wake.⁸⁶ It ultimately led the drafters to integrate a fiercely protective declaration of individual rights, perhaps more so than any Constitution before it. Therefore, even though the design of the Basic Law does bear some likeness to that of the U.S. Constitution, on the whole, the above elements demonstrate that it is quite different, and where it is different is significant.

The unique circumstances under which the German Basic Law was drafted amounted to a constitution that was not only cognizant of the concept of human rights, but was purposeful, unambiguous, and unmoving in its protection of them.

II. THE CONSTITUTION *IN RE* ABORTION: THE COURT WEIGHS IN ON THE ABORTION DEBATE

A. *The United States*

1. Constitutional Personhood

The *Roe* majority held that “[i]f this suggestion of [fetal] personhood is established, the [argument that women have a right to abortion], of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.”⁸⁷ To this end, the Court considered the text of the Constitution for references that might illuminate whether constitutional personhood extended to unborn life.⁸⁸ As this Note demonstrated previously, however, no specific Constitutional text is directly applicable to the abortion question.⁸⁹ The *Roe* Court accordingly proceeded by citing each time the word “person” appeared in the Constitution.⁹⁰ This included Section 1 of the Fourteenth Amendment, the Due Process Clause, the Equal Protection Clause, the Qualifications Clauses for both Congressmen and Presidents, the Migration and Importation provision, the Electors provisions, and the Fifth, Twelfth, and Twenty-second Amendments.⁹¹ Viewing the term exclusively within the context of the particular reference, the Court held that the fetus was not ascribed “person” status within the meaning of the Constitution.⁹²

⁸⁶ Bryde, *supra* notes 54, 69, 84 and accompanying text.

⁸⁷ *Roe v. Wade*, 410 U.S. 113, 156–57 (1973).

⁸⁸ *Id.* at 157.

⁸⁹ See discussion *supra* Part I.A.

⁹⁰ *Roe*, 410 U.S. at 157.

⁹¹ *Id.*

⁹² *Id.* (holding that “[n]one indicates, with any assurance, that it has any possible pre-natal application”). *But see* Marcin, *supra* note 48, at 49–50 (arguing that Justice Blackmun had gotten it wrong because he neglected to consider the word “people,” the plural of the word “person,” or “posterity” in the Preamble to the Constitution in his textual analysis).

Professor Gerard Bradley disagrees.⁹³ He notes that in Justice Blackmun's determination of the constitutional personhood of the fetus, he "cleaved closely to constitutional text, history contemporaneous with its enactment, and decided cases."⁹⁴ While this is an originalist interpretation of which even Justice Scalia could be proud, Professor Bradley makes a crucial point that the interpretation was selectively applied to the Court's analysis of whether the fetus is a constitutional person.⁹⁵ In short, Bradley contends that

had [Blackmun] applied these same criteria to the woman's assertion of right under the Fourteenth Amendment, *Roe* would have come out differently. Were constitutional text, precedent, and nineteenth century legislative practice, as well as anomalies forced into contemporary legislative practice, the measure of *her* claim, an attorney who claimed that the Constitution required abortion-on-demand would face Rule 11 sanctions.⁹⁶

Regardless, the fact of the matter is that, to the chagrin of millions, the *Roe* Court's skewed constitutional analysis created an abortion-legitimizing right to privacy; and because the unborn life was determined not to have constitutional personhood,⁹⁷ it was therefore not guaranteed the right to life.⁹⁸

2. The Right to Privacy

In *Roe v. Wade*, the Court necessarily engaged in some evaluative analysis of which rights were implicated in a woman's choice to terminate her pregnancy. In what is now an infamous exercise in

⁹³ See Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 346 (1993) (arguing that "unjust discrimination against the unborn permeated our laws up to and including *Roe*. Even the blanket exception for the mother is an arbitrary preference which, precisely as such, cannot be rationally defended if the unborn are persons with an equal right not to be killed. A fully just regime would . . . have no special law for abortion at all. Our legal tradition has had special laws for abortion. This fact demands some explanation, if only as a dialectical defense of my legal argument for the personhood of the unborn.").

⁹⁴ *Id.* at 340.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ For the significance of the denial of constitutional personhood, see Marcin, *supra* note 48, at 47, drawing a parallel between *Roe* and the *Dred Scott* decision:

It is in the context of the denial of personhood to the developing prenatal child that a telling analogy has been drawn between Justice Blackmun's denial of constitutional personhood to fetuses in his *Roe v. Wade* opinion in 1973 and Chief Justice Taney's denial of constitutional personhood to blacks, slave *or free*, in his well-known *Dred Scott v. Sandford* opinion in 1856. There have only been two times in the entire history of the Supreme Court when the Court has denied personhood to any classes of individuals. The first time was the *Dred Scott* decision in 1856 and the second was the *Roe v. Wade* decision in 1973.

⁹⁸ *Roe v. Wade*, 410 U.S. 113, 158 (1973).

constitutional jurisprudence to both advocates and opponents of abortion,⁹⁹ the Court unveiled a constitutional right to privacy and declared that a woman's decision to terminate a pregnancy fell within that right, or, more specifically, her emanating right to reproductive autonomy.¹⁰⁰

Therefore, at its very first shot at determining the constitutionality of statutes criminalizing abortion, the Court denied the unborn a right to life and ruled definitively in favor of a woman's right to choose. Justice Blackmun, writing the majority opinion for seven of nine justices, essentially "discovered" a right to privacy in *Roe v. Wade*.¹⁰¹ Finding that the alleged right was "embodied in the Fourteenth Amendment's Due Process Clause," the Court held ultimately that the right was broad enough to encompass a woman's decision to terminate her pregnancy and that, beyond that, it was "fundamental."¹⁰²

Justice Rehnquist, one of two dissenting justices in *Roe*, disagreed with this finding,¹⁰³ as have numerous Supreme Court justices and countless constitutional scholars since. Numerous *amici* briefs for the appellee in *Roe* argued that life begins at conception and that the unborn life is therefore a constitutional person whose right to life must undeniably trump a woman's right to privacy.¹⁰⁴ They further contended that the right of the unborn to life is guaranteed by the Fourteenth Amendment because it is a "fundamental, enumerated right necessary for ordered liberty [and therefore] takes precedence over the woman's right to privacy, which however genuine, is not enumerated in the Constitution, was probably not within the contemplation of the Founding Fathers and, as it developed historically, was thought to be subordinate to the right to life."¹⁰⁵ Nevertheless, Justice Blackmun's view prevailed, the woman's right to privacy was codified, and the right to life of the unborn was denied.

⁹⁹ See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 922 (1973) (criticizing the legal rationale of the *Roe* majority); Bradley, *supra* note 93 at 335-36 (arguing that, among others, the pro-life Robert Bork and the pro-choice John Hart Ely both disagree with the legal analysis of Justice Blackmun in *Roe*).

¹⁰⁰ Levy & Somek, *supra* note 11, at 117.

¹⁰¹ *Roe*, 410 U.S. at 152 (acknowledging that "[t]he Constitution does not explicitly mention any right of privacy" but that such a right may be pieced together from judicial interpretations of various constitutional amendments).

¹⁰² Ely, *supra* note 99, at 920, 928 n.58.

¹⁰³ *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting).

¹⁰⁴ Robert E. Jonas, *Dissenting Remarks*, 9 J. MARSHALL J. PRAC. & PROC. 595, 602 (1976).

¹⁰⁵ *Id.* (citing *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 253 (1891)).

3. The Limited & Legally Enigmatic State Interest in Protecting Unborn Life

Because the *Roe* court determined that “the fetus is not a ‘person’ within the meaning of the Fourteenth Amendment’s guarantees of due process and equal protection,”¹⁰⁶ the amount of protection the State could afford unborn life was greatly limited. The simultaneous holding that the woman had a fundamental right to privacy broad enough to encompass abortion placed the Court in a conundrum. The decision “that a mother has the absolute right, up to the day before delivery, to terminate [her] pregnancy would offend virtually [every]one’s moral sensibility, [and thus] the recognition of some limit to the mother’s right of reproductive autonomy is hardly surprising.”¹⁰⁷

The Court accordingly set up the trimester framework, by which it gave States the ability to limit abortion—essentially restricting the woman’s right to privacy—in graduating degrees corresponding to the interest the State had in protecting potential life at various stages throughout pregnancy.¹⁰⁸ The Court determined the State did not have a “compelling interest” until the fetus reached viability,¹⁰⁹ a conclusion that has garnered abundant criticism.

With the little legal justification offered for the trimester framework, the controversy over the constitutionality of the right to privacy, and the arbitrariness of asserting that the state has a “compelling interest” in protecting fetal life at viability,¹¹⁰ in addition to a host of other legal inconsistencies in *Roe*,¹¹¹ abortion proponents have been compelled to seek alternative legal justifications for abortion. Increasingly, they are seeking that justification in the Equal Protection Clause.¹¹²

B. Germany

The events leading up to the *Bundesverfassungsgericht*’s first abortion decision were markedly different from those in the United States. In addition to Germany’s intimate experience with the human

¹⁰⁶ Levy & Somek, *supra* note 11, at 115.

¹⁰⁷ *Id.* at 119.

¹⁰⁸ *Roe*, 410 U.S. at 164–65.

¹⁰⁹ *Id.* at 163.

¹¹⁰ See, e.g., Ely, *supra* note 99, at 935 (discussing that the right to privacy “discovered” in *Roe* is resilient, being given “protection[] so stringent that a desire to preserve the fetus’s *existence* is unable to overcome it—a protection more stringent . . . than that the present Court accords the freedom of the press *explicitly* guaranteed by the First Amendment” (emphasis added)).

¹¹¹ See *id.* at 924–26.

¹¹² Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J. L. & PUB. POL’Y 419, 438 (1995).

rights violations of Nazi Germany in World War II,¹¹³ Germany had more recently experienced heightened focus in medical and scientific debate on the subject.¹¹⁴ In response to the debate and the corresponding gravitation of public opinion toward more permissive abortion legislation, the more liberal Social Democratic Party majority mustered enough votes to pass, by a narrow majority,¹¹⁵ the Abortion Reform Act of 1974 (“ARA”).¹¹⁶ The ARA decriminalized abortion in certain cases and allowed abortion on demand within the first twelve days of conception.¹¹⁷ It further imposed mandatory counseling requirements, which required the woman seeking abortion to receive counseling that would serve primarily to “prevent premature [abortion]” and “effectuate a long-term reduction in the abortion rate.”¹¹⁸ Five German States and ninety-three members of the federal Parliament challenged the constitutionality of the Act, however, and before the legislation went into effect, it was enjoined so that the Constitutional Court could determine its constitutionality.¹¹⁹

On February 25, 1975, the *Bundesverfassungsgericht* rendered an opinion in which it held that the ARA was unconstitutional and that the German parliament had an affirmative duty to protect life, even against the rights of the mother.¹²⁰

1. The State’s Obligation to Protect Unborn Life

The constitutional text of the Basic Law that the abortion question implicates most directly is Article 2, paragraph 2, sentence 1, which proclaims that “[e]veryone shall have the right to life.”¹²¹ From this and

¹¹³ See Bryde *supra* notes 54, 69, 84 and accompanying text.

¹¹⁴ See Albin Eser, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. L. 369, 372–73 (1986).

¹¹⁵ John J. Hunt, *A Tale of Two Countries: German and American Attitudes to Abortion Since World War II*, in LIFE AND LEARNING IV: PROCEEDINGS OF THE FOURTH UNIVERSITY FACULTY FOR LIFE CONFERENCE HELD AT FORDHAM UNIVERSITY JUNE 1994 122, 125 (Joseph W. Koterski ed., 1995) (“The vote of 247 to 233 with 10 abstentions (Social Democrats), did not constitute an absolute majority in the Bundestag [Parliament] and was passed without a clear popular mandate.”).

¹¹⁶ Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255, 259–60 (1977).

¹¹⁷ Criminalization generally applied to all abortions not performed to save the life or health of the mother. See *Abortion I Case*, *supra* note 14, at 610.

¹¹⁸ Eser, *supra* note 114, at 378.

¹¹⁹ *Abortion I Case*, *supra* note 14, at 622.

¹²⁰ See discussion *infra* Part II.B.1–2.

¹²¹ Gorby, *supra* note 20, at 570; GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at art. 2 (Ger.).

the general structure of the Basic Law, the Court has declared a hierarchy of values, beginning with human dignity.¹²²

Additional text, which is of secondary significance to the inviolability of the right to human dignity, is the section dealing with the development of one's personality, found in the first paragraph of Article 2, which states: "Everyone shall have the right to the free development of his personality, *insofar as he does not infringe the rights of others* or offend against the constitutional order or the moral code."¹²³ It is readily apparent that the latter is not unqualified.

While the drafting history of the U.S. Constitution does not have specific reference to abortion and therefore cannot shed much light on the constitutional personhood of a fetus, the legislative history of the German Basic Law *does* include some specific references to abortion and therefore does provide some insight to the constitutional personhood of a fetus.¹²⁴ Consequently, the Basic Law is decidedly less ambivalent with regard to the personhood of unborn life than is the U.S. Constitution.

In expounding upon the Basic Law provisions relevant to abortion in light of the legislative debate concerning the constitutional personhood of the unborn, the Constitutional Court declared:

The duty of the state to protect every human life may . . . be directly deduced from Article 2, Paragraph 2, Sentence 1, of the Basic Law. In addition to that, the duty also results from the explicit provision of Article 1, Paragraph 1, Sentence 2, of the Basic Law since developing life participates in the protection which Article 1, Paragraph 1, of the Basic Law guarantees to human dignity. Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself be conscious of it and know personally how to preserve it. The potential faculties present in the human being from the beginning suffice to establish human dignity.¹²⁵

In addition to finding an affirmative State duty to protect potential life, the Constitutional Court also implied a right of the unborn to life, essentially "maintain[ing] that the right to life extended even to the foetus, since the Constitution guaranteed it to 'everyone.'"¹²⁶ While

¹²² See Levy & Somek, *supra* note 11, at 116.

¹²³ GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I at art. 2 (Ger.) (emphasis added).

¹²⁴ The legislative history for the ratification of Article 2, para. 2, recounts Parliamentary discussion over whether "germinating life" was to be included in the right to life. *Abortion I Case*, *supra* note 14, at 639–40. A motion was presented regarding explicit mention of the same. See *id.* While the motion was ultimately rejected, the written report of the session claims that "[t]he motions introduced by the German Party in the Main Committee . . . did not attain a majority only because, according to the view prevailing in the Committee, the value to be protected was already secured through the present version." *Id.* at 640 (internal quotation marks omitted).

¹²⁵ *Id.* at 641 (emphasis added).

¹²⁶ Eser, *supra* note 114, at 373.

proponents of the legislation argued that “everyone” was limited to “completed person[s],” they were unsuccessful in convincing the Court.¹²⁷

As for the scientific, theological, and legal question as to when life begins (hence when this right to life would mature), the Court refrained from entering the debate,¹²⁸ holding that it was not necessary to reach a conclusion because it had already established that the Basic Law imposed an affirmative duty on the state to protect life—all life—and that such a duty would “provide[] direction and impetus for legislation, administration, and judicial opinions” regarding abortion.¹²⁹

One manifestation of the impact the State’s affirmative duty to protect life has had on legislation is the counseling requirement. “For the Constitutional Court . . . , the constitutional priority given to the life of the unborn child implied that the state has a constitutional duty to protect the life of each unborn child by *preventing* abortions.”¹³⁰ To this end, the Court upheld the legislatively imposed waiting periods on women seeking abortion in order that women may first receive counseling—counseling that has the express purpose of dissuading women from obtaining an abortion.¹³¹ Compare this to the optional counseling that women may receive in the United States, where it is highly controversial even to entertain the idea of discouraging women through counseling.¹³²

Most importantly, the German Constitutional Court placed estimation of the right to the free development of the woman’s personhood at a level lower to that of the State’s commitment to protect life, and it consequently refused to legalize abortion. To the contrary, it seemed to embrace the argument that “[t]he allowance of abortion by the penal law cannot be interpreted in any other way than in the sense of legal approval.”¹³³ It went on to declare specifically that, “[i]f one were to deny that there was any duty to employ the means of the penal law, the protection of life which is to be guaranteed would be essentially

¹²⁷ Levy & Somek, *supra* note 11, at 115 (internal quotation marks omitted).

¹²⁸ *Abortion I Case*, *supra* note 14, at 641–42.

¹²⁹ *Id.* at 642.

¹³⁰ Levy & Somek, *supra* note 11, at 117 (emphasis added).

¹³¹ *Abortion I Case*, *supra* note 14, at 651.

¹³² See Rachel Benson Gold, *All That’s Old Is New Again: The Long Campaign to Persuade Women to Forego Abortion*, 12 GUTTMACHER POL’Y REV. 19, 21 (2009) (“Providing women information specifically geared to dissuading them from having an abortion is a *perversion* of medical ethics in general and the informed consent process in particular.”) (emphasis added).

¹³³ *Abortion I Case*, *supra* note 14, at 625; see also Hunt, *supra* note 115, at 128 (contending that the German Constitutional Court’s keeping abortion in a criminal context has led to a lower per capita abortion rate in Germany than in the United States).

restricted. . . . The elementary value of human life [thus] requires criminal law punishment for its destruction.”¹³⁴

2. The Balancing Act—the Duty to Protect Life Balanced with the Right to Full Development of Personhood

Even in spite of the hierarchy of values establishing the right to life as superior to other constitutional rights, the Court acknowledged that “[i]n balancing all of the considerations, Article 2, Paragraph 2, Sentence 1, of the Basic Law, which as a fundamental norm also protects unborn life, could not be construed to mean that it requires a universal penalization of [abortion] from the beginning of life forward.”¹³⁵

This is because the right of the unborn to life is in tension with the corresponding right of the mother to the free development of her personality and, as an extension of that, reproductive autonomy.¹³⁶ Such a right, however, is not absolute and is necessarily subservient to the more fundamental right to life.¹³⁷ For this reason the Court rejected a “terms solution” to abortion and instead maintained criminalization of abortion with indications as exceptions.

Ultimately, the Court came to a much more restrictive view of the legality of abortion—and a much more esteemed view of the fetus—than the U.S. Supreme Court had in *Roe*. First, it recognized a comprehensive duty of the state both to protect *and* promote unborn life, basing this obligation on the status of human life as an “ultimate value, . . . the living foundation of human dignity and the prerequisite for all other fundamental rights.”¹³⁸ Second, it declared that this state obligation existed even if it curtailed the rights of the mother because the fetus “is an independent human being who stands under the protection of the

¹³⁴ *Abortion I Case*, *supra* note 14, at 646–47.

¹³⁵ *Id.* at 634.

¹³⁶ See Kommers, *supra* note 15, at 7 (stating that “Article 2 (1) of the Basic Law . . . embodies the principle of personal self-determination—the closest German equivalent to our right of privacy found in the due process liberty clause of the fourteenth amendment . . .,” and it is from our right of privacy that the right to abortion is discerned).

¹³⁷ The Court held that:

[t]he right of the woman to the free development of her personality, which has as its content the freedom of behavior in a comprehensive sense and accordingly embraces the personal responsibility of the woman to decide against parenthood and the responsibilities flowing from it, can also . . . likewise demand recognition and protection. This right, however, is not guaranteed without limits—the rights of others, the constitutional order, and the moral law limit it. . . . [T]his right can never include the authorization to intrude upon the protected sphere of right of another without justifying reason or much less to destroy that sphere along with the life itself . . .

Abortion I Case, *supra* note 14, at 643.

¹³⁸ *Id.* at 642.

constitution”¹³⁹ Third, and finally, it held that, as a consequence, abortion must be clearly condemned in the legal order.¹⁴⁰ To balance the right to life of the unborn with the woman’s right to the free development of her person, the Court instated an “indications solution” by which abortions that are justified as one of the enumerated indications, certified following counseling, and performed by a licensed physician “need not be punished under the German Basic Law.”¹⁴¹

3. The Effect of Reunification

By the early 1990s, the composition of the Court had changed,¹⁴² but its bipartisanship and commitment to responsible constitutional exegesis remained the same. Additionally, the constitutional hierarchy of values had remained unchanged.¹⁴³

This time around, however, the legislature essentially balanced its obligation to protect fetal life against the people’s desire to reunify with East Germany.¹⁴⁴ In the legislature, the fetus lost. The Pregnancy and Family Medical Assistance Act of 1992 virtually gutted the Court’s holding in 1975, paradoxically ascribing equal weight to the state’s interest in protecting potential life and the woman’s right to terminate that life in the event of “deprived social conditions.”¹⁴⁵ This is not the final state of abortion law in Germany, however, for once again members of the German Parliament requested a court-ordered injunction so that the Constitutional Court could review the constitutionality of the legislation.¹⁴⁶

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 644.

¹⁴¹ Kommers, *supra* note 15, at 7–8.

¹⁴² See Markovits, *supra* note 70.

[T]he Court now has two Senates, with eight judges each, sitting for a nonrenewable term of twelve years. The term limits ensure a regular turnover at the Court, and so prevent the entrenchment of particular political approaches; the even number of justices forces them to compromise in close cases. The men and women chosen in this way have been remarkable for their moral commitment and their open minds. It helped that the constitution did not settle all appointment choices and thus left room for a flexibility more easily achievable by ordinary law.

Id. at 1346.

¹⁴³ See Kommers, *supra* note 15, at 19.

¹⁴⁴ East Germany had developed abortion law of its own and arrived at a much more permissive policy, allowing abortion on demand during the first trimester. See John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. OF TRANSNAT’L L. 189, 198 (2004).

¹⁴⁵ Levy & Somek, *supra* note 11, at 121–22, 131–32.

¹⁴⁶ Kommers, *supra* note 15, at 15.

In the second major abortion case,¹⁴⁷ the Court reaffirmed its affirmative duty to protect potential life and further held that “constitutional provisions protecting human dignity and the right to life *required* the legislature in most instances to make abortion a crime.”¹⁴⁸ It held unambiguously that abortion was an “act of killing,” and was therefore the subject of criminal law, but that it may be “justified,” and therefore exempt from criminal penalty, in specifically enumerated cases.¹⁴⁹ While the exceptions to the general rule criminalizing abortion tended to make abortion more legally permissive than it had been previously, the Court still mandated that the legislature balance the right to life of the unborn against the rights held by the mother.¹⁵⁰ Further, the Constitutional Court mandated that counseling of women seeking abortion was still required and that the design of the counseling was “preventive protection” for the unborn life,¹⁵¹ which required nothing short of “advisors who [could] be trusted to convey a strong prolife message, to treat women in distress respectfully, and provide them with comprehensive information about available care, facilities and financial support.”¹⁵²

In sum, the decision laid the groundwork for legislation that would represent the state’s unrelenting commitment to recognize the value of unborn life, even though the court also recognized the increasingly demanded, yet legally inferior, right of the woman to the full development of her personhood.

CONCLUSION—WHERE DO WE GO FROM HERE?

The purpose of this Note is to “challeng[e] and enlighten[]”¹⁵³ American constitutional jurisprudence on abortion. Considering the moral and legal insufficiencies of current American jurisprudence, there is much the United States can learn from the German Constitutional Court with regard to our hierarchical understanding of fundamental

¹⁴⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203, 1993 (Ger.) *as reprinted in* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 349 (2d ed. 1997) [hereinafter *Abortion II Case*].

¹⁴⁸ CURRIE, *supra* note 55, at 13–14.

¹⁴⁹ Kommers, *supra* note 15, at 18 (“[A]pplying [criminal law] reasoning to abortion, while any deliberate destruction of the fetus after the fourteenth day of conception is an ‘act of killing,’ thus satisfying the elements of a criminal act (*Tatbestand*), this act may be ‘justified’ and thus declared ‘not illegal’ (*nicht rechtswidrig*) in some circumstances.”).

¹⁵⁰ See Levy & Somek, *supra* note 11, at 116 (“[T]he Constitutional Court, unlike the Supreme Court in *Roe*, engaged in an explicit constitutional balancing of the competing rights at issue.”).

¹⁵¹ Kommers, *supra* note 15, at 20.

¹⁵² *Id.*; cf. Gold, *supra* note 132 and accompanying text.

¹⁵³ Kommers, *supra* note 15, at 3.

rights and the Court's commitment to protect them, regardless of past precedent and the ebb and flow of popular opinion.

In 1949, the Federal Republic of Germany ratified the Basic Law, which was in many ways a direct response to the unspeakably heinous Nazi-era human rights violations.¹⁵⁴ In essence, it was an expression that the German people had learned from the commission and experience of gruesome acts against humankind and the gravity of disregard and, ultimately, contempt for human dignity. Deserted death camps and mass graves served as chilling reminders of the results of stripping from humans their intrinsic value as persons.

They subsequently incorporated a fiercely protective bill of rights into their constitution, and in its very first article they proclaimed the inviolability of human dignity.¹⁵⁵ When the *Bundesverfassungsgericht* was called upon to render its first decision on abortion in light of its Basic Law in 1975, despite mounting public pressure to legalize abortion, the Court declared that abortion was then—and would remain—the subject of criminal law, no matter how compelling arguments to the contrary may have been.¹⁵⁶ In its rationale, the *Bundesverfassungsgericht* emphasized the supremacy of its duty to protect life over its commitment to promote the free development of personhood.¹⁵⁷ Even following a tenuous reunification process, it reaffirmed its utmost obligation to protect human dignity and held its commitment to other rights—namely the right to the free development of personhood—to be necessarily inferior. The *Bundesverfassungsgericht's* interpretation of its Basic Law therefore remained cognizant of the human rights violations committed at the hands of the Nazis and consequently remained steadfast in the Basic Law's design to prevent repetition of them.

The United States Constitution has a decidedly less informative history than that of the Germans with regard to human dignity. Specifically, the Constitution was not preceded by egregious human rights violations that prompted widespread public contemplation and fervent political response. Accordingly, abortion proponents are seemingly correct in their assertion that there is no explicit constitutional right of the unborn to life. Even so, it is important to note that the Constitution's history is equally, if not less, uninformative with regard to a right to abortion.¹⁵⁸ Without our own history to inform us of

¹⁵⁴ See *supra* Part I.B.

¹⁵⁵ See *id.*

¹⁵⁶ *Abortion I Case*, *supra* note 14, at 625; see also *Abortion II Case*, *supra* note 147, at 349.

¹⁵⁷ See *Abortion I Case*, *supra* note 14, at 625; see also *Abortion II Case*, *supra* note 147, at 349–50.

¹⁵⁸ Bradley, *supra* note 93, at 340.

the consequences of massive violations of human dignity, can the United States not learn from the Germans that, out of respect to *life*, the fetus must be attributed personhood that merits significant State protection, at any term of a pregnancy?¹⁵⁹

This is not to say that there is no case in which the termination of a pregnancy could be legally justified. In Germany, even after the *Bundesverfassungsgericht*'s intractable refusal to decriminalize abortion in 1975, women were still able to obtain legal justification for abortion if specific "indications" were met, some of which being rape, incest, or the life and health of the mother.¹⁶⁰ In essence, then, German abortion law requires a balancing of interests at any stage of the pregnancy between the fetus's right to life and the woman's right to the full development of her personhood.¹⁶¹

Ideally, the United States should pass a constitutional amendment defining personhood and advocating greater respect for human life than that which can be inferred from the Constitution as it stands. Such an approach would certainly not be novel; Americans did something similar in 1868 with passage of the Fourteenth Amendment. After more than a century of embracing slavery, the American people were finally moved to create a constitutional amendment declaring the rights of "life, liberty, [and] property" to be rights fundamental for "all persons."¹⁶² Essentially, the American people had learned from odious consequences the gravity of their contemptuous disregard of human dignity.¹⁶³ Taking a lesson from wiser, post-war Germany, the American people should do likewise and vindicate human dignity by protecting the right of the unborn to life.

Many, perhaps most, legal scholars and historical and philosophical commentators disagree with this proposition. Some even go so far as to analogize the state interest in protecting unborn life to society's general interest in preserving non-sentient species from extinction.¹⁶⁴ The fact of

¹⁵⁹ Therefore, evaluation of abortion legislation should always involve a balancing of interests between the right to life and the right to terminate it.

¹⁶⁰ Eser, *supra* note 114, at 373–76 (discussing the "indications" model of abortion regulation).

¹⁶¹ See *supra* text accompanying note 150.

¹⁶² U.S. CONST. amend. XIV.

¹⁶³ Caitlin E. Borgmann, *The Meaning of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 556 (2009) ("If, as a moral matter, an embryo or fetus is a person, then ultimately this must be reflected in the interpretation of our Constitution just as, for example, the moral recognition that slaves were persons led ineluctably to their recognition as full persons under the Constitution.").

¹⁶⁴ See Lawrence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution Is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155, 156 (2009) (arguing that "the only way to avoid [a Constitutional] anomaly is not to regard prenatal humans as constitutional persons. Nevertheless, the State has a morally legitimate interest in valuing and protecting prenatal humans . . . and it may enforce that interest, provided that it does

the matter is that the State has more interest in protecting prenatal life than that which arises from a commitment to valuing life as it is incidental to biodiversity¹⁶⁵—this is *human* life we are talking about after all. To avoid such a dismissive view of human dignity, the Court must evaluate abortion restrictions in a new light, and, if Americans can glean anything from the experiences of the Germans, they can learn that the right to life must necessarily rank higher within a constitutional hierarchy of rights than does the right to reproductive autonomy.¹⁶⁶

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not violate the fundamental rights and interests of persons.”); *see also id.* at 200–01 (contending that “[t]he federal Endangered Species Act protects certain groups of living, nonhuman entities (both sentient and nonsentient) from extinction. Congress’ findings note that ‘these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.’”).

¹⁶⁵ *See id.* at 200–01.

¹⁶⁶ Critics of this approach will point out that abortion in Germany today is more legally permissive than it was when the *Bundesverfassungsgericht* issued its initial opinion on the issue. Regardless of some of the convergence of abortion legislation in the two countries in recent years, the *Bundesverfassungsgericht* has remained steadfast in its constitutional hierarchy of rights, which places the right to life ahead of the right to the woman’s free development of her personhood and refuses to decriminalize abortion except in specifically enumerated circumstances. For a summary of current German abortion restrictions, see Christian Ehret, *Germany Parliament Approves Late-term Abortion Restrictions*, JURIST: LEGAL NEWS & RES. (May 14, 2009, 12:10 PM), <http://jurist.law.pitt.edu/paperchase/2009/05/germany-parliament-approves-late-term.php>.