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US State Abortion Law in an International Context: Distinguishing Religion and Politics

Paul J Zwier*

Abstract

US states have been adopting a conservative approach to abortion that have far reaching percussions to women. By a conservative approach, I mean a legal framework ascribing personhood to a fetus from the moment of conception. Depending on the state it may mean that women are not able to get access, for example, to certain birth control which contain medicine that thins the wall of the uterus and so helps inhibit pregnancies from forming. In its most extreme some conservative legislation tries to restrict access to medical abortion prescriptions [1]. A conservative turn in the states, whether coming from the federal district court, a state's court, or legislature, puts women who advocate for their right—some say their human right to control their own bodies in early pregnancy [2], to strategize about the best way to secure those rights. Setting aside self-help options for women seeking abortions, (moving to a state or going across state lines to states with clinics that will prescribe the medication,) the broader question for those seeking to allow for medical abortions in early pregnancy is how to change the law in the state. Is the best advocacy strategy through the courts, or whether it is better for them to use the political process to make their advocacy to the public generally? Should it seek to secure an even more explicit amendment to their state's Constitution?

At the heart of the strategy will be an important question: How best to persuade a court or body politic about the religious aspects of the question. Is the court or legislature or regulatory agency the best institution to be tasked with balancing deep intuitions about the sacredness of potential human life with shared goals of also protecting the health of women during their pregnancies? How can the discussion avoid polarization and demonizing that leads to political deadlock?

Regarding the latter questions, some help may come from looking at the international history of jurisdictions with conservative approaches to abortion. Ireland, Poland, Mexico, and Argentina each have had their unique confrontations with more conservative legal-religious settings. All four share a religious Catholic majority in their citizens that needed (and in the case of Poland, still needs) to be addressed [3]. The "religious" setting in a particular US state will likely share some of the "Catholic" perspectives on when human life may begin, but will likely also have some significant differences, especially around the source of its religious authority for criminalizing abortion. On the other hand, a particular US state may share a more "pluralistic" perspective, which balances off strong nonrational religious views against religious freedom concerns of other faiths. As a result, important compromises in Ireland, Mexico and Argentina reveal the more irrational nature of approaches that try to deny abortions after conception, or even at heartbeat, on religious grounds. These jurisdictions then have composed compromises that still do reverence to later stages

Affiliation:

Professor of Law, Emory University School of Law, Atlanta, GA 30322 United States

***Corresponding Author**

Paul J Zwier, Professor of Law, Emory University School of Law, Atlanta, GA 30322, United States.

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of fetal development but permit women to control their bodies during the first 12, and in the case of Argentina and Mexico, to 14 weeks. US states may do well to aim for a similar compromise. Ireland and Poland also have European legal settings that are both similar and different, that can help a state see what approach its state supreme court might take to the question of how its constitution will be interpreted. They share decisions from their Constitutional Tribunals that have marked conservative shifts toward giving *personhood* rights to fetuses in the midterm of pregnancy. They also share a legal umbrella, brought about by the fact they are members of the EU, and as member states have committed to a shared protections of human rights under the authority of the European Court of Human Rights (EHRC), they use the argument of "natural" law to ground rights of women to control early pregnancy. As a result, they present a contrasting legal setting that can amplify the legal setting a particular US state might find itself in. Mexico shares a more "federalist" structure of the US, but also has rejected a criminalizing approach in a particular state's jurisdiction, that had criminalized abortions before 12 weeks. Mexico, then, shares many of the challenges that US states face, but has in principle, at least, set aside its previous religious based position criminalizing all abortions after conception.

Briefly, the situation in each country is as follows: In Ireland, Irish progressives had tried in the European Court of Human Rights (ECHR) to challenge the Irish Constitution. They lost in 2010 at the ECHR, and so turned to a national referendum to bring about change to its Constitution [4]. If progressives in US states adopt the approach that the Irish women did in 2018, they might take their case directly to the electorate and use state referendum provisions to amend the Constitution. An important feature of the Irish approach was that it then was forced politically to "trust" the Irish legislature to regulate abortion according to the majority will. They needed to present the case to the public generally, that "personhood" did not begin at conception. Having made that case to a majority of voters, they repealed a previously enacted 8th amendment to the Irish Constitution, declaring life beginning at conception, and were able to trust the Irish public health regulatory agency to enact health regulations that balanced the rights of women and the unborn. These regulations provide that Irish women have a right to choose during the first 12 weeks of pregnancy [5]. Thereafter, their rights are dependent on a woman's ability to meet their burden of proof to health providers, regulated by the state, that they meet the exceptions provided by current Irish regulations, according to rape, incest, or, importantly, for health of the mother against the/right of the viable fetus [6].

In contrast to Ireland, in 2020, Polish women learned that their Constitutional Tribunal restricted their right to choose after years where abortion was widely available. The Tribunal found a right of the unborn not to be discriminated against based on "its" disability [7]. The Tribunal treated the fetus, even in early pregnancy, as a "person" for purposes of judging discrimination against it. That ruling has made a Polish right to choose virtually nonexistent, even when a woman's life is at stake [8]. There seemed little appetite since then to challenge the holding by amending its Constitution. The history of abortion in Poland is made doubly political because of abortion having been linked in the mind of many Poles as being associated with Nazi concentration camps in Poland. It was also linked politically to "permissive" approaches to abortion backed by Soviet law pre-Polish independence. Add to that the Russia Ukraine war at its border, and some observers feel the time is not ripe to create political divisions on abortion rights in Poland [9]. There are also pragmatic worries about making the argument too political. They worry about how to amend the constitution in a way that won't be interpreted by the Court in a manner that fails to be protective of their rights to control their own bodies. They are caught waiting on the ECHR to decide their case, and while their legal arguments might be strong, (the Court is more open to using Europe's progressive morals as evidence of the existence of a human right), they are also subject to the court's go-slow political reasoning when it comes to human rights. They also have brought the case as a class action, which may diminish the individual narratives of the women caught in the Polish legal trap. Those individual narratives demonstrate how protecting the fetus from disability discrimination requires medical providers to wait to determine the health of the fetus while risking the health of the mother. As a class it is harder to avoid the "self-help" possibilities available to women, generally, since abortion is so widely prevalent in other European states.

More on the Polish Law Context on Abortion

According to the Polish Constitutional Tribunal, as of 2020, Polish law restricts abortion to cases of rape, incest, and where both the health of the mother is at risk, but more importantly, second guesses the woman's health risks by requiring consideration of whether the fetus has been proven to also be not viable, should the fetus be carried to full term [10]. The added restriction on allowing abortions only where the fetus is shown not be viable effectively bans abortion for women in Poland [11]. Determining when the fetus is not viable has proven difficult for Polish doctors and has in some cases even resulted in the deaths of Polish women because their doctors are afraid to perform abortions. They are afraid they would be charged with murder if they aborted the fetus someone later determines to be viable.

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Polish researchers estimate that 30,000 Polish women have been put at risk by Polish criminal law rules related to abortion in situations where the health of the mother is traded for the rights of the fetus who may be viable [12]. The added risk to the woman to carry to full term is required even when the fetus's chance at a meaningful life is very low, including where the fetus has serious physical disabilities that make survival nearly impossible [13].

The change in law was a Constitutional surprise to some Polish women, though not a "political" one. The Polish Constitutional Tribunal ruled in 2020 that a Polish statue, in existence since 1993, was unconstitutional because it resulted in the termination of fetuses based on the health of the mother, "discriminating" against the fetus based on its deformity. In so doing it granted to the fetus, even during the first trimester of pregnancy, the rights of "persons" under its Constitution. The Tribunal ruled the 1993 statute did not adequately protect the personhood rights of a fetus, even if physically or mentally severely defective, and that the health of the mother had to be balanced against the fetus, to ensure the nonviability of the fetus before terminating it.

To some Polish women, the Tribunal's decision was baffling in reference to the Polish Constitutional text [14]. Some Poles wondered how the Court and legislature could have gotten the Constitution so wrong for the preceding 30 years. After all, the Polish Constitution in article 33 provided an "equal rights for women" provision-- declaring women equal to men and prohibiting discrimination against women [15]. Didn't an equal rights provision aimed precisely at women provide sufficient basis to guarantee a woman's choice in early pregnancy? As a matter of law, then, there is nothing in the Polish Constitution that defines the "personhood" of a fetus beginning at conception. To Polish constitutional scholars the Tribunal tries to "coverup" the legislative/ political aspects of their decision by relying on vague and unspecific references to what it means to be Polish, and to "religion" and morals [16]. They seemingly use Catholic beliefs about when "life" may begin as a pretext for finding that *personhood* begins at conception. To progressives the Tribunal created political confusion about the words "life" and "personhood", to engender support in some Catholics, for preventing early term abortions.

Even where its reasoning was *political*, [17] the Tribunal seemed to ignore the 30 years of experience of some women in Poland, including with their doctors, in making a difficult decision to terminate a pregnancy, balancing the important existing personhood rights of a woman to control her own body, with the yet to be developed personhood of the fetus. The Tribunal ignored whether a woman was terminating the pregnancy because the child had a medical condition that made its viability nearly impossible, and so put at risk the woman's health by carrying the fetus to term. It ignored the difficult decision made by woman who had multiple children and couldn't face the difficulties of raising another child, but at a time before the cells in her body became a "person." It discounted the proof problems for the woman who was raped (maybe by husband in a failing marriage, or over the protestations of the woman that she did not want more children,) or by a woman who became pregnant by incest. It ignored decisions by a woman whose birth control failed, or by a woman who made a mistake, and simply couldn't face/deal with a pregnancy because of marriage, family, or other financial circumstances, again, at a time before the "personhood" of the fetus had come into being [18].

Some Polish women wondered how a Constitutional Tribunal could think so little of a women's choice, in consultation with her doctor, to make such a difficult decision. Was the Court simply ignorant of the circumstances women faced in making their decisions? Perhaps it was all "political." It was political because political leadership were playing a conservative Catholic card, that since most Poles were Catholic, and the Catholic church had been a factor in Poland rise to independence from Soviet communism, then "real Poles" were against abortion, even in the earliest stages of pregnancy. The question for the Tribunal was whose political interests were being advanced, and what legitimized the Court's views of "correct" Polish politics. The language of the Constitution itself seemed to provide little support for the non-rational, religious/political view that personhood begins at conception.

Some Polish women historians conceded that part of the populist case against Russian communism was that during its time in power, with few women having access to birth control, the Russian controlled state was very permissive with granting women access to abortion. Was Russia "controlling" the number of Poles through its encouragement of abortion? In the 70s and 80s some Poles were appalled that Polish women seemed to treat abortion like birth control [19]. It was somewhat politically expedient, then for populist Polish leadership to use abortion as a "wedge" issue, as a distinguishing moral matter between communist Russian morality and "true" Polish morality. But that brand of politics conflated the conditions in Poland in 80's, and before the equal rights Constitutional provision, article 33, was enacted. It was enacted in 1993. By 1993, across Europe and the US, women were granted rights to abortion to balance the autonomous rights to abortion during early pregnancy, with the not yet personhood rights of the fetus. As in the 70s, and afterward, many more Polish women treated abortion not as a means of birth control, but as often a desperate choice to balance their own health concerns in tragic circumstances.

In 2020 political leadership was seemingly still trying to assert what it meant to be Polish, in the face of Germany to the south, and Russia to the North, and immigrant non-Catholic refugee communities surging into Poland [20]. With declining birth rates among Polish Catholics, the political

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leadership seemed to be desperate to increase the number of children born to Polish woman [21]. The state had started its move to control the Tribunal in 2017, arguing a political interest to do away with indefinite terms of judges. It legislated supposedly consistent with the Polish constitution, and its provision authorizing the President to control appointment of judges [22]. To progressives, the legislation threatened the courts independence by asserting Presidential and legislative authority over the number and term of the judges and then muzzles them from criticizing (disagreeing with) legislative pronouncements and new court rulings [23]. They felt it didn't take much then, for the President to fill vacancies with Judges more inclined to an anti-abortion position, and muzzle criticism of judges who decided cases using conservative nationalistic reasoning [24].

As much as its democracy might have provided legitimacy for policies to promote having children, some Polish women questioned whether the Polish Constitution had changed, lessening the rights of women to make decisions over their own bodies. Several Polish women have since joined in legal actions brought before the European Court of Human Rights, contesting the Polish tribunal's ruling on the grounds that it violates a woman's right to autonomy over her own body [25]. The cases also contest the Polish Tribunal's argument that the statute created a moral hazard (women needed to be protected from themselves in their decision with their doctor to abort). Before its ruling, their case argues that a woman's human right to choose had long been recognized in Poland, and in Western Europe, and spoke to the existence of their rights as "human rights." While the European Court of Human Rights must decide the case under the language of the European Convention on Human Rights and does so first and foremost by interpreting the language of the Convention, it has in other cases (prohibiting sex trafficking) recognized a basis for protecting rights in the conventional view of rights existing in Europe. Polish plaintiffs hope the European Court of Human Rights will find in the moral conventions of European law, (especially with the Irish Constitutional amendment,) that a woman's right to choose should leave early pregnancy decisions concerning the health of the women to the woman and her doctor [26]. Otherwise, a more progressive balanced approach will have to wait in Poland for the appointment of new Tribunal justices who are more sympathetic to the precedent established before the latest change, and willing to "overrule" the 2020 Tribunal, perhaps for its failure to provide "originalist" meaning to its Constitution. As of October 17, 2023, the chances for a reform of the Tribunal have greatly improved, with the rejection by Poles of the right-wing Law and Justice Party [27]. That strategy would expose the whole nature of adjudication to its own "political" interpretive critique. US states that strategize to control appointment of judges, similarly risk "politicizing their courts, to the detriment of their legitimacy [28].

More on The Irish Legal Context for Abortion

While Ireland is also seen as a conservative Catholic country, in an interesting legal and political twist discussed above, in 2018 it amended its Constitution. The Irish Constitution now provides the legal basis for *permitting* Irish women greater access to abortion, at least in the first 12 weeks of pregnancy, as regulated by the health department [29]. The new Constitutionally authorized legislation permits early term abortion at the choice of the women, and other abortions, including to protect the health of the woman in cases where the fetus's condition, or chances at meaningful life, or viability, is very poor. Irish women had to take on the Irish Constitution directly to make this change. It used the political democratic processes, including the politicization of the earlier case law under the then existing Constitution's, 8th amendment, arguing these cases had resulted in bad effects on the health of Irish women [30]. The Court decisions were used as the evidence to generate the Constitutional change, granting to the Irish legislature the power to regulate regarding abortion [31].

The Irish women had first tried to use the European Court of Human Rights (ECHR). In the ECHR, in 2010 that court had accepted a case from Ireland challenging its restrictive 8th amendment, which allowed Ireland to restrict a woman's right to choose. ECHR ruled that woman's choice was not then well enough established to grant them a blanket right overruling the contrary provisions of the Irish Constitution. Part of its reasoning, however, was that Irish women were able to travel to London to get the care they needed, and so the harm suffered was made moot by their own actions. One of the plaintiffs in the case was found to have had her rights violated, but the court determined the causation between the violation of her rights, and damages was too remote. The verdict was not a clear victory and left Irish women waiting for a change in law to better protect their rights.

Anna Carnegie and Rachel Roth have detailed the political efforts Irish progressives went through to change the situation in the body politic since 2010:

A critical moment in the fight for Irish abortion rights occurred with the death of Savita Halappanavar. A 31-year-old Indian immigrant living in Galway, Ireland, Halappanavar was pregnant with her first child. Doctors refused to intervene after she was diagnosed with an incomplete miscarriage at approximately 16 weeks of pregnancy. Hospital staff told her and her husband that they could not do anything to expedite the miscarriage because a fetal heartbeat was still present, and Ireland was a "Catholic country." She died of sepsis from medical mismanagement of her condition.(footnote omitted). This concrete example of the tremendous harm caused by the Eighth Amendment outraged huge numbers of individuals, who then mobilized to put mounting pressure on the government to address the problem. The government's

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inaction became less tenable as activists made more people aware that it had never defined the terms under which women could legally access abortion care, as instructed to do 20 years earlier in the 1992 X ruling.10 Moreover, Halappanavar's death occurred on the heels of the 2010 European Court of Human Rights ruling in a. carnegie and r. roth / abortion law reform, 109-120 112 DECEMBER 2019 VOLUME 21 NUMBER 2 Health and Human Rights Journal favor of three women who challenged Ireland's abortion laws (known as the ABC judgment); that court urged the state to enact legislation to broaden access to abortion. European Court of Human Rights, A, B and C v. Ireland (2010), Communication No. 25579/05 (2010). In 2013, the Oireachtas (Irish Parliament) passed the Protection of Life During Pregnancy Act (PLDPA) after a particularly brutal campaign where anti-choice activists harassed and threatened elected officials in a way that was not common in Irish politics on issues other than abortion. (footnote omitted). This new law permitted abortion in an exceedingly narrow range of cases—namely, where two doctors were willing to certify that pregnancy put the life (as opposed to the health) of a woman at "real and substantial" risk, and three doctors if the risk is the prospect of suicide. Some anti-choice voices at the time tried to convince the public that the act would permit unfettered access to abortion. The PLDPA had little practical impact, resulting in fewer than 30 sanctioned abortions per year. (footnote omitted). Moreover, the PLDPA imposed a criminal penalty of up to 14 years' imprisonment for anyone who either obtained an abortion in Ireland (for example, through obtaining safe but illegal pills), or provided an abortion outside of its parameters. Several high-profile cases highlight the failure of the PLDPA to provide access in life-threatening situations. These include the case of Ms. Y, a pregnant asylum-seeker who had been raped in her home country and was denied an abortion in Ireland, even though doctors said she was suicidal and thus continuing the pregnancy posed a significant threat to her life. She was ultimately subjected to a forced Caesarean section to deliver the baby, as until 2019, Ireland's national consent policy denied pregnant individuals the same right to choose and refuse medical care as people who are not pregnant. (footnote omitted). ARC opposed the PLDPA, seeing it as a wholly inadequate response to the ban on abortion and the constitutional subordination of pregnant people. ARC went on to campaign for a referendum to repeal the Eighth Amendment and build a nationwide network of grassroots activists who could be mobilized to fight for a referendum whenever that day came. Invisible people have invisible rights. To break down abortion stigma, ARC organized values clarification and civic engagement workshops and trained people from around the country to host these events in their communities, as well as "speak outs" where individuals could share their abortion stories. ARC adopted an unapologetically pro-choice position in public spheres. The March for Choice that we organize each year around Safe Abortion Day in September has been called "the first openly pro-choice activity" in Ireland. (footnote omitted). In 2012, 2,500 participants marched, and that number grew to a high of 40,000 in 2017. People wore jumpers and T-shirts emblazoned with the word REPEAL and ARC's slogan FREE SAFE LEGAL, creating visibility and fostering a sense of community among people who realized they were not alone [32].

Importantly, then, individuals found the space to speak about how they were confronting difficult decisions about abortion, and the public seemingly became convinced that Irish women were not using abortion cavalierly, or as birth control. They were not seeing evidencing an attitude that treated pregnancy in an instrumentalist way, or without respect for the potential for human life.

As was said, the legal obstacles were in the language of their amended Irish Constitution. In 1983 Ireland's 8th Amendment granted to the unborn a right of *personhood*. The European court indicated, however, that, in time and with evidence, the women's right to choose could be grounded in proof it would derive from its examination of the values and mores of citizens of the European Union [33]. The ECHR told Irish women they would have to wait for the ECHR to get the evidence, but in the meantime, urged the Irish legislature to protect a woman's right to choose, especially where health of woman was at issue [34].

Ireland itself, reversed track, and in 2018 reamended the constitution to allow the Irish legislature to regulate conditions of abortion [35]. Subsequent legislation granted Irish women the right to abortion in the first 12 weeks of pregnancy, including if the fetus had abnormal chromosomes, or had stopped growing, or other disability. The Irish population voted for the amendment by a vote of 66% in favor of the change. The constitution now enables regulations that provides an Irish woman with control of her own body, which takes precedence over any "personhood" rights that might come into being for the fetus, in the future, but not before 12 weeks [36]. Northern Ireland (with a significant Protestant population) [37] also followed suit. Both provide funding so that the abortion is free in the first 12 weeks, and in circumstances where the regulations authorize it. The provisions across Ireland providing woman these rights are tentative, and subject to the continued will of the Irish legislative process. Yet, for progressives, with such a resounding majority in support of the new legislation, at least the 12-week window to make the decision seems safe.

The Irish history shows that putting faith in democracy in the end worked as a good strategy for increasing women's access to abortion. Relying on a court, like the European Court of Human Rights, to use "human rights" reasoning may have been a threat in their body politic, but the democratic sentiments of Ireland balanced its "religious"

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sentiments concerning abortion, to come up with a realistic Constitutional alternative [38]. The political debate provided more transparency to the underlying justifications for restricting abortion after conception. Religious beliefs were respected and debated. Women's motives and decision making became better understood. The political process used evidence from court cases to show how old law was based on an indefensible understanding of when "human (personhood) life begins," and the regulation of later pregnancy satisfied the more conservative groups that abortion was not simply being used as birth control.

The Jurisprudential Setting to Abortion in the EU

The Polish legal context is defined by 1) its civil law jurisprudence, 2) the fact that, though not a republic, and so unified in its legal structure, it yet operates in the legal framework of the European Union and the European Court of Human Rights, [39] and 3) that the President has constitutional authority over the appointment of judges on the Tribunal, and 4) that its Constitution, (1980s) was written as it came out from under of the jurisprudence of Soviet Communism, and clearly defined for itself Constitutional rights equal for women and men. (Article 33). The overwhelming number of EU countries with this same civil law structure, and Constitutional Tribunal, allow women the right to choose during the first trimester of their pregnancy, and for abortions to later occur in consultation with physician, when the health of the mother, broadly interpreted, augers for termination of the pregnancy [40].

One would think that its civil law context gives the Polish constitutional tribunal less "political" room to interpret provisions of its Constitution [41]. Yet, despite warnings for the European Court of Human Rights, and a resolution from the EU Parliament, the Polish Constitutional Tribunal found its way to declare in 2020, a 1993 Polish law that allowed abortion to protect the health of the mother, to be unconstitutional. It found that provision unconstitutional where it was used to provide abortions in cases where the fetus had congenital defects [42]. As discussed earlier, its decision has produced a health crisis for women in Poland, where hospitals delay abortions to wait to determine whether the fetus is fatally defective, endangering the health of the woman in the process. It may violate Poland's EU commitments to Human Rights [43].

For Ireland, the legal "threat" from the European Court of Human Rights may have been marginally a factor, but ultimately was less important to overcoming the role of Irish Catholicism than was the political process. Its democratic politics was better at revealing the irrationality in its Constitution, both as a matter of science (need to protect the health of the mother, and the uncertainty over when a life, even a "human" life, becomes a person, with legal rights).

Even in Poland, where its Catholicism is thought to especially essential to its identity, the role of the Catholic Church does not provide normative guidance about its Constitutional identity. Though the Polish Constitution does recognize some role for the Catholic Church/Vatican (treating the Vatican like a separate country), it is not bound by the Catholic Church's 1869 decision that life begins at conception. At the time of the enactment of the equal rights article, the Polish law clearly saw women as having autonomy equal to men, and that women could not be made by the state to carry children. In cases of incest young girls could seek abortions. In cases of rape, women under Polish law could take steps to terminate pregnancy on the foundational authority that women had had rights over their own body and could not be forced to bear children without their consent.

Mexico (and Argentina) Decriminalizes Abortion

In early September 2021, Mexico's Supreme Court ruled that Mexican state of Coahuila, which borders Texas, could no longer deny a woman's right to seek abortion because it violated a woman's right to health. It also freed those assisting them, in the first 12 weeks of a pregnancy, and mandated that the state provide that assistance to secure those rights [44]. The Court based its decision on its interpretation of its Constitution. Mexico City had decriminalized abortion in 2007, but other states had not. Of note the court reached a decision following the state of Veracruz having decriminalized abortion, but also shortly after the state of Texas had criminalized abortion after just 6 weeks. The Mexico Supreme Court seemed persuaded by the arguments made by women in Argentina, who had presented data on the crisis in women's health from criminalizing abortion in Argentina. In Argentina, in January 2021, the legal change came through the legislature. Argentina's legislation provides for state funding for abortion up to 14 weeks, as a matter of public health. Previously Argentina had only permitted abortion in cases of rape or incest, or to protect the health of the mother. Its legislation, like in Ireland, followed a concerted political effort. Its political effort was led by the Latin American and Caribbean Center for Reproductive Freedom.

Catholic Belief about Life, Human Life, Personhood, and the Court

From the Irish experience, Irish progressives attempted to show that, the extent to which a Court bases it reasoning on religious beliefs, its reasoning is based on flawed causal connections between religious ends (life is sacred) and means," [46] (no sex without marriage and only for procreation purposes, no "artificial birth control, no condoms, no vasectomies, no tubal ligations, no invitro fertilization, no birth control that thins the endometrial). Life may begin at conception but not "personhood." Also, as science showed more and more the flaws in the causal links, the Irish experience taught how Catholic beliefs are based on illogical

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beliefs, and "bad science." The Argentinian and Mexico experiences showed the same reasoning is important in both a legislative and judicial setting.

The story of how the Catholic church developed its views on abortion has been often rehearsed, and more often misunderstood. The Catholic church changed its position as to when human life began in 1869s, [47] following hundreds of years of believing that human life begins when it becomes "animated" or at *ensoulment*, the Augustinian view. Today, rendition of "ensoulment" is *quickening,* which we will see some argue is the logical precursor to *viability,* the doctrine used by the Supreme Court in *Roe v. Wade.* To Pope Pius IX, because when the fetus became animated was unknown, he thought it morally safer to err on the side of considering human life to begin at conception, even if that was well before "animation." His argument made some ethical and medical sense at the time because, so little was understood about early fetal development at the time. Now, science teaches more about when "animation," "quickening" and then "viability" occurs, which helps determine when movement becomes life, then human life, and then "personhood."

Though Pius IX started as a moderate, he became increasingly conservative as his Papacy went along. In 1864, immediately before his removal of the animate inanimate distinction he wrote the *Syllabus of Errors*, and his fears of liberalism were evident. In the Syllabus, he condemned what he thought were modern heresies, such as religious liberalism, secularization, and rationalism. His views may have been a reaction to concerns that nation states may start to see their citizens as mere instruments of its will. If royalty claimed a "divine right of kings" basis for its authority, Pius thought its decision making required an important countervailing religious check on the tyrant. So, the church must assert a strong position that human life was sacred and should be left to God, to protect the individual from the tyrant.

In other words, Pius IX declared that life began at conception to combat progressive and secularized "utilitarian" thinking. His reasoning was tied to a view that life was sacred, and ultimately who lives and dies should be seen as being in God's hands. It confused several ideas in its pronouncement, that life was evidenced by movement and growth, and by its potential for growth into a human being, and so was inanimate at conception. But because humans can't know when it became *animate*, it is morally safer to treat it as animate. (It is likely that he thought of animate as sentient, in that he directed his excommunication from the church for committing an abortion not at the women seeking abortion, and not at those who used birth control, but at those third parties who facilitated the abortion.)

Think how science now impacts the words Pius the IX used at the time. The English adjective animate meaning "alive" comes from the Latin verb animate, meaning "to give life to," which in turn came from anima. A characteristic of animals is their ability to move. Of course, if life is mere movement and growth, then plants, as well as animals, as well as fetuses are alive. And what science now tells us is that there are important chromosomal differences between plants, animals, and humans. While each grow, and so move and can be said to be alive, there are important difference in the life of each type of chromosome driven development.

There are chromosomal differences between bonobos, apes, (gorillas and chimpanzees), and humans. These all share approximately 95% similarity in chromosome patterns. Still, within these dissimilar sections on the chromosomes there are over 40 million different patterns. As you might predict, differences in each group are related to additional genome patterns related to speech and language, as well as memory. While fetal development of a gorilla is development of a life, it is not a human life, and never will be within its lifetime. Similarly, some fetuses don't have a full set of human chromosomes. Some few, tragically, have an extra set (trisomy 18). Either if they have chromosomes or have an extra set that causes something to go wrong in the growth of their cells into a human: they have too few, or not enough, these may prevent the development of the front lobe and cerebrum of their brains, or will keep them from developing an umbilical cord, or keep them from growing and getting nourishment from the mother beyond a certain number of weeks.

The analogy with gorillas' chromosome development shows that while gorilla development certainly has a sacred set of attributes, most believe gorillas don't have the same or equal rights as a human. They are not human, or "persons" in the common meaning of those words. While anencephalic fetus may have sacred attributes, they, like an animal, will never be a human. Had Pope Pius IX known about the genome, what he meant by *animate* likely would have tried to account for the potential development of human speech, language, and memory. The potential for the cells to grow into a human life would constitute an important element but would not have been sufficient. If a point could be identified where no speech, memory, or language development existed, that point would also be important to when the cells should count as being a human person.

Pope Pius IX "erred" on the side of conception for making this determination, but his pronouncement contained an error, none-the-less. If the fetal brain before 16 weeks is like a lima bean and has no creases or groves, it has no memory, speech, or language. (Note an "originalist" theory of interpretation would support that Pius IX never understood life as personhood. Animate comes from the Latin root word anima, meaning "breath, soul" that gave us "animal." It is unlikely that the Pope meant that the cells had become "animals," only that it maybe ensouled, or *capable* of breath.) In any event, the pronunciation that life begins at conception

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led to a historical cascade of pronouncements about human sexual behavior.

As a technical legal matter, he also issued his encyclical Bull before he issued his pronouncement that Pope's pronouncements were Infallible [48]. As a result, it may not have the indicia of infallibility of other Catholic beliefs instituted after the Bull.

Pope Pius IX arguably recognized that sperm alone was not human life, nor egg alone. Still, later Catholic doctrine declared that anything that *artificially* blocked the sperm from fertilizing the egg was a sin. Again, Pius IX pursued a goal, promoting ideas that life is sacred, by denying humans any potential partnership in controlling intercourse. Suddenly, what was meant to be a doctrine protecting individuals from state intrusion became a tool for the Church to intrude into a woman's control over her own body.

Since 1869 when Pius IX made his declaration, progressives argued that the patriarchy of leadership formulated several positions that were not necessitated by a religious belief that human personhood was sacred. Vasectomy was forbidden. In addition, according to official church doctrine, condoms (even to prevent transmission of disease) were prohibited, as were IUDs. Sex itself was only to be engaged in for procreation purposes. Invitro fertilization was prohibited because the coming together of egg and sperm was artificial, and so not "unitive." Once fertilized though, in a "unitive" (rape and or incest is unitive?) the Church declared that life (as marked by movement, growth, and uniqueness, was now sufficiently in motion, that whether the fertilized egg lived or died should be left in God's hands.

But those positions were not "popular" with most Catholics, and many argued that the "religious" nature of those practices should not be grounds for excommunication. The great majority of devote Catholic women expect to be able to get right-to-choose options respecting most medical services [49]. It didn't fit their experiences with intercourse and family planning. As a result, today, there is a significant clash with American Catholics between their beliefs and the "official" doctrines of the Church. While a significant number of Catholic hospitals in the US will not facilitate in vitro fertilization, vasectomies, tubal ligations, or even providing birth control pills, [50] many other Catholic hospitals do provide many of these medical procedures and services [51]. Moreover, most devote US Catholics saw no necessary connection between planned parenthood and whether they consider the life of their child as sacred.

From the beginning of the Catholic pronouncement that life was sacred, and so began at conception, the doctrine created some difficult questions for the Church. At first it took the position that since the whole process of conception was in God's control, that meant that intercourse should only take place for the purpose of procreation. The Church then advised that birth control, even the rhythm method within marriage, was counter to God's purposes. They took an extremely male dominant view, that forbad women from refusing to have intercourse with their husbands and forbad women from ever taking steps to lessen the chances that they would get pregnant.

Of course, the next set of questions concerned rape, which was seen as only occurring outside of marriage. The Catholic Church made no exception, arguing that the conception with the rapist, once egg fertilization was accomplished, was now subject to God's will, and so the women could not have an abortion [52]. Note that for Catholics, the 1869 change was directly contrary to the majority position in the Catholic Church before 1869 when the pregnancy was caused by rape.

The next dilemma for Church doctrine that life began at conception concerned situations where the life of the mother was at stake, and an abortion was a necessary effect of saving the mother's life. Here the Church developed a view that considered the women on equal footing with the fetus. The majority Church position was that since the intent of doctor performing the care was to save the life of the woman, that it was not murder if the fetus was aborted. The "double effect" doctrine would then complicate religious medical care regarding tubal ligations and hysterectomies to save the life, or reduce the health risks to the mother of future bad health outcomes.

In each of these situations, rape, and to save the life of the mother, the Church used a mixture of "natural law" reasoning (intuitions, held by church leaders that God would want to teach the community that life was sacred by treating as a murderer any doctor or woman who aborted a fetus against a second strong intuition, that women should be treated as equal and autonomous with men). Presumably, the community was made more loving and more compassionate if it refused the woman an abortion, even in these tragic circumstances. But why would the death of a women to save a fetus with significant health care challenges, promote a more compassionate community. It might send a message that a women's life was less sacred than a not yet formed life. To progressives, its message to women seemed to be that God favored a not yet formed person over a fully formed sentient human being. How did that not demean the way women were treated? How doctrine and practice caused the desired goal, that individuals see life as sacred, was not logically, or causally, entailed.

Other Catholics took a much different view of how God acted in the world, or God's Providence. God's providence as a matter of Biblical interpretation, showed that God often worked in concert, or partnership with humans. Humans had a responsibility to act in a loving and compassionate way towards one another. God grieved when humans did not exercise their free wills in a compassionate manner. So,

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when men raped women, or husbands their wives, or when the state tried to forbid women from taking steps to undue tragic mistakes, many Christians worried that an intolerant view of abortion had become support for the very tyrannical oppression it was meant to combat.

Many noted the "non-rational" basis for Church doctrine. The Bible itself was not clear about how to determine when human life was "ensouled" or made a person [53]. To many Jews, interpreters of the Old Testament, they argued the text taught that life began at breath, or "Ruha." Instead, the Catholic Church's view was based on an intuition, born out a male dominated tradition, that saw women more as property, than as equal persons with the male. The gender of the decisionmakers made their intuition suspect, and raised the legitimacy of relying on natural law, when that law was determined without input from woman. Why shouldn't a women's privacy, control over her body, count at least equally with the group of cells not net formed into a sentient being?

In addition, the Church had long adapted its "natural law" perspectives considering science. Science informed its view of what was "natural," or created, or designed into the creation by the Creator. As result, the Church adopted its view of whether the world was flat, (despite some Biblical texts to the contrary) when Galileo studied the stars. The Church changed its view of how and when creation occurred considering scientific methods of dating matter and theories of evolution. While neither of these scientific developments contradicted Church doctrine of a Creator God, the Church yet accommodated its specific beliefs about life and the Creation, considering scientific developments, ending excommunication for those who believed in, for example, evolution. That is because, despite Pope Piux IX sentiments to the contrary, God's will may emerge considering different societal understandings of its context, and for progressives these include what science demonstrated.

Contrast with the Catholic view, for example, how Anglicans view a women's right to choose. The Anglican/ Episcopalian church forbids "abortion as a means of birth control, family planning, sex selection or any reason of mere convenience [54]. Yet, it viewed a better understanding of the science of early pregnancy as created room, in early pregnancy, for a woman to terminate her pregnancy in other situations. It argues that a better understanding of when a group of cells becomes sentient can help it both protect the sanctity of woman's bodily autonomy with potential sanctity of the cells when they become "persons."

Catholic belief clings to a distinction between artificial means to prevent pregnancy and "natural" means. That distinction is hard to implement in practice. Modern chemistry belies the distinction between artificial and natural, as many hormones are chemicals produced by the body, which can be impacted by what food one eats and drugs one takes. As a result, using those chemical properties to facilitate termination of pregnancy through the thinning of the endometrial lining might be said to be "natural" and arguably, safe. If a drug can facilitate the menstrual period to help the health of the mother, say to prevent cancer, (and vaccinations, to prevent Covid,) then it is hard to understand why the same drug can't facilitate the shedding or thinning of lining of the uterus to stop a pregnancy [55].

In the 1960s, because of the arrival of oral contraception, and the "sexual revolution," many in the Catholic Church saw Vatican II, as a chance for the Church to likewise confront the new science about life and death, and how it might impact its rules for the family, including abortion. To the disappointment of many, the Church stayed committed to its views on when life began [56], though some American Bishops used the doctrine of subsidiarity, (local option), to give room for Catholic woman to remain faithful, while using birth control [57]. Still, for many traditionalists, the Catholic Church continues to "double down" on its views, even of contraception, though it doesn't go so far as to prescribe criminal prosecution for Catholics using contraceptives, even for those taking drugs with abortifacients.

The present Pope recognizes the distinction between "life," generally, the term used by the Catholic church, and "human life," [58] and, legal "personhood." [59] His position was recently brought to the fore by Elizabeth Diaz reporting for the NYT, who quotes the Pope as saying:

"In any book of embryology, it is said that shortly before one month after conception the organs and the DNA are already delineated in the tiny fetus, before the mother even becomes aware," he said in a recent interview with the magazine America. "Therefore, there is a living human being. *I do not say a person*, because this is debated, but a living human being." (emphasis added). https://www.nytimes.com/interactive/2022/12/31/us/human-life-begin.html [60].

But what is the distinction between a group of cells being a "human being" and a "person." What his slight change signals is the Pope's own "progressive" approach to church doctrine, both its meaning and implementation. For example, while the Pope is seen as having mystical access to God's will, whether he sees that will as "changing" considering emerging understandings of science, giving rise to new interpretations of God's will, is a question not unlike what one asked of a Constitutional Tribunal. For example, what if he was in conversation with a sincere Anglican. What would the conversation look like. The Anglican bishop might note that on the one hand past Papal practice indicates an openness to that change. The 1869 pronouncement that life begins at conception, was issued at a time when women were thought of a man's property. Women couldn't deny themselves to their husbands, nor get in the way of God's creative purposes of procreation. As a result, the corollary

doctrines of intercourse itself being only for procreation, and that use of contraceptives by women was a sin, grow out of a logic bound in that understanding of women. The Church forbids sex before marriage, use of contraception, all serving a purpose of making marriage sacred, and the family produced by that marriage.

An Anglican bishop might advocate that many logical connections between the belief in sacredness of personhood and specific practices change with the arrival of birth control. Birth control can safely facilitate family planning. There seems to be great good that can result from better family planning. Won't families be happier and more loving if husband and wife share in decisions of having children, their timing and their support? Women's health, both physically and mentally, can be protected by using birth control. Children can be "spaced," so that more care can be given an individual child in early years. Where resources are limited, those resources are not "overrun" by too many mouths to feed all at once. The home and the family as perhaps now *designed*, are better protected through the use of birth control. If there is no longer a necessary logical connection between those practices and protecting the sanctity of marriage and having children, then perhaps God's will is for more planning.

What was made clear to a majority of Irish, (perhaps influenced by the Anglicans in such close proximity with different yet devote views), even those who were Catholic, is that up until 12 weeks, even saying the fetus, or group of cells that will make up a unique human life, constitute a human *person*, is a non-rational belief. It may not be "irrational," but, as legal philosophers have so effectively argued, it is not logically derived from the meaning of person hood as a matter of linguistic logic, or philosophy [61]. It is then political, or doctrinaire, even when based on religious reasoning. Its coherence, if any, is based on a projection of consequences. Which consequences will follow from meanings ascribed to both goals and means prescribed is a bet, that is not logically entailed.

We must stop and examine the "non-rational" political argument being made that personhood begins at conception. The Catholic argument is that without treating the fetus as a "person" the nation will be violating God's law of love. It will treat human life as if the person were "God" and so fully capable of making decisions about its life and death. In so doing humans are more likely to treat other humans in a utilitarian manner. Humans tend to then look at whether a particular human is useful, and so the state can decide for itself what life is useful. Such beliefs create a chain reaction of reasoning, that leads to a state promoting some persons ahead of others, without regard to the sacred dignity created by God in every human person [62].

The Church warns about future consequences to support its definition of "human life." It uses the Nazis, and Stalinists--systems with strong "utilitarian" ideas of the state, to justify the harm in utilitarian reasoning. It counsels against those who see life as lacking any sacred status, whether at beginning of life, or at the end of life, and partners with the state to "require" (treat criminally) individuals who treat the fetus as less than a full human life.

As the Irish electorate realized, the science is much more complicated about when human life becomes a human "person." To the Irish electorate, it became settled that a woman has a right to contraception, and this means that some physical means of ending a pregnancy, even where a sperm has fertilized an egg. They seemingly reasoned that ending the pregnancy in the early term does not end the life of a human person. Moreover, the science of invitro fertilization, (IVF), morning after pills, miscarriages, (from shedding of the endometrial, to low growth or no growth development, from environmental factors), medical abortions, and genetics (anencephalia, spina bifida, other genetic abnormalities), teaches them as much.

For the Irish Catholic voter, the science of contraception speaks to the lack of *personhood* at conception. It can still give "sacred" status to a fetus, later in its development, without doing damage to a balancing of the sacredness of a woman's control over her own body, and womb, in the process. A fertilized egg does, indeed, have human *potential*, even life, but not personhood. Hormonal contraception, for example works by impacting risk of pregnancy in three ways. It inhibits eggs from being released from the ovaries, thickens the wall of the neck of the uterus to inhibit sperm from getting through, but also, and important to our point, *thins the wall of the uterus to keep fertilized eggs from implanting in the placenta*. Common emergency pills, or day after pills, also work by thinning the wall of the uterus to keep a fertilized egg from implanting. The distinction between "emergency" and abortion pills narrows, as they both work by "dislodging" or keeping the fertilized egg from implanting in the placenta at different times during early pregnancy, (the time that a fertilized egg is starting to implant in the placenta to lead to the conditions under which a human life can develop into a person [63].

The science of IVF shows how the cells of a fertilized egg have multiple purposes. A great majority of fertilized eggs that may occur at any time of intercourse do not survive. To many scientists and ethicists, to claim that each death is a murder is at least inconsistent with Church "dual intent" exceptions for murder, widely recognized by the Church. Killing, even of another human, is justified by both doctrines of self-defense, and defense of others. So, a woman has the right to kill a rapist to prevent the rape. Many women can't have a child without IVF. Their intent is not to kill embryos, but to create the circumstances where they can have a child. Similarly, there is no intent when embryos are "discharged" during intercourse that don't lead to impregnating in the

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uterus. Many fertilized eggs that even attach to a placenta don't survive [64]. (Only a state desperate to populate their country would think it good policy to try to preserve potential human life down to this stage.)

For progressives, medical science teaches that even though the fertilized eggs contain cells containing DNA unique to an individual, does not make any cell or even group of cells a *person*. Hair cells contain DNA, as do saliva, and some will become organs, some will grow to provide a means for attaching to a placenta, some will develop into an umbilical cord, some to provide a way for the fetus to get oxygen and nourishment from the human placenta, without its other cells being able to breath or eating on its own. IVF allows medical practitioners to select from eggs those that are the healthiest, and have the best chances to survive. The other fertilized eggs are discarded, without moral consequences imagined by beliefs systems opposed to utilitarianism. Conventional ethics argues there are other ways to guard against state or elite fascist control over bodies that to endeavor to protect potential for human personhood down to conception.

During pregnancy, the body carrying the fertilized egg often miscarries the fetus, discharging the fetus that is not imbedded in the placenta. For some Catholics, this is "God's will," because it occurs naturally and spontaneously, Others feel that use of contraceptives, including abortifacients, also uses "natural" hormones, or chemicals facilitating the bodies hormones, to terminate the pregnancy. While it is common to think of the "woman's" body as making a "decision" that ends the pregnancy, the science is more complex. Why the woman's body "miscarries" results from several correlated conditions, including the health of the woman, the health of the fetus, environmental factors, (genes, the development of the fetus, the chemistry in the uterus) and the DNA in the fertilized egg. Again, while some view the miscarriage as a death of sorts, the science of it is also more complex, in that when a "human person" begins during pregnancy is analogous to religious thinking about ensoulment, or viability, or quickening. Before that the human cells are better seen as groups of cells with person hood *potential* before coming together, and should be seen as blood cells, or brain cells, or cells making organs, or cells that combined with cells from the mother, making functioning umbilical cords. Or even better the cells are like skin cells and hair, and other cells in the body that the body constantly discards, depending on if they are healthy, functioning, and viable [65].

The Irish experience informs the US state situation in two important ways. First, it shows how a progressive movement might take on the religious right in its understanding of when life begins. While there is no figure like the Pope to admit to the distinction between life and personhood, Protestants start with an authority, the Bible, that is ambiguous at best as to when "personhood" begins. Genesis contains the famous passage using the Hebrew word, "ruach" for breath, at the point that Adam becomes a live. Under a strict reading based on original intent, human beings become persons when they are born. There are some passages that suggest a child "leaps" in the womb as a sign to the mother, and that something sacred is occurring earlier during the pregnancy. Traditionally it was related to movement, or quickening, and viability. These factor then in Northern Ireland's adoption of the Irish Republic's view of the right to choose. In the US, the protestant evangelicals are largely Baptist. In the 1970s, the Baptist Convention joined the Uniform law Restatement in defining life at viability. Current religious belief was the reason why the Court, led then by Protestants, Jews, and an Anglican, had little thought that life began at conception. Latter positions by some Baptists seems to have developed in response to the sexual revolution and its feelings that secular humanism was dominating American public life, which would lead to a Communist takeover. So too, its views were born out of fear that loss in the belief in the sacredness of life would lead to a totalitarian takeover. Ironically, its fear of the motives of a woman's choice have blocked any consideration of the cost to human liberty that prevention of birth control and medical abortions will cause.

US women may instead choose to follow the Irish example and take their case to the body politic in their state [66]. Like Ireland it can use examples of the harm caused to women by the Polish Constitutional Tribunal's rulings to elect new representatives willing to either elect new Tribunal judges, or better, like Ireland, enact a Constitutional amendment making clear it is the legislative's prerogative to regulate abortion. It will need then to elect legislatures like the Irish did, to enact a law that protects a woman's right to choose, both in the early term as a matter of right, and later to protect the health of the mother, broadly construed. (It may be better for the Polish electorate to take on the issues at the national level, rather that increase a defensive reaction form the Poles, if the EU is seen as the source for its law.)

One way of understanding the Polish legal setting for how to secure rights for Polish women is by looking to the US to see whether its view of its Constitution can provide a means for a future Tribunal to set aside its ruling in Constitutional Court of Poland, *Case No. K 1/20* (OTK ZU A/2021, item 4, October 22, 2020). Ironically, a more progressively constituted Tribunal might be able to use Alito's majority opinion, which grounds its Constitutional interpretation of any judicial precedent in the history of Constitutional provision it has previously attempted to interpret. Applying that type of reasoning should enable a later Polish Tribunal plenty of authority for setting aside the Case No. K 1_20 holding. At the time of the Polish adoption of the equal rights amendment to its Constitution, women were clearly understood to have a right to terminate their pregnancies during the first trimester.

These two European experiences then may inform US women who are seeking to protect their rights to choose in

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the states in which they live: Should progressives make their case to their respective courts? Will their court likely take an originalist position, and in a twist of outcome, likely decide women have a right to choose, based in existing precedent interpreting the constitution? Or does the court follow a more "purposive" approach to interpreting its equal protection clause, that will allow it to draw on consensus values towards women's rights developed post Roe v. Wade, to support its continued interpretation of its meaning? Will the Court use an originalist approach to interpret an 18th century view of its equal protection and due process clauses to restrict a woman's right to choose as not having been contemplated by its original drafters? Should they seek a referendum? How will they present their case in light of the religious political setting the state finds itself in? If they seek a referendum to amend the Constitution, how should their Constitution be amended to affect the hoped for changes? How should the referendum implement any constitutional changes in a way that can best protect a woman's health and right to choose?

Preliminary Perspective regarding US Common Law

We must first recognize, however, the difference between a civil law context in Poland, and a common law context in the US (and Ireland). Perhaps the common law strategy of using history and precedent won't provide Poles that same argumentative force that it provides in the US. In the US, different states may have developed their own unique attitudes towards precedent, and common law. Both Louisiana and California have "code" or civil law histories. Will its common law traditions override these in favor of developing a more progressive interpretation of its laws related to pregnancy?

Ever since Holmes announced in his seminal text, The Common Law, that the basis of law "was not logic, but experience," US jurisprudence has struggled to give meaning to the concept of *experience*. It is fundamental to the idea of the common law that judges are allowed to provide meaning to old precedent and texts, in the light of new contexts. Logic can dictate new meanings considering new understanding of the scientific facts. New understanding of nature can drive new understanding of law. These scientific experiences are still fundamental to keeping the common law focus on doing justice. But what of other kinds of experience that can impact the court? What about a court's own view of "public policy" and the changing values in society? Can these also impact the meaning of precedent and text?

US jurisprudence struggles to articulate how the courts' reasoning about "public policy" is different from that engaged in by legislatures. Many historians argue that the idea of separation of powers is based, in part on a fundamental difference between how courts make decisions and how legislatures make decisions. Since the time of *Marbury v. Madison*, John Marshall (and justices following) were determined to keep the court from being "political," or acting like a legislature [67]. One of its key doctrines of interpretation was to turn down cases of review that involved "political questions." [68] What exactly is the judge's experience teaching the judge, that allows the judge to interpret the law beyond its original context and meaning? Presumably the judge is learning something from viewing controversies coming before it in court, which provides the judge with a basis for interpretation of the law into these new contexts. The judge learns from the failings in earlier cases, and the injustice bubbles up to the surface in the mind of the judge. If the judge ignores that experience, the law gets too out of step with the present contexts. The court becomes too technical and *logical* and starts to veer from what "justice" might demand from the court into engaging in a hierarchical oppression of a different kind- one that looks political and dogmatic [69].

But what makes the judge's experience sufficient for interpreting the law into new contexts. In some ways judicial experience can be thought of as akin to the "experience" gained by a historian examining a series of historical events from the past, for trends and meaning. In the context of judging, where a decision is required, to some the context makes the judge also like a clinical psychologist, engaged in treatment, or a medical doctor, who develops ways for dealing with cases considering cases that require their treatment decisions. Each professional is using past ways for treating cases, but, at the same time, developing new techniques considering their experience with the "new" diseases, and new circumstances. In each of these settings the past is a guide to the present but not sufficient for the treatment of ongoing problems.

Judges are obviously more bound by history, because embedded in precedent contains a legal foundation for equality. Patients care less about how others are treated, and more about recovery from their illness. Parties seek judges who will treat them fairly, or equally, with others. Parties seek equal treatment regardless of class, race, gender, or status. Precedent gives the right to claim from the judge equal treatment that others have received. As a result, if others have been given rights, parties in litigation seek equal access to those rights. As a result, history in law is vital to providing this "equal" treatment. That idea of equality imbedded in precedent gives the law its authority.

Madison's view of religious pluralism is also an indication of a US value at work in any particular state setting. Religious beliefs, since non-rational, and so, at their heart, subject to personal conscience and group consensus within the religion, shouldn't be forced on those of another religion. Just as an individual ought to be able to choose to treat human life as beginning at conception, others may have a non-rational belief, though backed by a science view, that human persons form later in the pregnancy. One group's religious view should not be imposed on others, especially through forms

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of criminal punishment and prosecution. (Hawthorne's The Scarlett Letter, read by many US school children, taught this lesson.)

The common law made room for religious pluralism in its procedures. Different approaches and practices could compete, in different settings, so see which ones created the most loving, just, and compassionate communities. The job of assessing the different approaches is left to historians, sociologists, anthropologists, and scientists. Historiographers have long recognized that there is an uncertain interpretive process in assessing any history. That interpretive process makes history continually subject to modern, or current, experiences. Deriving lessons from history presents additional difficulties because history is never finished. The past blends into the present so that it is hard to determine when the current experience is right, or fair, to be used in interpreting the past. Current history itself, is never quite finished in the present. Like with scientific research, the lessons are always tentative and unfinished because history, both in traditional understanding, and in the present, is incomplete. It is especially incomplete in determining the consequences from past decisions, and in matters of divining motive, or intent. Moreover, it is incomplete when it tries to predict future consequences, or public policy impacts. Judges are especially sensitive to their (in)ability to see the unintended consequences of rules. Predicting the future is an extremely uncertain endeavor.

In a liberal democracy, the conservatives rely mainly on democracy as the process by which law (and society, especially the Constitution) is to get input on the need for it to change, or to be reformed. Progressives worry that democracy can be captured by the powerful business elites. In addition, the problem of US democracy, since the days of Alex de Tocqueville, is the problem of mob rule. The Frenchmen de Tocqueville, having lived through the French revolution, was on guard for the potential of a tyranny of the majority. A tyrannical majority too often acts in "fear" to protect itself from new groups and new technologies that the majority has yet to come to understand. The mob turns to the guillotine to govern. One can argue that for progressives, in the context of abortion, is the problem of the tyranny of the majority: that a conservative majority legislates restrictions on abortion because of belief systems nonrational at best, and perhaps serving ends that serve elites in their preservation of power. (Males get to control whether their wives must keep a baby.)

Conservatives and Progressives have long battled over how to balance the past, and the lessons gleaned from it, or at least accepted as being grounded in the past, and how those lessons should be weighed against the emerging understanding of present experience, and the new needs society is facing. Both battle over the new understanding of "values" or goals. Both sides express that society is "aiming" to bring about a just society reflecting current moral values. Sometimes they focus on substantive rights, sometimes on process--or who gets to make the decision in a federalist system. (In matters of abortion, conservatives favor "states" rights to make the decision about when life begins).

Supreme Court historians have noted the shift that occurred during the Warren Court (1953-69) toward a more progressive basis for Constitutional interpretation. Authors Stone and Strauss see that the Warren Court was more willing to take on the problems of sexism and racism in the society, using the principles of equality and democracy. According to Stone and Strauss, the "Warren court" was a time when the Supreme Court was open to considering authorities other than legal precedent. During its time it was not unusual for the Supreme Court to have before it briefs like the famous Brandeis Brief.

The Brandeis brief was a pioneering legal brief that was the first in United States legal history to rely more on a compilation of scientific information and social science than on legal citations. It is named after then-litigator and eventual associate Supreme Court Justice Louis Brandeis, who presented it in his argument for the 1908 US Supreme Court case *Muller v. Oregon*. The brief was submitted in support of a state law restricting the number of hours women were allowed to work.[2] The Brandeis brief consisted of more than 100 pages, only *two* of which were devoted to legal argument.[3] The rest of the document contained testimony by medics, social scientists, and male workers arguing that long working hours had a negative effect on the "health, safety, morals, and general welfare of women." *Johnson, John W. (1992). "Brandeis Brief". In Hall, Kermit (ed.). The Oxford companion to the Supreme Court of the United States. New York: Oxford University Press. pp. 100–101*, Baer, Judith A. (1978). *The chains of protection: the judicial response to women's labor legislation*. Westport, Conn.: Greenwood Press. p. 57

As a result, the US Supreme court was open to different types of information about society in cases like *Brown v. Board of Education*, where the Supreme Court was perfectly comfortable in using the new research from sociologists and economists, to help it discern whether a separate or equal education was needed to address problems of racism in education. In *Griswold v. Connecticut* it was open to information and argument about women's health, in an age of contraception, were free to get access to contraception to give them liberty over their own bodies.

Use of economics helped it measure disparities and respond to inequality. History, by itself, was seen as an insufficient basis for determining the meaning of equality. History was too often captured by hierarchies, that made past interpretations of equality and due process biased in favor of hierarchies. Law needed to be able to better protect children,

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workers, from the adhesion and oppressive principles of contract and free market that made the market oppressive. It was into that understanding of the role of the Court interpreting the Constitution that *Roe v. Wade* was born.

The majority certainly was cognizant of the dangers of relying on substantive due process as a basis of a women's right to abortion during early pregnancy but felt that it need not be bound to historical views of women, (that at the time of the 14th amendment) that viewed women as property. The Court was willing to consult biomedical research on the science of "viability" to base a woman's right to choose, against the state's interest in protecting the life of an unborn child. Viability in Roe was based in a "natural" law understanding of when a fetus became of person. The logic of the law was driven by what science brought to society's understanding of when a fetus, at first a biological mix of personhood potential, would be said to itself become a seat of rights. The US Constitution, after all, gave persons the rights of life liberty and the pursuit of happiness. Cells, even bodies, with heart beats, by themselves were not "persons." One's heart could be beating, and yet a person would be "brain dead." Viability, then was a "natural" and rational basis for determining the meaning of person, that could then be balanced against the natural understanding that women ought to be free to control their own bodies from the intrusion of the state, or of others.

If state's high court judges were of the mind to see its law as informed by science, and the harm done to women whose rights to choose were restricted by nonrational ideas of when "life begins," it might use its equal rights articles to find in its Constitution, a women's right to choose. Or, it might see "privacy" rights, inherent in a women's right to choose birth control, to justify prohibitions from the state into the medical decisions involving pregnancy.

Alito's Use of History in *Dobbs* May Set Precedent for Progressives in States to Support Choice

Yet, an additional way to use Dobbs, is to turn its reasoning about history, and original meaning, in favor of setting aside the Polish tribunal's recent ruling. Originalism argues that it is not consistent with the "social contract" for a court to substitute its judgment for what the Constitution means with what it meant at the time the body politic enacted the Constitution. The question for Polish Tribunal is what the Polish Constitution meant at the time it was enacted in the 1990s. Informed by Roe v. Wade, the Polish Constitution must have understood its equal protection article for women considering the public health decisions being made during the 1990s. As a result, the Tribunal should not substitute its view of personhood for the fetus as trumping a women's rights to make decisions to terminate a pregnancy in existence when the Constitution was enacted.

Still, to see how Alito made history the sole basis for setting aside Roe, we must read *Dobbs* with care. And to see the conservative epistemological shift to history over emerging experience as the primary basis of Constitutional law in Alito's decision in *Dobbs v. Jackson Women's Health Organization,* he must be read considering the insider's account of *Roe v. Wade* provided by James Robenalt. Robenalt, in his excellent book, JANUARY 1973: WATERGATE, *ROVE V. WADE*, VIETNAM, AND THE MONTH THAT CHANGED AMERICA FOREVER, (Chicago Review Press, 2015), shows that the hidden reasoning at work in the majority in *Roe* was one based on "natural law." Powell and his majority colleagues came together in grounding in their understanding of a women's right to control her own body in not only various provisions of the Constitution (the penumbra for a right of privacy), but also because the emerging intuition that equality for women meant the right to protect their use of their own bodies. Women had liberty interests to protect themselves, that to Powell, were inherent in what it meant to be an equal person in the law. Law would surely provide that a woman's body was her own. That law was grounded in what it meant that women were equal to men. As opposed to some societies that blamed women, even when raped by others, from bring dishonor on the family, in the west, it was part of the natural law of what it meant to be "equal." Women had the undeniable right, especially when victims of rape, or incest, or unwanted disease, and unconsented dangers to mental health, to protect their own bodies. A woman's liberty interest was grounded then in the recognition of a higher law, that was bound in the meaning and dignity of a women's equal personhood to men under law. While the state may at some point have an interest in protecting the unborn, that interest had to be balanced against the "inherent" and natural law based right of women to choose.

The irony is that Alito, and (predecessor theorist judge Bork), then Scalia-Thomas-Gorsuch-Cavanaugh-Coney-Barrett-Catholic contingent on the court, are more than comfortable with using "natural law" to argue against a series of social ills: same sex marriage, the "right to die," a women's right to vote, (maybe even interracial marriage). They argue that since America's founding, till the Warren Court, these rights did not exist. As such they couldn't be said to be part of the rights contemplated by the founders, nor drafters of the 14th amendment. They couldn't be "natural" because for too many years they didn't exist. They were not rights since they were not explicitly referenced in the Constitution. These rights could not be said to be part of the "natural law," because history did not condone them. They base their arguments that "natural law" argues against the granting of liberty rights (in same sex marriage, interracial marriage, right to die,) where none had existed previously.

For each group (Conservatives and Progressives) on the Court, finding a grounding for liberty rights is an admittedly

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fluid process. For the conservatives, natural law is proven out by history and tradition, and that history inevitably moves from a time when no one explicitly thought liberty provided a right, to where it did. After all, slavery was permitted by most nations for centuries. Still, there could be a time when history is subject to an awakening, confirmed by a time when certain rights become accepted. When there has been sufficient time for those rights to be confirmed and accepted, is further tested by federalism. For conservatives, federalism allows states to determine what rights majority decisionmakers in those states find they need to protect. Conservatives argue that the 14th amendment provides a legitimate "authoritative" basis for prohibiting slavery. Beyond that, their view of history is that if a right wasn't recognized widely in the community it didn't exist, at least not as a matter of fundamental human rights especially protected from majority overreach, (*strict scrutiny* required to uphold laws impinging on fundamental rights,) in the law.

For progressives, on the other hand, the natural law is informed by history, but history can also reveal values misshapen by prejudice and hierarchical discriminations. Once these are set aside, modern and more recent history can now "show" or give evidence for a true "natural law" understanding of the liberty interest in question. These rights don't depend on state confirmation, but exist at a higher level of grounding, in the "inalienable" and "inherent" notions of liberty, ensured to all persons under the Constitution. Yet, history, even if recent, can confirm the "new" understanding of a right. When that precedent is well enough established, and supported by "majority" sentiments, that 30-to-50-year precedence can support a progressive/natural law basis for that right.

To see Alito's different view of history, and his refusal to give any "natural law" status to the past fifty years in the US since Roe, we need to take a close reading of his majority opinion in *Dobbs*. After all, according to Alito, *Roe* was simply wrong. For Alito, the majority in *Roe v. Wade* engaged in a flight of activist, progressive fantasy, creating a fundamental right for a woman to choose to abort an early pregnancy where none existed in the Constitution. He ignored the realities of the situation confronting the *Roe* court. He ignores the unenforceability of criminalizing abortion that existed in the 1860s. He ignores the divisions in the jurisdictions about when life began, and the harm these differences caused women, especially women of color. He ignores the harm to women desperately seeking abortions from "abortion mills," and instead focused on criminal abortion *laws* that existed in the 1860s, at the time of the writing of the 14th amendment. His logic is that if some states criminalize abortions, and didn't limit the prosecutions by statute according to viability, then states intended to protect a fetus *from the time of conception*. It is both the historical basis and logic of his argument, to which we next turn.

Abortion Framed as an "Expanded" Substantive Liberty interest in the Due Process Clause of the 5th Amendment Needing Deep Grounding on US History and Tradition

According to Alito's framing of the issue:

We have held that the "established method of substantive-due-process analysis" requires that an unenumerated right be "'deeply rooted in this Nation's history and tradition'" before it can be recognized as a component of the "liberty" protected in the Due Process Clause. Glucksberg, 521 U. S., at 721; cf. Timbs, 586 U. S., at ___ (slip op., at 7).

Glucksberg dealt with a state's right to criminalize suicide, and held, (Ginsberg) that the right to die was not a right grounded in our tradition or history. Ginsberg then leaves it to the states to determine whether under their constitutions, they want to give room for a "right" to die. States could evolve a "right" to die where a person is in a persistent vegetative state, had made clear the person's desire to die, (to surrogate, or by means of a living will), and refuse life sustaining treatment. All states now provide a patient with such rights to forgo feeding, oxygen, respirators, where they make their intent known. At the time of Glucksberg, Ginsberg was unwilling to find a human right in suicide in the either the 5th amendment or the 14th amendment.

Instead of seeing in a woman's right to control her own body, as a right fully emerging since a woman's right to vote in the early 1900s, Alito picks the 1860s, as a time to determine a woman's right to choose. Why pick the 1860s as the place to understand societies view of women and their ability to control their own bodies? One wonders how conscious Alito is of the fact that instead of focusing on the shared understanding of the moral issues at the time of Roe, he was buying into an understanding of the issues in a time when women were widely viewed as property. Instead of attributing obvious prejudice towards women to the law makers of that time, he instead uses that time as evidence of a "natural" law basis for allowing the state to intrude into decisions between women and their doctors during the first stages of a pregnancy. Like Pope Pius before him he seems to be unaware of any biases against women imbedded in definitions of when life begins.

The Case from History that *Roe* got wrong.

Of course, the case from history is not always easy to make, and in contrast with the Polish situation, where it was pretty clear that Poles enacted its equal rights amendment for women with termination of pregnancy rights in mind, to many, the 14th amendment to the US Constitution was enacted at a time when termination of pregnancy decision, at least as to the nature of the rights of the fetus, wasn't based in an understanding of when human person hood began. But this didn't stop Alito from using his historical understanding

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of when life began as a basis for setting aside the *Roe* understanding of a woman's right to choose. I am arguing that what Poles might do is embrace the use of history, but not that it embraces Alito's actual historiography as applied to the 1860s.

According to Alito, the undisputed historical facts showed that states in the 1860s (and at the time of Roe) overwhelmingly criminalized abortion, and as a result for the Supreme Court to set aside state's views about the need to protect unborn fetuses was the height of arrogance. It was simply an impermissible politically based decision that the court could intuit changing values in society, in favor of a woman's right to choose. He argued that where states criminalized abortions, even for fetuses who were less than 12 weeks old, they were taking sides against a state's belief (attributing to the state a motive for the criminal statutes) that life begins at conception. What some historians feel that Alito gets wrong about history, is that he equates criminalizing abortion with a particular belief about when life begins. The overwhelming evidence in history is that not even the Catholic church decided life began at conception, until 1869, after the adoption of the 14th amendment [70]. In other words, Alito is reading his Catholic understanding of when life begins as the basis for legislative criminalization of abortion, when it is clear that no one, at the time, and certainly not a majority Protestant southern legislature, thought life began at conception.

Alito thought Justice Powell, at the time of the *Roe* decision, was oblivious to the federalism issues that augured against his finding a woman had a fundamental right to choose to terminate a pregnancy pre-viability. Alito argued that Powell and the majority ignored "positivist" bases of law in the history surrounding the criminalization of abortion, even if based on the time of the adoption of the 14th amendment, which fixed a meaning of criminalize abortion, by the context of these historical fact. Alito writes:

Not only was there no support for such a constitutional right until shortly before Roe, but abortion had long been a crime in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow. Roe either ignored or misstated this history, and Casey declined to reconsider Roe's faulty historical analysis. It is therefore important to set the record straight [71].

What is the analytical framework of Alito's argument that gives the following meaning to the words of the 14th amendment, which denied to states the ability to discriminate against persons on the basis of race or religion.

1. Some abortions were treated as crimes in some states around the time of enactment of the 14th amendment, therefore 2. all states treated all abortions as criminal.

The historical facts were that no terminations of pregnancy by a women before the fetus "quickened" was ever brought against the women or a third party assister because the fetus was not ever understood to yet be alive.

The only cases on record up to enactment of the 14th amendment for the crime related to abortion was brought against a person (often a spurned angered man not wanting the women to bare the child, against the women's wishes, through an act of violence, caused the death of the fetus.

Consider then the gaps in logic in Alito's argument number 2, that

2. Therefore, these states saw women as not having the right to abort a fetus at any time during her pregnancy, and if she tried to abort at any time, she committed a crime, and any doctor (third party) who assisted was treated as a criminal.

Again this ignores a number of historical facts: that no cases were ever brought against a women, and if it had been, she would have had a number of defenses, there was no human life that had been ended, that she acted out of self-defense (she would have been killed, shunned, if she had the child), and there is no proof of a human being having been killed.

Alito admits that the common law of crimes, later picked up by state statutes, set the point where the criminal law attached at the point of "quickening." Quickening, at the time, was when there was "evidence of life."

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages,31 and thus, as one court put it in 1872: "[U]ntil the period of quickening there is no evidence of life; and whatever may be said of the feotus, the law has fixed upon this period of gestation as the time when the child is endowed with life" because "foetal movements are the first clearly marked and well defined evidences of life." Evans v. People, 49 N. Y. 86, 90 (emphasis added); Cooper, 22 N. J. L., at 56 ("In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it" (emphasis added)) [72].

Two points to make here. There was obvious understanding already in the 1860s that intercourse, where cells combined

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in some way to start to grow, preceded human quickening. The coming together of sperm and egg, a fertilized egg, was something any farmer understood. It is wrong to conclude there was consensus that of a nonfactual, that had the average farmer understood sperm and egg, that they would have thought that personhood began at conception. Afterall, Animal Husbandry has been around since Middle Ages. Farmers bred their animals and understood much about insemination and miscarriage.

The second point is to look at actual practice by criminal prosecutors at the time of the 1860s. None thought to criminally prosecute women for abortion which occurred early in a pregnancy.

Of course, then, Alito's historical argument immediately fails, because there was never a criminal prosecution before the adoption of the 14th amendment, before "quickening," which was set at about 20 weeks. (Especially of a doctor or a woman seeking an abortion). He argues, however, that that was because of the ignorance of society at the time about when life began. Again, cells are alive, as they are in all plants and animals. Human life as a "person" means more than cellular, biological life. He ignores the distinction here between when life begins, and when the law saw fit to treat that life as a "person." He excuses the failure of society by saying life begins earlier on its ignorance and lack of understanding. (This is precisely the point of the dissent, that his history picks and chooses the time and place where the "law" (natural law) is set in stone. He argues that following the time of the adoption of the 14th amendment, there is more evidence of what it meant, in the later actions of states. Then his opinion ignores the emerging understanding of life, in the experience of medical science, society, and the courts in the decade leading up to Roe.

(Other historians (in the amici brief) have argued that Alito misunderstands the history at the time of Roe. While states may have criminal statutes against abortion, many struggled to define when "life began" for purposes of the law, treating the life as a person, whether at conception, or viability. These historians see in post-civil war period till *Roe*, that most states made exceptions for protection of the health of the mother, and in cases of rape and incest. Overwhelmingly most prosecutors did not use the criminal statutes to prosecute the women themselves. These amici historians see enough consensus during this time, (1950s) that the American Law Institute (ALI) took it upon itself to Restate the law concerning criminalizing abortion. ALI's study determined that prosecutors mostly used criminal abortion statutes to prosecute men who attacked their wives, causing fetuses to abort (saying that their intent to harm the women also made it murder if a fetus was aborted,). Prosecutions were also used against *unlicensed* abortion providers "causing" the death of a woman and fetus simultaneously. In these cases, prosecutors invoked a "felony murder rule" where the charge of murder of a woman that required felonious intent was provided by the intent to end the existence of the fetus.

The practice surrounding the actual criminal prosecutions for abortion evidenced no belief in life beginning at conception. Instead, it showed a universal discomfort from prosecuting licensed doctors for terminations of pregnancies for health reasons in early term with the consent of the woman (and often male parent), or for terminations of pregnancies during the first trimester. The consensus of belief was that before "viability" criminal prosecutions of women and licensed health care providers was just not warranted.

Alito does admit that history is some evidence of a consensus in belief among many citizens and some legal scholar historians that life began at viability. The US Solicitor General saw in that practical history a basis for not needing a balancing of a women's right to choose to abort before viability, but that after viability, according to the common law, any right a fetus might have could be balanced for the health of mother. None-the-less Alito quarrels with the Solicitor General's argument that "quickening" was based on viability, that is, evidence of life independent of the womb. Alito writes:

The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.'" Brief for United States 26 (quoting Parker, 50 Mass., at 266). But the case on which the Solicitor General relies for this proposition also suggested that the criminal law's quickening rule was out of step with the treatment of prenatal life in other areas of law, noting that "to many purposes, in reference to civil rights, an infant in *ventre sa mere* is regarded as a person in being." Ibid. (citing 1 Blackstone 129); see also Evans, 49 N. Y., at 89; Mills v. Commonwealth, 13 Pa. 631, 633 (1850); Morrow v. Scott, 7 Ga. 535, 537 (1849); Hall v. Hancock, 32 Mass. 255, 258 (1834); Thellusson v. Woodford, 4 Ves. 227, 321–322, 31 Eng. Rep. 117, 163 (1789). Id., at 22

Again, Alito is less than complete in his excerpt regarding other areas of law where pre-viability of the fetus didn't bar a court granting the fetus rights. While it is true that common law property law seems to give the unborn fetus some property rights as a being with a potential prospect of becoming person, (to get an injunction, or at some time later to benefit from property distributed to the fetus,) it ignores the fact that as to future rights of a beneficiary, those depended on birth. It made no sense to attach rights to the fetus who was miscarried, for whatever reason. In addition, the criminal cases deal, again, with the punishment of a man who abuses his wife, causing the death of the fetus. These are situations grounded in other reasoning than in the belief that the fetus is a person at the time of the violently induced miscarriage. A legislature could obviously want to provide deterrence for the

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violence against a woman that caused a miscarriage. (Abuse of women, (like abuse of animals) was considered a violation of God's law, and the law of nature, not because the animal was a human person, or the fetus a human person, but because of heinous nature of the act.)

Alito uses history of the existence of criminal statutes against abortion, and then excuses the actual practice of prosecution based on a history of other laws in the context of the 1840s and 50s. He ignores the most salient other area of common law, tort law. Justice Holmes wrote directly on point, that the common law of torts did not give a previable fetus rights to sue, or to compensation [73]. Even where compensation was awarded for the loss of the fetus, none of these cases concerned consenting conduct by the woman herself. The purposes of the rules in those cases did not involve a balancing a woman's right to control her own body, considering the recognition that the woman was an equal person under the law. As we will see, what is particularly frustrating to the dissent, is that in the 1840s women were viewed under much state law as "property," and did not have the right to vote. How can state legislation and case law that is more grounded in US tradition and law ignore the failure during its early history to see woman as equal person? [74] Alito says that it is because at the time of a particular Constitution event, like the 14th amendment, the meaning that must be given to the 14th amendment was inbedded in the attitude of men to women that thought of women with little or no autonomy rights.(It is like saying no man thought a woman could be a doctor, so woman couldn't be doctors, as matter of the common meaning of the word doctor.)

State Legislative Motives are Irrelevant [75].

As opposed to areas of law involving race or religious freedom, where legislative intent is often determinative of violations of the Constitutional prohibitions, when it comes to legislative motives behind criminalizing abortion, Alito claims that legislative motives don't matter. Of interest to comparative law scholars (advocating for a woman's right to choose before other constitutions) is Alito dismissal of an amicus brief relied on by respondents, that saw in state legislation at the time (criminalizing abortion) a motive to encourage Protestant women to have as many children as Catholic woman.

This is particularly troubling because he feels free to ignore the absence of clarity about why states criminalize abortion in the first place. He ignores the legislation may have had less to do with the life of the fetus, or an understanding that the fetus was a human person, than a desire to encourage women of a certain faith to have more babies so that they wouldn't be out populated by others of a different religious perspective. He instead assumes the motive for this legislation is based on a widely shared religious belief that life began at conception, a belief that can be best described in the US at the time, as an unformed and incoherent fringe belief in a small minority Catholic population, with little understanding of the science involved. It was not until the 1970s, that a majority of Protestants joined the right to life movement. (Before that, the great majority of mainline Protestants joined the American Law Institute's view that a fetus was not a person pre-viability). It was not until Nixon era politics when some Evangelical Christians took up abortion as a cause and started to conflate the argument that life began at conception, with the argument that personhood begins at conception. Remember that during the time of the election of John F. Kennedy, some Protestants were concerned that Kennedy's Catholic faith would mean he would impose "life begins at conception" (so no use of contraceptives) beliefs on the family. These Protestants objected to the Catholic doctrine of life beginning at conception being "imposed" on others of different faiths and beliefs [76]. Birth control was believed to be an inherent feature of a woman's control over her body, and so was not seen by Protestants as a matter of religious belief about whether, for instance, whether a husband could insist that his wife have a baby.

It turns out since Dobbs that some states grant privacy rights to their constituencies by amending their Constitutions to protect a woman's access to birth control, perhaps, in part, to ward off minority Catholic beliefs in when life began. Such privacy provisions now have become the basis for a state Supreme Court to rule that legislation restricting termination of pregnancy right of a woman during the first weeks of pregnancy (either by "heartbeat" restrictions, or in attempts less than 10 weeks), to violate her privacy rights. South Carolina in the prime example[1] (and some thought Georgia would interprets its Constitution's right to privacy in the same way) [78]. Some women feel that their religious free exercise rights are also implicated, and their cases brought in Ohio by Jewish groups, and United Church of Christ arguing as much. Some states may have difficulty if their legislation is based in an explicit invocation that "religious beliefs" (or even moral beliefs) support a state's view that criminalizes all abortions, without then seeing such a belief as not infringing on other "religious" beliefs that life doesn't begin at conception, or that person hood starts only at birth. As a historical matter most women certainly understand the basis of their autonomy rights to control their own body has grounding in morality, if not religious beliefs in human liberty.

Finally, Equal Rights Amendments have been ratified by 38 states during the time since *Griswold* and *Roe*. Will a state court see in a state's ratification of the equal rights amendment, at the time of *Roe*, an historical basis for a state view that protects a women's right to choose? (It is certainly as good as a historical basis for the right to choose for women in a statebased on its constitutional provision for equal rights for women). Most have due process and equal protection clauses

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that prohibit the state from taking property or impinging on personal liberty without due process. Ratification of the equal rights amendment for women provide a basis for understanding those state provision to apply to women the right to choose that can't be taken away without due process.

Alito does cite to the mixed motives behind legislation criminalizing abortion but dismisses it because determining legislative intent is such a hard and unknown process, based on describing intent of the entire legislative body based on evidence of intent of a single legislator. (One wonders whether a state supreme court would feel differently if their state's legislature or body politic had adopted an Equal Rights Amendment for women.)

Another amicus brief in Dobbs relied upon by respondents (see Brief for Respondents 21) tries to dismiss the significance of the state criminal statutes that were in effect when the Fourteenth Amendment was adopted by suggesting that they were enacted for illegitimate reasons. According to this account, which is based almost entirely on statements made by one prominent proponent of the statutes, important motives for the laws were the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to "shir[k their] maternal duties." Brief for American Historical Association et al. as Amici Curiae 20. 597 U. S. ____ (2022), at 28.

The irony is that Alito prefers to ascribe to the legislation that criminalizes abortion a belief that life, including personhood, begins at conception, rather than to recognized that it was highly unlikely that belief was shared by a majority of legislative enactors.

Also compare Alito's argument with the argument that will now need to be made under a state's constitution. If the state, like Poland, saw legislating to criminalize abortion as a way for the state to increase the number of women bearing children, presumably to be raised under the direction of most of a particular faith, the Court would be forced to examine those motives to determine whether they violate other Constitutional provisions. Alito would presumably find that any for the criminalization justified by the electorate who enacted the legislation, which is again, to rule out legislative motives while presuming the good faith of the motives of the majority of the electorate.

To be clear, Alito is not arguing that life and personhood begins at conception. Nor is he arguing for some inherent right in personhood in the unborn to not be discriminated based on disability. He is only arguing that states ought to have the right to so rule. And that is what history demands that the state make the call. What is less clear is whether the state Supreme Court is bound by Alito's historical reasoning concerning the legitimacy of state criminal statutes, or whether a particular state could determine its experience with abortion gives it enough judicial basis to determine a state constitutional right to abortion.

For Poles, then, the Tribunal cannot argue that some lower court or part of the republic be allowed to make the call. As a result, the Tribunal is more bound by the "original" meaning of Polish Constitution, and its current decision ought to be set aside. The Polish Constitutional Tribunal needs to understand that without a historical grounding, the Constitutional provisions may have become too political, and stop operating in a manner that protects human rights from the religious and political perspectives of a current majority.

Dissenters in the US Frame Issue as Necessary Limitation on a State's "tyranny of majority power."

The dissent in *Dobbs*, written by Breyer, starts as follows:

We start with Roe and Casey, and with their deep connections to a broad swath of this Court's precedents. To hear the majority tell the tale, Roe and Casey are aberrations: They came from nowhere, went nowhere—and so are easy to excise from this Nation's constitutional law. That is not true. After describing the decisions themselves, we explain how they are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations. The majority does not wish to talk about these matters for obvious reasons; to do so would both ground Roe and Casey in this Court's precedents and reveal the broad implications of today's decision. But the facts will not so handily disappear. Roe and Casey were from the beginning, and are even more now, embedded (cite omitted) in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. *For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people.* (my emphasis). So we do not (as the majority insists today) place everything within "the reach of majorities and [government] officials." West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 638 (1943). We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once [79].

The dissenters in *Dobbs* had two responses to Alito's opinion. First, the historical facts were much more complex than Alito made them out to be, whether a woman was seen as having a liberty interest in the control of her body to abort a fetus in the early stages of pregnancy.

It is true that at the time of *Roe*, the court was more willing to take as a given, founded in their collective experience in society, that a majority of women had a "natural" law "privacy" right. That natural law was discerned by the *Roe* majority. It served as a basis for requiring the state to show

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a "compelling" interest in the life of a "viable" fetus, to justify a state's regulation of the woman's decisions, rather than assuming the woman had no such right because it was a relatively new understanding based on new medical understanding of pregnancy.

Robenalt, who had access to Hammond's thinking, (the law clerk behind Justice Blackmun and Powell's negotiation over Roe v. Wade), shows a more complex story and complete basis for the Roe decision than the one that Alito describes as an ahistorical power grab by progressives [80]. Hammand's descriptions of the deliberations at the Court shows that at the time, the woman's right of privacy had been overwhelming accepted by the Court. Douglass's Constitutional theory of privacy, and theory of fundamental rights for women, (grounded in both the penumbra of provision in the Constitution, and the due process and equal protection clauses of the 14th amendment,) required the state to show a compelling interest in protecting the fetus, which, in turn, focused on the "viability" of the fetus [81]. In addition, he shows that the justices were uniform in worry that states were impermissibly intruding on decisions better left to the woman and her doctor [82]. No one of the justices expressed a personal view that human life, or personhood, began at conception, (though they admitted that was an option) [83].

Even though the Supreme Court's membership was in flux (Berger was taking a more conservative role, relying on the arrival of Powell and Rehnquist to curtail the activism of the Warren Court,) the judges were surprising in agreement that state should keep its hands off the woman's decision to abort in the first trimester. Their disagreements were not in the federal government's need to recognize a fundamental privacy right in woman to choose, but in how to ground the decision in principle. None wanted to rule when life began. They saw the range of options, from conception, to viability, to birth. But the state's interest in regulating, and how it would choose to regulate, especially during a sexual revolution facilitated by birth control, had given rise to a crisis for women. Adding to the sense of crisis was the state's inability to articulate the basis for its regulations. Either the state was unclear in its intent to protect the fetus, (and as of when), or its enactments were so vague, making the statute unequally and arbitrarily enforced, or so intrusive, as to raise legitimate fears of a totalitarian state intruding itself into marital bedroom. The state's legislative approaches were doing serious harm (as they do now) to a woman's right to terminate a pregnancy before personhood rights attach to the fetus. It threatens doctors and women with criminal prosecutions where the state is acting under vague and arbitrary guidance.

The three decisions before the Court during *Roe*, 1) a Texas case where legislation required a medical panel to okay the abortion, 2) a Connecticut case, that required the procedure be done at a licensed hospital (to avoid the abortion "mill" fiascos), and 3) the Georgia legislation, (Roe v. Bolton), that protected life from conception, according to the majority, each had to go.

As Robenalt recounts, Douglass's opinion in Griswold v. Connecticut [84], had caused a stir. Justice Black's dissent had raised important arguments against basing a substantive right of privacy in the due process clause of the 14th amendment. Douglass, however, had not relied solely on due process. Most constitutional scholars were on board with Douglass's decision. Douglass's opinion found a right of privacy in the "penumbra" of provisions in the Constitution [85]. Deciding that what was emerging from the common law of interpretation of the Constitution was an insight that a fundamental right of privacy supported a women's right to contraception better than substantive "due process" right found in the 5th and 14th amendments. Douglass and others thought that giving substantive "due process," more than "procedural" meaning, produced disastrous results, because it would involve the Supreme court in reviewing the substantive decisions of state courts. Privacy in the penumbra provided a way around the "slippery slope" problems of substantive due process.

The penumbra was found in Constitutional protections starting with the 1st amendment, (for freedom of conscience, religious liberty, freedom to contract, freedom to associate), 4th amendment freedom from illegal searches and seizures, 5th amendment freedom from compelled testimony, 3rd amendment freedom from quartering troops in private homes, even in time of war, 9th amendment ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people"). Others have since seen privacy in Constitutional prohibitions against taking property without compensation, and conscientious objection exceptions for military service, among others. provided the foundation for a right of "privacy," that should not be taken by the state without due process.

What Robenalt shows is that with Justice Douglass no longer on the Court, Justice Blackmun was no longer willing to extend "privacy" as a fundamental right, considering its imprecise origins [86]. Privacy could be subject to the same criticisms directed at a "substantive" due process right: Douglass worried how the court would be able to articulate a rule against "homosexual marriage," or marriage between a minor and an adult, or "some other" relationship that was arguably formed between consenting beings [87]. What was needed was a way for the privacy right to be balanced by a state's compelling interest in the health and welfare of its citizens.

While unwilling, then, to eventually ground the right in privacy (so the need for Planned Parenthood of Southeastern Pa. v. Casey 505 U.S. 833 (1992) (to ground the balancing in viability), it is misleading, at best, to suggest that the Constitution gave personhood rights to fetuses before viability.

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And so, the second response of the dissent is to argue there is no historical basis for granting to a fetus personhood rights superior to a woman's liberty interests. The criminalization of the abortion was directed at a violent third party intending the woman and fetus harm. It could be said to protect a woman's right to bodily integrity during pregnancy from unconsented violence. It was not directed on woman herself, especially in early term abortions. The justices in Roe were concerned that if the legislation was imprecise, a doctor, in consultation with the patient, could be caught up in a state's attempts to protect a viable fetus. That is why Powell would land on viability as a flexion point for the articulation of the state's compelling interest.

The jurisprudential shift embedded in Alito's opinion away from "natural law" to a fixed focus on some "originalist" basis, grounded in a moment of the enactment of the 14th amendment, shows an outright rejection of a broader basis for Constitutional law. No reliance on a Brandeis style brief, that explored the national view of a liberty interest in play was permissible. Sociology, anthropology, economics, were all excluded from consideration, in favor a "historical inquiry" of the law's meaning, at a particular time and place. Alito now makes historiography the sole basis of interpretation of Constitutional meaning of federalism, rather than any broader common law-based view, that the life of the law could develop considering "experience" with the context and meaning that the law spoke into. As a result, his history is a weird sort of history, in that it denies recent history's ability to interpret and give meaning to past historical events.

Ironically, for both US states, and nation states, the federalism consideration, is not a concern. Without federalism to excuse it taking up the definition of when personhood rights should attach, the state has no option but to take up its view of its Constitution, in light of both histories, and its view as to what meaning to ascribe to its Constitution. Many state constitutions have been interpreted since Roe, ascribing meaning to its provisions based on Roe. Some have been amended since Roe and interpreted that amended constitution in the light of Roe, reaffirming a women's right to choose. That history now may capture the state's Constitution considering Roe. Or a particular state's constitution may have stood unamended during the time since Roe v. Wade, including a challenge to criminal statutes that may have been interpreted in prosecution of women and third parties who were involved in terminations of pregnancies. Remember that in Dobbs, the court says that states are the place to make the decision about how to balance when life begins. Many of these states may have effectively made their decision in confirming the reasoning and application of Roe [88]. The Supreme Courts of US states are left to consider whether they have some basis for making a Constitutional finding that personhood begins at conception. Any court member inclined to interpret its constitution as so providing, would need to make his, her, their own historical case that its state's specific constitution so provides.

To see the difficulty here, consider the South Carolina Supreme Court's decision concerning privacy rights granted women by its Constitution [89].

Also consider the Georgia State Court's decision to interpret its constitution considering Roe, because that was the state of its understanding of Georgia Constitutional law at the time a Georgia legislature tried to legislate to outlaw abortion from the time a detectable heartbeat [90]. State judge McBurney's opinion is based on Georgia's void ab initio doctrine, judging legislation as void if it violated the Constitution at the time it was enacted. In 2019, the legislation clearly violated Roe and so violated the US Constitution as understood at the time. McBurney didn't reach the question of whether to legislate a "heartbeat" law the State of Georgia would need to amend its Constitution. He did note that the Georgia Constitution provided (like South Carolina) broader privacy rights than those recognized in the US Constitution. He did rule that to enact a heartbeat law the state would have to, at a minimum, reenact the heartbeat law after Dobbs. Of course, after which if it did so, a new challenge could be brought under the historical meaning provided the privacy provisions in the Georgia Constitution that could test its Constitution. Any Federal Court's view of that state court's constitution would not bind the Georgia Supreme Court. Note also that McBurney's stay of the 2019 heartbeat bill was short lived. The Georgia Supreme Court agreed to take up the case and lifted Burney's stay while it considers its decision.

State/Nation Constitutions and the Nature of Human Rights

With the US Supreme Court's having returned to the states the subject of abortion, it puts squarely to these bodies several important questions. First, does the state constitution already afford women the protection over their bodies during early stages of pregnancy to terminate their pregnancies? If so, for "right to life" constituencies, the question is whether they should seek to amend the constitution [91], or, if the better strategy is to seek through the political processes in the state the appointment of new Supreme Court justices. The states of Kentucky, Vermont, California, Montana, and later, Arkansas show that going to the state electorate to amend the Constitution is not a risk-free option. No state so far has enacted Constitutional amendments restricting the state's abortion rights to a degree lesser than what existed under Roe and Casey. In Kentucky the state electorate voted no to an amendment that would have stated there was no right to an abortion, or to funds for abortion, by a margin of 52.3 -47.7. In Vermont, the state electorate voted yes to a provision granting the constitutional right of personal reproductive autonomy by a margin of 76.8-23.2. In Michigan the electorate voted yes for Constitutional proposal granting a state constitutional right to

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reproductive freedom, including decisions "about all matters relating to pregnancy," such as abortion and contraception. (56.7-43.3). In Montana a born alive infant's provision was voted down, 52.6-47.4 [92]. And finally, there is California, which overwhelmingly voted the State Constitution would be amended to protect a person's reproductive freedom "in their most intimate decisions," including the right to abortion and contraceptives. (66.9-33.1).

If they choose to try to control the Court through judicial appointments, there are also new risks, especially if the Court feels bound to interpretations of its provisions considering Griswold and Roe understandings of those provisions at the time they were enacted and or most recently interpreted. Here they would also have to read the State Supreme Court's judicial jurisprudence. What is its adherence to precedence, and hope that the new majority reinterprets the constitution to prohibit abortion like the Polish Constitutional Court did. (Perhaps in might pick a new provision in the Constitution prohibiting discrimination and use it to find a new right to protect the personhood of a fetus from conception.) It will be interesting to see what the Georgia Supreme Court does in this regard, if it were uphold the Georgia Heartbeat law. If Georgia has amended its Constitution (at a time when Casey was the law of the land), then progressives in Georgia will have no choice but to take their fight to the electorate to do what the Irish did, and reamend the Constitution.

For the prochoice constituencies, whether in the states, or Poland, they also face a similar choice. Should they seek through the Court to affirm Roe v. Wade like rulings in the Court. Is it clear under the state constitution whether the right stems from a penumbra of "privacy," or from the equal rights provisions in the state constitution, or in the due process clause of the state constitution. In each case the Court may exercise different historical analyses. The irony is, that one of the most powerful arguments that a particular state's constitution does provide a woman a right to choose during early pregnancy is in history. The state often has understood itself considering Roe v. Wade and its progeny. The state, then, may be bound by the "understanding" of its provisions interpreted to provide equal protection and privacy, by the widely held views of the court and its justices as informed by that case law [93]. Alito's opinion may show how the progressives use history to lock the State Supreme Court into a position understood as history, which informed by Roe.

On the other hand, the Alabama Supreme Court recently showed how the religious view of the members of the Supreme Court can lead it to interpret its Constitution as ascribing personhood to a fertilized embryo. One justice even surmised that the wrath of God awaited any government that would permit death of a fertilized egg, even if discarded during the medical practices surround IVF [94].

Finally, like with progressives in the US, the best strategy maybe for the state to do what the Irish did, and take the fight to the electorate in the state to either amend the Constitution, or enable the state legislature to regulate abortion, as informed by the referendum on abortion. In this later case the progressive case can use the examples of the bad results that occur in banning all abortions, with no exceptions. It should also use case studies of bad results where states required proof of nonviability, and where a states granting to the fetus person hood rights at the time of conception led to death or severe injury to the mother. It can then make the religious argument, supported by the Pope's contribution that Catholic Church doctrine is making no prescriptive belief statements about when a fetus becomes a person. Using science, and studies of fetal development, it can argue for some medically based understanding of viability, or of neural ability, that can be a basis of fetal personhood rights. (Progressive can effectively provide the Brandeis brief to the electorate, generally.) They can use both history, history and experience from other states, and international law, (including the Irish), to argue that women have autonomous rights to control their own bodies that take precedence over the fetus in early pregnancy and have important weight when a women's health is threatened, over the rights of a not yet sentient being [95]. This route requires some faith in the democratic process, where all citizens are empowered to vote, and where the rationality of even a conservative majority in a particular jurisdiction can see the incoherence of a position that makes a fetus a person at conception.

References

1. *Alliance for Hippocratic Medicine v. US Food and Drug Administration*, No. 2:22-cv-00223-Z, (plaintiffs joined by 22 states). For a description of the abortion pill, *See*, Planned Parenthood: The Abortion Pill, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill

"Abortion pill" is the common name for using two different medicines to end a pregnancy: mifepristone and misoprostol.

First, you take a pill called mifepristone. Pregnancy needs a hormone called progesterone to grow normally. Mifepristone blocks your body's own progesterone, stopping the pregnancy from growing.

Then you take the second medicine, misoprostol, either right away or up to 48 hours later. This medicine causes cramping and bleeding to empty your uterus. It's kind of like having a really heavy, crampy period, and the process is very similar to an early miscarriage. If you don't have any bleeding within 24 hours after taking the second medicine, call your nurse or doctor.

Your doctor or nurse will give you both medicines at the health center. When and where you'll take them depends

on state laws and your health center's policies. Your doctor or nurse will give you detailed directions about where, when, and how to take the medicines. You may also get some antibiotics to prevent infection.

How effective is the abortion pill?

The abortion pill is very effective. The effectiveness depends on how far along you are in your pregnancy when you take the medicine.

- For people who are 8 weeks pregnant or less, it works about 94-98 out of 100 times.
- For people who are 8-9 weeks pregnant, it works about 94-96 out of 100 times.
- For people who are 9-10 weeks pregnant, it works about 91-93 out of 100 times. If you're given an extra dose of medicine, it works about 99 out of 100 times.
- For people who are 10-11 weeks pregnant, it works about 87 out of 100 times. If you're given an extra dose of medicine, it works about 98 out of 100 times.

The abortion pill usually works, but if it doesn't, you can take more medicine or have an in-clinic abortion to complete the abortion.

When can I take the abortion pill?

Depending on where you live, you may be able to get a medication abortion up to 77 days (11 weeks) after the first day of your last period. If it has been 78 days or more since the first day of your last period, you can have an in-clinic abortion to end your pregnancy.

Why do people choose the abortion pill?

Which kind of abortion you choose all depends on your personal preference and situation. With medication abortion, some people like that you don't need to have a procedure in a doctor's office. You can have your medication abortion at home or in another comfortable place that you choose. You get to decide who you want to be with during your abortion, or you can go it alone. Because medication abortion is similar to a miscarriage, many people feel like it's more "natural" and less invasive.

Your doctor, nurse, or health center staff can help you decide which kind of abortion is best for you.

2. In the Polish case to the ECHR, the plaintiffs claim their human rights have been violated by the Polish Constitutional Court. Some Polish women are looking to the Irish experience to help them gage their chance in the ECHR. The Irish experience augers for taking the matter to the electorate. But perhaps the Irish setting is too unique.

3. The Central Statistics Office, A Phriomh Oifig, Standish reports that as of 2016, 78 % of citizens of the Irish republic are Catholic. https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/ The Catholic News Agency, CNA, reports over 90% of Poles identify as Catholic. https://www.catholicnewsagency.com/news/246730/more-than-90-of-poles-identify-as-catholics-despite-increasing-secularization

4. A,B, and C v. Ireland, (2010), (Application Number 2557905) https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-102332%22]}

5. Oireachtas. Health (Regulation of Termination of Pregnancy) Act 2018. Contract No.: 31. 2018 December 20. [cited 18 October 2021] https://www.oireachtas.ie/en/bills/bill/2018/105/

6. Id.

7. Constitutional Court of Poland, *Case No. K 1/20* (OTK ZU A/2021, item 4, October 22, 2020).

8. Federation of Women and Family Planning (Fedora), Abortion Without Borders, Amnesty International, International Federation of Human Rights, reportedly all contributed to the estimate of women put at risk in a year. Rosie Swash, the Guradian.org (Oct., 2021) https://www.theguardian.com/global-development/2021/oct/22/more-than-30000-polish-women-sought-or-foreign-abo

Amending the Constitution

9. rtions-since-law-change-last-year

10 Aleksandra Krzysztoszek**,** *Polish parliament rejects controversial abortion bill before elections***,** March 8, 2023. By Aleksandra Krzysztoszek

Provisions for amending the Polish Constitution are contained in Article 235,

AMENDING THE CONSTITUTION

Article 235

i. A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic.

ii. Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days.

iii. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm.

iv. A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators.

v. The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill.

vi. If a bill to amend the Constitution relates to the provisions Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment.

vii. After conclusion of the procedures specified in para 4 and 6 above, the Marshal of the Sejm shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland (Dziennik Ustaw).

11. Constitutional Court of Poland, *Case No. K 1/20* (OTK ZU A/2021, item 4, October 22, 2020).

12. Shaun Walker, Poland Delays Abortion Ban as Nationwide Protests Continue, The Guardian, 2020, https://www.theguardian.com/world/2020/nov/03/poland-stalls-abortion-ban-amid-nationwide-protests

13. Federation of Women and Family Planning (Fedora), Abortion Without Borders, Amnesty International, International Federation of Human Rights, reportedly all contributed to the estimate of women put at risk in a year. Rosie Swash, the Guradian.org (Oct., 2021) https://www.theguardian.com/global-development/2021/oct/22/more-than-30000-polish-women-sought-or-foreign-abortions-since-law-change-last-year

14. Those with severe Trisomy 18, (defect in the 18th Chromosome), and other still born fetuses occurring up to 20 weeks, from heart defects, and "neural cranial" defects (in the brain or spinal cord including spina bifida.)

15. Shaun Walker, Poland Delays Abortion Ban as Nationwide Protests Continue, The Guardian, 2020, https://www.theguardian.com/world/2020/nov/03/poland-stalls-abortion-ban-amid-nationwide-protests

16. Articles 32 (1. All persons shall be equal before the law. All *persons* shall have the right to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.) and 33 (1. All *persons* shall be equal before the law. All persons shall have the right to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever. (Italics not in the original and added by author for emphasis.)

17. Constitutional Court of Poland, *Case No. K 1/20* (OTK ZU A/2021, item 4, October 22, 2020).

18. The political nature of judicial decision making has been fully explored in the US context by Duncan Kennedy, and the Critical Legal Studies movement. See Duncan Kennedy, *A Pure Critique of Adjudication*, Harvard U. Press, Cambridge MA, 1992). Elsewhere I have argued that there is a place for judicial decision making that is derived from principles of equity and democracy, that keep Constitutional decision making apolitical. See, Paul J. Zwier, *Critical Race Theory and the American Justice System: How Juries Struggle with Issues of Racial Prejudice*, (Cambridge Scholars Press, Cambridge, EG, 2023).

19. As we will see, the question of when "personhood" comes into being is hard to pinpoint. What we know, consistent with other medical legal situations is that "heartbeat" is not a sufficient criterion, despite some states attempts to make it sufficient. Medical science has shown that with spina bifida (no frontal lobe of the brain), a heartbeat does not correlate with the bringing into being of a sentient person. End of life medical decisions also don't relay on heartbeats, but measure brain activity, and whether there is any brain activity that correlates with personhood. While the brain can be "seen" as of 9 weeks, it is a smooth group of cells with no "folds" that later indicate a communicative functioning. Those develop through pregnancy, but especially after birth, during the first year of life. The stimuli to the brain in early pregnancy don't create anything science can even measure, regarding its eventual communicative functioning and whether it is "normal." See, Lindsey Konkel, *The Brain before Birth: Using fMRI to Explore the Secrets of Fetal Neurodevelopment*, Environmental Health Perspectives, (2018) https://ehp.niehs.nih.gov/doi/10.1289/ehp2268#:~:text=The%20fetal%20brain%20begins%20to,basis%20of%20the%20nervous%20system.&text=By%20the%20ninth%20week%2C%20the,as%20a%20small%2C%20-smooth%20structure. The state of Georgia has floated a "heartbeat" law, which at least one court has questioned whether it will survive a Constitutional challenge based on the state's privacy provision. See, *Sister Song Women of Color Reproductive Justice Collective v. State of Georgia,* CIVIL ACTION 2022CV367796

20. Marek Okolsky, Abortion and Contraception in Poland, Studies in Family Planning, November, 1983, Vol. 14, No. 11 (Nov., 1983), pp. 263-274 (12 pages)

21. Brianna Navarra, Inside Poland's Drastic immigration Reversal, US News and World Report, March 2022,

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https://www.usnews.com/news/best-countries/articles/2022-03-08/the-russia-ukraine-conflict-highlights-polands-complicated-history-with-refugees (describing Polish earlier 2016 anti immigrant policies towards Middle-easterners).

21. For example, see article in The Guardian, condemning President Kaczynski's having blamed low birth rate in Poland on Polish women drinking. https://www.theguardian.com/world/2022/nov/07/polish-politician-blames-low-birthrate-on-young-women-drinking-jaroslaw-kaczynski

22. Article 15 of the act instituting the Tribunal gives the President of the Polish Republic the power to appoint the President and Vice President of the Tribunal.

23. *See, John Macy and Allyson K. Duncan, The Collapse of Judicial Independence in Poland: A Cautionary Tale,* Judicature International, (2020-21), https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale/ https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=2003

24.Id.

25.Amnesty International reports three cases that have been filed, K.B. v. Poland, and three applications, K.C. v. Poland, and three applications, and A.L.-B v. Poland and three applications. https://www.amnesty.org/en/latest/news/2022/01/poland-regression-on-abortion-access-harms-women/

26.On the other hand, the politics of the judges on the ECHRs may becoming more progressive. The Grand Chamber who will hear the Polish case will be made up of its President, who is Irish, Siofra O'Leary, on no other member state restricts abortion anywhere close to the way that Poland does. One member of the Grand Chamber will be a Pole, Kryzsztof Woijtyczek. Other members of the Grand Chamber will be made up of Section heads, and then other randomly selected judges from European nations, all of which are progressive when it comes to a woman's right to terminate a pregnancy in early term.

27.Polish Voters Reject Right-Wing Government, AP, https://apnews.com/article/poland-election-government-tusk-c83032bf51c7017caf7dfbe2c90f1ba1

28.See, Kennedy, D., at footnote 18.

29.36th Amendment to the Constitution Bill 2018 (repealing the restrictive 8th Amendment, and authorizing legislation to regulate abortion.) https://data.oireachtas.ie/ie/oireachtas/bill/2018/29/eng/initiated/b2918.pdf

30.Anna Carnegie and Rachel Roth, *From the Grassroots to the Oireachtas: Abortion Law Reform in the Republic of Ireland*, https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2469/2019/12/Carnegie.pdf

31.Id. (the authors argue in the second half of the article that the regulation is unduly cumbersome and still restricts choice in important heath threatening circumstances.)

32. Carnegie and Roth, note 22.

33. See: L. Earner-Byrne and D. Urqhuart, The Irish Abortion Journey, 1968–2018 (Basingstoke: Palgrave, 2019); C. Hug, The Politics of Sexual Morality in Ireland (Basingstoke: Palgrave Macmillan, 1999); L. Smyth, Abortion and Nation:

The Politics of Reproduction in Contemporary Ireland (Abingdon: Ashgate, 2005). Cf., Sylwia Kuzma-Markowska and Laura Kelly, *Anti-abortion Activism in Poland and the Republic of Ireland c.1970s–1990s**

Journal of Religious History, Vol. 46, No. 3, September 2022 doi: 10.1111/1467-9809.12870, (where the authors argue that the differences between Ireland and Poland also stem from an effective use by Irish anti abortionists of three strategies, 1) science, (purported showing "life" at early stages from the DNA and human formation in the first trimester, from 2) need to protect women from the health effects of abortions, and 3) the need to protect women from men who were pressuring them to have abortions.)

34. It will be interesting to see whether the ECHR now has enough evidence of the existence of those rights, now with the latest provisions of the Irish Constitution, or whether the US recent retraction of rights, leads it to again leave the matter to the European nation states. Again, the US experience with a woman's right to choose is evolving. 38 states have now ratified the equal rights amendment, and even in those states who have not, some State Supreme Courts have founded such a right in privacy provisions in their constitutions. In addition, as we will see, all states who have attempted to change their Constitutions to approach Polish like restrictions, have been voted down.

35. It was surprising how complicated amendment turned out to be. Not only did progressives need to excise Amendment 8, but they had to bring an expedited review of a second Constitutional provision that had grant rights to the unborn equal to rights of a woman. Article 40.3.3. The Irish Supreme Court may clear, following the 66% vote doing away with Article and providing the Constitutional authority for the Irish legislature to regulate abortion, that the Supreme Court was not going to weigh in using Article 40.3.3 to revive personhood rights at the time of conception. Note then, that in Ireland, the legislative process has been freed up from Constitutional constraints to legislate abortions.

Women's rights to abortion are then made subject to political forces that could change back and forth. Still for now the existence of a women's right during the first 12 weeks seems secured by the airing of the bad results in cases during the 8th amendment, the Catholic Church, via, the pope, backing away from a "personhood" begins at conception position, and by the recognition that Irish law regarding invitro fertilization and better understanding fetal development, (making impossible for a women to choose concerning some fetal conditions, until well into the pregnancy), supports a consensus understanding of a women right to choose.

36. It is estimated that about 170,000 people traveled from Ireland to seek a legal abortion between 1980 and 2018. In 2018, a referendum repealing the Eighth Amendment (restricting all abortion) passed overwhelmingly by a margin of 66% to 34%. As a result of the repeal, legal abortions are now allowed during the first trimester, with costs covered by the public health service. PBS news hour, https://www.pbs.org/newshour/health/what-irelands-history-with-abortion-might-teach-us-about-a-post-Roe-america

37. See, The Conversation, https://theconversation.com/northern-ireland-census-shows-more-catholics-than-protestants-a-political-scientist-on-what-this-really-means-191273#:~:text=We%20believe%20in%20the%20free%20flow%20of%20information&text=The%20results%20of%20the%202021,as%20Protestant%20or%20other%20Christian. (reporting that a 2022 census shows 43% Catholic, 37% Protestant or other Christian.)

38. Even Pope Francis admits the church's teachings about "live beginning" at conception, does not mean the "personhood rights" start at conception. Elizabeth Diaz reporting for the NYT quote the Pope as saying:

    "In any book of embryology, it is said that shortly before one month after conception the organs and the DNA are already delineated in the tiny fetus, before the mother even becomes aware," he said in a recent interview with the magazine America. "Therefore, there is a living human being. I do not say a person, because this is debated, but a living human being." https://www.nytimes.com/interactive/2022/12/31/us/human-life-begin.html

    The idea that Christianity entails belief that "personhood," or even "a life" begins at conception, is a politization of Christianity. It is a politicization because first, only a minority of Catholics hold to that belief, main line Christianity in the US does not, and evangelical Christians have come to believe as much, even though there is little or no Biblical support for such beliefs.

    Diaz reports,

    From the faith's earliest days, many theologians have seen the soul as something God creates and puts into a body in utero, though they have differed on when, exactly, this "ensoulment" occurs.

    In the 13th century, Thomas Aquinas, following the philosophers Augustine and Aristotle, posed that the "rational soul" came into being not immediately but at around 40 days for a male and about twice that for a female, the time he thought "quickening" happened. Quickening, the stage in pregnancy in which a woman starts to feel movement in her uterus, actually happens around four or five months, regardless of sex. In medieval Christian Europe, an ensoulment that was not immediate helped to address anxiety around pregnancy loss, given the prevalence of miscarriages and stillbirths, and Catholic teaching that only baptized souls could be saved. The Catholic Church generally held this view of a later fetal ensoulment for the next 600 years.

39. (Viljanen) …

    The European Court of Human Rights has been in the avant-garde of human rights law, especially in the field of civil and political rights. The universal link, materialized in its connection to other treaties, is an increasingly significant element of the Court's operation. When J. G. Merrills wrote his analysis of the Court's role in the development of international law, he found that in Strasbourg other treaties had been used for three types of interpretation: 1) amplifying the Convention, 2) indicating omissions and 3) providing evidence of contemporary developments. 3 Fifteen years after Merrills' major contribution to the academic discourse we can talk about a real network of international human rights courts, with references to each other's jurisprudence. There are several examples of this co-operation between human rights instruments and their supervisory mechanisms which seems to become an everyday phenomenon in the field of civil and political rights. …

    The European Court of Human Rights does not have an ability to combat major human rights problems on its own. The Court's case law is developed case by-case basis with the strict interpretation against the expansion of the Convention rules outside of the text of the Convention. However, after the international human rights network has reacted to a particular problem through treaties and soft-law, the Court's role becomes important in the development process, transforming itself into the most authoritative source of human rights case law. In comparison to UN treaty bodies through its binding judgments the Court has a standard setting role not just in the 47 Member States of the Council of Europe, but also within the global human rights community. It is obvious

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that the Court is not starting the discourse on a particular human rights problem, and it is not the final stage of the development of any human rights law in that question. The Court is not adapted to take a widespread role in the network of human rights instruments; it's mission is to pass the torch to another actor and let the dialogue to continue; and maybe to return to the discourse in a later stage of the development process.

40. Center for Reproductive Rights, European Reproductive Rights, and Comparative Overview, (2021), https://reproductiverights.org/european-abortion-law-comparative-overview-0/ (26 out of 28 European Union member states allow abortion on a woman's request or broad social grounds.)

41. *A year after the Polish Constitutional Tribunal's ruling that de facto banned abortion, the European Parliament called on the government in Warsaw on Thursday (11 November) to lift the ban that puts women's lives at risk.*

    In a resolution "The first anniversary of the de facto abortion ban in Poland " adopted by 373 votes in favour, 124 against and 55 abstentions, MEPs called on the Polish government to ensure that no more women in Poland die because of this restrictive law.

    The vote came following the death of a pregnant Polish woman in early November – who her family said died of septic shock after doctors waited for her unborn baby's heart to stop beating – which electrified the abortion debate in the country and beyond.

    Following her death, tens of thousands of people demonstrated on Saturday (6 November) in Warsaw and dozens of other Polish cities to denounce a nine-month-old abortion law blamed for claiming the life of a pregnant mother, organizers said.

    On 22 October 2020, the Polish Constitutional Tribunal ruled that the provision of the 1993 Act on Conditions of Termination of Pregnancy was unconstitutional.

    This act allowed abortions to take place in cases where a prenatal test or other medical considerations had indicated a high probability of a severe and irreversible fetal defect or an incurable illness that threatened the foetus' life.

    This entailed a de facto abortion ban, as most legal abortions in Poland were based on these grounds.

    Following the last 10 months, only 300 Polish women accessed abortion services in hospitals on the grounds of a threat to life and health.

    Over the past year, Abortion Without Borders has helped 34,000 women from Poland access an abortion, which represents only a fraction of the total number of Polish women needing support to access this service.

    On 20 October, during the plenary debate on the first anniversary of the de facto abortion ban in Poland, Equality Commissioner Helena Dalli, called on the member states to "ensure the respect of their obligations in line with international human rights law".

    "We stand in solidarity with the women in Poland who have shown resistance and resilience. Strong women's rights are an asset for the whole of the European Union".

    The European Court of Human Rights has recognized the lack of access to abortion services as a violation of the right to family and private life.

    Dalli also highlighted that the EU has no competence on abortion rights in a member state and called on EU countries to "respect fundamental rights, which bind them by virtue of their national constitutions and commitments under international law".

    Samira Rafaela, a Dutch MEP from Renew group, said that "the anti-abortion law in Poland has been exceptionally harmful and changed the daily lives of Polish women and girls".

    "Thousands of women have crossed borders to Germany, England, the Netherlands, and Belgium – amidst a pandemic, may I remind everyone. The Polish government has no respect for fundamental rights. They neglect women, they disregard our bodies, and they put women's lives at risk," Rafaela said.

    Constitutional judge criticizes EU Parliament's abortion resolution

    "The resolution of the European Parliament on abortion is an unprecedented attempt to interfere in internal political issues of the Republic of Poland and is not covered by European treaties," said Constitutional Tribunal President Julia Przyłębska.

    The European Parliament accused Poland's …

    Sirpa Pietikäinen, a Christian Democrat Finish MEP, called the Polish law "gross and aggravated offence to women's rights" and warned that "we also need to keep a very close eye on what is happening in the other member states, for example in Slovakia".

    Therefore MEPs urged the Polish government to swiftly and fully guarantee access to safe, legal and free abortion services for all women.

    EU lawmakers expressed concerns that, due to this restrictive legislation, women have to seek unsafe abortions, travel abroad to obtain abortions or carry their pregnancy to term against their will, including in cases of fatal foetal impairment.

    Parliament thus called on member states to cooperate more effectively to facilitate cross-border access to

abortion, for example by granting Polish women access to a free and safe abortion in other national healthcare systems.

Furthermore, MEPs condemned the increasingly hostile and violent environment for women human rights defenders in Poland and called on the Polish authorities to guarantee their right to express themselves publicly without fear of repercussions or threats.

They also strongly criticized the disproportionate use of violence against protesters by law enforcement and urged the Polish authorities to ensure that those who attack protesters are held accountable for their actions.

Highlighting that the ruling on abortion is yet another example of the political takeover of the judiciary and the systemic collapse of the rule of law in Poland, MEPs asked the Council to include this issue in its investigation into the rule of law situation in Poland by expanding the scope of its hearings.

42. Constitutional Court of Poland, *Case No. K 1/20* (OTK ZU A/2021, item 4, October 22, 2020). *Kapelańska-Pręgowska, J. (2021). The Scales of the European Court of Human Rights: Abortion Restriction in Poland, the European Consensus, and the State's Margin of Appreciation. Health and Human Rights, 23(2), 213-224. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8694290/*

43. (Kapelańska-Pręgowska, 2021), https://www.hhrjournal.org/2021/11/the-scales-of-the-european-court-of-human-rights-abortion-restriction-in-poland-the-european-consensus-and-the-states-margin-of-appreciation/#_edn2. The author concludes:

    In this paper, I have attempted to analyze recent international developments concerning access to abortion services in order to anticipate the possible outcome of applications recently brought before the ECtHR against Poland. In *A., B. and C. v. Ireland*, the court left the content of the domestic abortion law to the discretion of national authorities. It relied on a broad margin of appreciation that had not been narrowed down by a strong European consensus. Over time, this consensus has become even stronger, meaning that giving the state nearly unlimited discretion in abortion regulations would run counter to harmonization. If the idea and interpretative function of the European consensus is to be maintained in a meaningful manner, this consensus should either narrow the margin or at least be a decisive factor in determining proportionality. A final reflection concerning the margin of appreciation concerns the methodology that is used to establish the "exact content of the requirements of morals" in a given country. The ECtHR has, on many occasions, presented a standpoint that by reason of "direct and continuous contact with the vital forces of their countries," state authorities are *in principle* in a better position than the international judge to give an opinion on the "requirement of morals." *A., B. and C. v. Ireland* (ECtHR, Appl. No. 25579/05, Judgment of December 16, 2010), para. 223; *Handyside v. the United Kingdom* (ECtHR, Appl. No. 5493/72, Judgment of December 7, 1976), para. 48; *Vo v. France* (ECtHR, Appl. No. 53924/00, Judgment of July 8, 2003), para. 82. The determination of a structural margin of appreciation is based, *inter alia*, on "democratic legitimation" and the quality of the lawmaking process, especially "in matters of general policy, on which opinions within a democratic society may reasonably differ widely." M. Saul, "The European Court of Human Rights' margin of appreciation and the processes of national parliaments," *Human Rights Law Review* 15/4 (2015), pp. 745–774; *S. A. S. v. France* (ECtHR, Appl. No. 43835/11, Judgment of July 1, 2014), para. 129. With this in mind, it is doubtful whether the 2020 judgment issued by Polish Constitutional Court—whose legitimacy is being questioned—should be regarded as instructive on society's views on abortion. In some circumstances, an exception from a rule is necessary.

    By acknowledging the significance of a European consensus and the evolving universal standards concerning reproductive rights, the ECtHR would avoid two pitfalls: one connected with analyzing the doubtful public interest in protecting the convictions of a part of Polish society, and another with a potential criticism of judicial activism and the court's imposition of its own moral evaluation of an abortion ban. Y. Arai-Takahasi, "Proportionality," in D. Shelton (ed), *The Oxford handbook of international human rights law* (Oxford: Oxford University Press, 2013), p. 467. In embracing such an approach, the ECtHR would not anticipate or even channel change—it would simply recognize it. C. Rozakis, "The particular role of the Strasbourg case-law in the development of human rights in Europe," in N. Vima (ed), *European Court of Human Rights: 50 years* (Athens: Athens Bar Association, 2010), pp. 20–30.

    Cf., German High Court finds basis for government regulation of carbon emissions in the health and human rights of the future born citizens of Germany).

44. The Mexican Supreme Court, in May of 2019, held that denying women access to abortion violates their right to health. While it still did not explicitly deem abortion criminalization unconstitutional it implied as much, because it held the state couldn't simply argue a women could get an abortion in Mexico City, but had to secure the woman's right in the state.

The case involved a woman's petition to federal health authorities to terminate her pregnancy on the grounds that it posed a risk to her health. Her petition had been denied by authorities, who argued that the General Health Law did not provide access to abortion. Although she opted for an abortion in Mexico City, where it is decriminalized and provided for as a free service, she nonetheless challenged their decision through an amparo, arguing that the authorities' denial violated her right to health. The amparo has a long history of being interpreted in a manner that made it impossible for women to ask for redress, given that no matter what they chose – ending or continuing the pregnancy – the amparo would always be rendered meaningless given that a ruling generally takes more than 9 months to materialize (the case at hand, for example, took a total of six years to be resolved). The Supreme Court this time took a "gender perspective" in deciding the amparo because a gender-neutral interpretation ignored the disparate impact they could have on men and women. The looked to the UN's Convention on Elimination of All Forms of Discrimination Against Women, CEDAW in justification for it perspective. The Court conceptualized a right to health, relying both on constitutional and international law provisions, including the San Salvador Protocol, which held that this right guarantees people the "enjoyment of the highest level of physical, mental, and social wellbeing", which "includes what it means for each woman to be well", an "approach that recognizes the importance of women's perception and knowledge about themselves and what they may or may not assume or bear". It also cited to the UN Committee on Economic, Social and Cultural Rights CESCR's General Comment No. 14, that this right does not only protect people's autonomy to make decisions regarding their health, but ensures they have access to the "full range of facilities, goods, services, and conditions" that are necessary to execute those decisions and attain the highest level of health possible. The Court reasoned that: if a health condition – be it physical, mental or social– appears or worsens with the pregnancy for causes directly or indirectly related to it, this state of health is sufficient to consider the interruption of the pregnancy as a therapeutic action aimed at solving the risk of a pregnant woman progressing towards a more serious health condition. Denying such a therapeutic action is denying women their right to health.

To the Supreme Court it did not matter that the General Health Law did not explicitly contemplate access to abortion. See, Estefanía Vela Barba, "The Mexican Supreme Court's latest abortion ruling: In between formalities, a path to decriminalization," Reprohealthlaw Blog Commentaries series, October 31, 2019.

Also of note, of the 12 ministers on the Supreme Court of Justice to the Nation, the President since 2015 is a woman, Norma Lucia Pina Hernandez. The three most recent ministers appointed are also women, one of which were newly on the Court for the case, Yasmin Esquivel Mossa, (March 2019). The other two, Margarita Rios Farjat (December 2019) and Loretta Ortiz Ahlf (December 2021) came on the Court after the case was decided.

45. In Historic Victory, Argentina Legalizes Abortion, https://reproductiverights.org/historic-vote-argentina-legalize-abortion/

46. Russ Douthat, Bad Religion, How We Became a Nation of Heretics, (Free Press, April, 2013)

47. See, Angel Lopez, June 1, 2010, Pope Pius IX (1792=1878), The Embryo Project, Arizona State University, https://embryo.asu.edu/pages/pope-pius-ix-1792-1878 Lopez writes:

    The papacy of Pope Pius IX was full of adversity and challenges that he chose to meet head-on with reform. As a moderate Pope, he tried to find a balance between liberal and conservative tendencies. He began his reign with moderate liberal policies by granting amnesty for political crimes, gave freedom to the press, and refused to wage war even when revolution loomed. He appointed many liberal individuals to high posts in the church. Pius IX also sympathized with supporters of an Italian state. However, his conservative tendencies became apparent in his first encyclical, addressed on 9 November 1846, which condemned rationalism, indifferentism, and the theory of progressive revelation. His *Syllabus of Errors*, published in 1864, was largely based on conservative thought. In the Syllabus, he condemned what he thought were modern heresies such as religious liberalism, secularization, , and rationalism. was also highly involved in reforming church doctrine. His long-time devotion to Mary led to the establishment of the dogma of Immaculate Conception of Mary on 8 December 1854. On 8 December 1869, opened the Vatican Counsel in the Basilica of St. Peter in Rome. Before the Counsel ended 8 July 1870, Pope Pius IX established the dogma of "papal infallibility," which states that when speaking in terms of Church doctrine, the Pope speaks the truth with certainty… He challenged the canonical tradition about the beginning of ensouled life set by in 1591. He believed that while it may not be known when ensoulment occurs, there was the *possibility* that it happens at conception. (my emphasis). Believing it was morally safer to follow this conclusion, he thought all life should be protected from the start of conception. In 1869 he removed the labels of "aminated" and "unanimated" and concluded that abortions at any point of were punishable by excommunication. While excommunication was

used to punish those who procured abortions, it was not extended to those who used contraception.

Pope Pius IX, commonly known as Pio Nono, died on 7 February 1878. His was the longest papacy in the history of the Catholic Church and is often considered one of the greatest popes to have ever lived. His dogma of Immaculate Conception, Vatican I, and papal infallibility were some of his most notable accomplishments. His efforts in punishing those that procured abortions at any time of prevailed within the Catholic Church; excommunication for an abortion became Canon Law in 1917, and later revised in 1983. (footnotes omitted).

48. Id.

49. Belden Russonellow & Stewart, Religion, Reproductive Health and Access to Services: A National Survey of Women, April 2000, https://www.catholicsforchoice.org/wp-content/uploads/2014/01/2000religionreproductivehealthandaccesstoservices-1.pdf

50. Lindsay K. Amon, MD, MSc, Jennifer Villavicencio, MD, Catholic Hospitals, Patient Autonomy, and Sexual and Reproductive Health Care In the United States, January 29, 2020. https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2759754

51. Stulberg, D., Hoffman,Y, Dahquist, I, and Freedman , L, *Tubal Ligation in Catholic Hospitals: A Qualitative Study of Ob-Gyns' Experiences, NIH, National Library of Medicine, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4154979/*

52. In the extreme its position is reminiscent of extreme Sharia law adherents that believe that rape of a girl brings dishonor to a family, and justifies a brother taking the life of his sister to restore the families honor. The Feminist Sexual Ethics Project, https://www.brandeis.edu/projects/fse/muslim/honor.html

53. Bible scholar Tony Keddie first provides context for the concept of abortion at the time of Christ. He argues that the whole of idea of marriage was much different than today's ideas. They were likely polygamist contracts, based on the idea of *paeter familias*, or male obligations to provide support for the woman. Abortions were prohibited to protect the woman's health. Over 25% of children born did not survive 8-10 days. He surmises that many unwanted children were simply abandoned, consistent with Greek and Roman philosophical beliefs the human being were still forming, even after birth. Keddie (footnote 26, Chapter on Family Values) notes that interpretation of Jerimiah1:5, "Before I formed you in the womb, I knew you," should be understood metaphorically, but even if taken literally, it doesn't specify at what point during gestation God formed the fetus (similar to Psalms 139:15-17). Keddie notes that prophet Jerimiah, chapter 20:14-18, writes that he was killed (not murdered) from his time in the womb, perhaps indicating his personhood, but not from conception, at only some point thereafter. (Keddie, page 306).

54. Pew Research Center, Religious Groups Official Positions on Abortion, January 16, 2013, The church forbids "abortion as a means of birth control, family planning, sex selection or any reason of mere convenience." https://www.pewresearch.org/religion/2013/01/16/religious-groups-official-positions-on-abortion/#:~:text=Episcopal%20Church,-While%20the%20Episcopal&text=The%20church%20forbids%20%E2%80%9Cabortion%20as,any%20reason%20of%20mere%20convenience.%E2%80%9D

55. See, Cleveland Clinic, What is endometrial hyperplasia, https://my.clevelandclinic.org/health/diseases/16569-atypical-endometrial-hyperplasia#:~:text=Your%20endometrium%20is%20the%20lining,a%20type%20of%20uterine%20cancer.

56. Pope St. Paul VI issued *Humanae Vitae*, the landmark encyclical reaffirming Church teaching against contraception, on July 25, 1968.

57. In the encyclical, Paul VI warned of serious social consequences if the widespread use of contraceptives became accepted. He predicted that it would lead to infidelity, the lowering of morality, a loss of respect for women, and the belief that humans have "unlimited dominion" over the body.

58. In 2012, Kathleen Sebelius, a Catholic, Obama's head of Health and Human Services, directed Catholic hospitals and universities and charities to pay for contraceptives, including abortifacients, for their employees. See Edward Feser, ,Contraception, subsidiarity, and the Catholic bishops, February 7, 2012, http://edwardfeser.blogspot.com/2012/02/contraception-subsidiarity-and-catholic.html (arguing the problem with abortion is exacerbated by Catholic Bishops refusal to excommunicate Catholic women who use contraception.)

58. https://theoutline.com/post/8536/catholic-history-abortion-brigid

59. Interview conducted by Sam Sawyer, SJ, America, The Jesuit Review, November 2022, https://www.americamagazine.org/faith/2022/11/28/pope-francis-interview-america-244225

60. The Pope explained the pastoral dimension in any Church role in decisions regarding abortion:

Each time a problem loses the pastoral dimension (*pastoralidad*), that problem becomes a political problem and becomes more political than pastoral. I mean, let no one hijack this truth, which is universal. It does not belong to one party or another. It is universal. When I

see a problem like this one, which is a crime, become strongly, intensely political, there is a failure of pastoral care in approaching this problem. Whether in this question of abortion, or in other problems, one cannot lose sight of the pastoral dimension: A bishop is a pastor, a diocese is the holy people of God with their pastor. We cannot deal with [abortion] as if it is only a civil matter.

61. Duncan Kennedy, A Critique of Adjudication (fin de siècle) (1997).

62. Progressive argue that keeping the state out of the decision better ensures that the state doesn't start to favor some persons, with some beliefs, (races, genders) over others.

63. https://www.nhs.uk/conditions/contraception/combined-contraceptive-pill/#:~:text=The%20pill%20prevents%20the%20ovaries,and%20being%20able%20to%20grow

64. (Universiltly of Cambridge Research, 2011)

65. Medical abortions:

    - Causes
    - Low birth weight/growth stops
    - The medicine of medical abortions (without surgery). Incoherence at the level of what is natural and so God's will.
    - Human free will and God's control
    - Pluralism and James Madison
    - Protestants—Anglicans, Presbyterians, Methodist, Evangelicals

    Catholic commentor Diaz explains how the Catholic Church has evolved in its understanding the meaning of belief about when "human life" begins. For centuries the Church believed "human life" began when "ensoulment" occurred. Thomas Aquinas took the idea of "ensoulment" from Greek philosophy, Aristotle and Augustine, that early cell developments were hot sufficient for "human life" to start. Well into the 19th century, Catholics were comfortable that early terminations of pregnancy, before "quickening," or "viability," or even "breath," which had Biblical significance to Jewish theology, (from the creation story) was essential to when humans were said to be human. Complicating theological concerns about whether an unborn child "went" to heaven, having never been baptized, or having never "confessed" Christ as Lord, pushed the church to give assurances to parents that their unborn child was in "heaven." Still, its beliefs were pastoral, directed to give comfort to parents of a fetus, rather than to make a theological statement about when human life began.

    Modern church attitudes toward birth control also impacts on Catholic beliefs about when "human life" begins.

    While a minority of Catholics may believe as much, the Constitution makes explicit that the Catholic Church is treated as a separate sovereign country and does not have sovereignty over the Polish government. At a minimum the equal protection provision should elevate a woman's right to control their own bodies over the rights of fetus pre-viability. Otherwise, a court's basis for legal interpretation is simply "political" and has no authority outside of the political perspective of who is on the court at any particular time. Cross Reference Georgia Appellate Court.

66 Ruth Bader Ginsberg is said to have worried that in the US women should have kept pushing for ratification of the equal rights amendment, rather than rely on Roe v. Wade. University of Chicago, Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit, 2013, https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit*

67. (Smith, 1996) (Smith argues that Marshall, appointed by a Federalist (Madison) along with other Federalists, was well aware that Jefferson (a Virginia republican) and other republicans were leery of federalist politics impacting decisions involving disputes between royal land holders and American plantation owners. Republican preferred state judges deciding these cases over the Supreme court, in the belief they could control them better through local politics. Marshall set out to argue that in matters of Constitutional interpretation, the court was doing something quite different that acting as a legislature.

68. Three cases form the basic parameters of the "political question" reasoning for denying Court decision making: Oetjen v. Central Leather Co., 246 U.S. 297 (1918)

    Oetjen v. Central Leather Co. (1918), which is one of the earliest examples of the Supreme Court applying the political question doctrine, the Court found that the conduct of foreign relations is the sole responsibility of the Executive Branch. As such, the Court found that cases which challenge the way in which the Executive uses that power present political questions. Thus, the Court held that it cannot preside over these issues.

    The Court broadened this ruling in Baker v. Carr, 369 U.S. 186 (1962) Nixon v. United States, 506 U.S. 224 (1993)Baker v Carr (1962), when it held that federal courts should not hear cases which deal directly with issues that the Constitution makes the sole responsibility of the Executive Branch and/or the Legislative Branch.

    The Court in Nixon v. United States (1993) also extended this doctrine to which lawsuits which challenge

the Legislative Branch's procedure for impeachment proceedings. Note, Political Questions, Public Rights, and Sovereign Immunity, 130 Harv. L. Rev. 723 (2016).

69. 'Woe to you scribes and pharisees,' warns Jesus, who interpret the law of the sabbath in a way that that ends up harming humans and animals. The sabbath was made for man, not man for the sabbath. The law was made for humans, as an attempt to build a justice, loving and merciful community, not humans for the law. Harold Berman, The Interrelation of Law and Religion.

70. The Catholic Church's current position on abortion is 144 years old. In the 1869 document Apostolicae Sedis, Pope Pius IX declared the penalty of excommunication for abortions at any stage of pregnancy. Up to then Catholic teaching was that no homicide was involved if abortion took place before the foetus was infused with a soul, known as "ensoulment".

    Separate consciousness was believed to occur at "quickening", when the mother detected the child move for the first time in her womb. It indicated a separate consciousness. In 1591, Pope Gregory XIV determined it took place at 166 days of pregnancy, almost 24 weeks. That is the current legal limit for abortion in the UK. It was Catholic Church teaching until 1869.

    Among those who held a different view on abortion to that of the Catholic Church now are some of its most eminent thinkers.

    These include at least three of the 33 Catholic Church "super saints" – Jerome, Augustine and Aquinas – all of them "Doctors of the Church". Were one to follow the logic of some in the church today, they should be excommunicated.

    It has been argued by apologists that those saints did not have the benefit of being aware of such scientific discoveries as that of the ovum in 1827 and the human fertilization process in the 1830s. Then, as it is put, such saints would have known that human life began at conception. That is to miss the point.

    Those saints never doubted that what they were dealing with from the moment of conception was human life. What preoccupied them was when that life became a person. They did not accept that a collection of biochemical elements with potential was a person. They sought evidence of emerging consciousness. In those pre-scientific days they settled on quickening as the great indicator of that – when the child began to kick in the womb. Social Affairs, *Catholic Church teaching on abortion dates from 1869*, The Irish Times, https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/catholic-church-teaching-on-abortion-dates-from-1869-1.1449517

71. 597 U. S. ____ (2022), at 16.

72. Id., at 21. Brief for United States 26 (quoting Parker, 50 Mass., at 266). 2

    The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus "as having a 'separate and independent existence.'" Brief for United States 26 (quoting Parker, 50 Mass., at 266). 2

73. Comment, Legal Status of Fetus in Vetra Sa Mere (in the womb), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6031&context=uclrev

74. For progressives, how Alito can ignore developments in the law after the recognition of equal rights for women is a mystery. But it is important to see that progressives also need humility in arguing that science and sociology provide epistemological support for the existence of "fundamental rights." Post modern critiques from analytic philosophy show the epistemological failures of ascribing to natural science and ability to determine whether some value is normative, good, or just. Science can provide proof of change and evolution, but not that the change is to the good. Experience helps, but that experience, too, is faulty if it doesn't presume some fundamental ability of a human to learn from that experience, what is good, or right, ,or just, either because of something inherent in what it means to be human (created in the image of God), or based upon some delegation to that person the ability to make choices based on their understanding of the community values.)

75. Of interest to Polish abortion rights advocates, is Alito's dismissal of an amicus brief relied on by respondents, that saw in state legislation at the time (criminalizing abortion) a motive to encourage Protestant women to have as many children as Catholic woman.

    Another amicus brief relied upon by respondents (see Brief for Respondents 21) tries to dismiss the significance of the state criminal statutes that were in effect when the Fourteenth Amendment was adopted by suggesting that they were enacted for illegitimate reasons. According to this account, which is based almost entirely on statements made by one prominent proponent of the statutes, important motives for the laws were the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to "shir[k their] maternal duties." Brief for American Historical Association et al. as Amici Curiae 20. 597 U. S. ____ (2022), at 28.

76. The JFK library contains evidence of Kennedy's own struggles with his Catholic beliefs. "Late in October, three American-born bishops in Puerto Rico issued a statement forbidding Catholics from voting for candidates who

disagreed with the Church on abortion and birth control. Kennedy initially decided to respond to their declaration, but finally concluded that it was unwise to focus too much attention on this potentially damaging incident. Several studies have concluded that this controversy, coming at the worst possible time, was a significant factor in the sudden halt in Kennedy's momentum and the surge toward Nixon in the final days of the campaign." https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/john-f-kennedy-and-religion

77. See, *Planned Parenthood South Atlantic v. State of South Carolina, et al.* Opinion No. 28127 Heard October 19, 2022 – Filed January 5, 2023 (South Carolina)

78. See, SisterSong Women of Color Reproductive Justice Collective v. State of Georgia, file:///C:/Users/pzwier/Downloads/2CV367796_judg_on_plead-signed.pdf

79. Cite as: 597 U. S. ____ (2022) 7 BREYER, SOTOMAYOR, and KAGAN, JJ.,

80. James Robenalt, JANUARY 1973: WATERGATE, ROE V. WADE, VIETNAM, AND THE MONTH THAT CHANGED AMERICA FOREVER, (Chicago Review Press, Chicago IL, 2015), 88-93, 168-176; (Hereinafter Robenalt).

81. Robenalt, *supra*, note 35, at 90-93.

82. Robenalt, *supra*, note 35, at 90-93.

83. Robenalt, *supra*, note 35, at 90-93.

84. 381 U.S. 479 (1965). By a seven to two vote, the Court declared that a statute forbidding the use of contraceptive devices was unconstitutional as an unconscionable intrusion into the privacy of the marital relationship.

85. Mr. Justice Black dissented. The Court's senior member felt that the Court's announcement of a constitutional right of privacy was unwarranted because no specific constitutional provision guaranteed such a right. The major emphasis of Justice Black's opinion was its accusation that "privacy" was an inchoate concept of uncertain dimensions which a majority of the Court had adopted in order to transcribe their personal ideas of normative social and political philosophy into constitutional dogma. Justice Black felt that the Court's action ignored well established canons of judicial decision-making and threatened to upset the balance of the constitutional system specified by the Framers of the Constitution. Justice Black feared that the Griswold decision was the harbinger of a return to substantive due process, a concept alien to the judicial function and one which the Court had previously repudiated after disastrous experience. It wouldn't be but few short years and Black's reasoning would provide a new majority with the tools to reject privacy as a separate fundamental right.

86. Robenalt, *supra*, note 35, at 170-176.

87. Robenalt, *supra*, note 35, at 170-176.

88. See, *Planned Parenthood South Atlantic v. State of South Carolina, et al.* Opinion No. 28127 Heard October 19, 2022 – Filed January 5, 2023 (South Carolina) https://www.sccourts.org/opinions/HTMLFiles/SC/28127.pdf where the court held,

Unlike the United States Constitution and the constitutions of most of our sister states, South Carolina's Constitution includes a specific reference to a citizen's right to privacy. That provision states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ." S.C. Const., art I, § 10. In this case, we are asked to determine whether that right to privacy extends to a woman's decision to have an abortion, and, if so, whether the Act unconstitutionally infringes upon that right. We are not asked to determine whether our constitution mentions the word "abortion"—clearly it does not. Instead, the fundamental question before the Court is whether this Act, which severely restricts and, in many cases, prohibits a woman's decision to terminate a pregnancy, constitutes an "unreasonable invasion of privacy."

89. Id. South Carolina had enacted in 1971 an explicit right to privacy in its Constitution so the SC Supreme Court saw it as its task to interpret its meaning in light of the meaning of the amendment in 1971.

…Flowing directly from this right to procreation, the Supreme Court recognized that the right to marital privacy was violated by a contraception ban in Griswold v. Connecticut, 381 U.S. 479, 485 (1965). The Supreme Court subsequently extended this right to unwed individuals in Eisenstadt v. Baird, arguing that privacy in intimate relations cannot be limited based on marital status. 405 U.S. 438, 453 (1972) ("It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."). The Eisenstadt court also held, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. Fast on the heels of Griswold, the Supreme Court ruled that the right to privacy, emanating from the Bill of Rights and applying to the states through the Fourteenth Amendment, protected a woman's decision to terminate pregnancy in the first trimester without interference from the state. Roe v. Wade, 410 U.S. 113,

163- 64 (1973) (overruled by Dobbs, 142 S. Ct. at 2240). Earlier this year, that decision was overturned because "abortion is fundamentally different" from contraception and marriage in that it involves the ending of fetal life. Dobbs, 142 S. Ct. at 2243. A critical part of the Dobbs Court's justification for overruling Roe was that Roe "held that the abortion right, which is not mentioned in the Constitution, is part of the right to privacy, which is also not mentioned." Id. at 2245 (emphasis added). Recognizing that Roe was overturned partially based on its reliance on an unmentioned and hence arguably nonexistent constitutional right to privacy, Dobbs does not control, nor even shed light on, our decision today since the South Carolina Constitution expressly includes a right to privacy.

Turning towards the concept of privacy in our state, only six after Griswold recognized marital privacy rights, South Carolina adopted article I, section 10. There can be no doubt that the authors of this provision were aware of Griswold and its use of the right to privacy.

90. See, SisterSong Women of Color Reproductive Justice Collective v. State of Georgia, file:///C:/Users/pzwier/Downloads/2CV367796_judg_on_plead-signed.pdf

91. States like Montana provide for the right to fish and hunt. If such matters are freely made part of the Constitution, then restricting a women's right to choose can be made a matter of constitutional importance, and amendments depend on the will of the majority. (For amendment to the federal constitution, the process is quite difficulty. **An amendment may be proposed by a two-thirds vote of both Houses of Congress, or, if two-thirds of the States request one, by a convention called for that purpose**. The amendment must then be ratified by three-fourths of the State legislatures, or three-fourths of conventions called in each State for ratification. How easily is it for a state to amend its constitution? Different states make it easier or harder. According to Ballotpedia,

Every state but Delaware requires voters to ratify proposed state changes to a state's constitution. From 2006 through 2020, a total of 1,016 constitutional amendments were proposed and put before voters. Of this total, voters approved 733 proposed changes to state constitutions.

There are four ways that proposed constitutional amendments can be proposed and put on the ballot in most states:

- Through a legislative proposed constitutional amendment
- Through a constitutional amendment put on the ballot through a citizen signature petition. Eighteen states allow this method of amendment. The requirements in several of these states, such as Mississippi and Illinois are difficult and rarely used.
- Through State Constitutional Conventions. Some states allow voters to decide at regular intervals whether to hold a convention.
- In Florida, there is a Commission that refers ballot measures for Constitutional Consideration.

Legislative amendments

See also: Legislatively-referred constitutional amendments

The legislatures of 49 states vote on constitutional amendments in order to refer them to the ballot for voter consideration. Delaware is the exception, with the legislature voting on constitutional amendments but not requiring voter approval. Most of the states (36 of 49) require legislatures to approve the amendments during one legislative session. An additional four states require amendments to be passed during one or two successive legislative sessions, depending on whether the amendment receives a simple majority or supermajority. The remaining nine states require legislatures to approve amendments twice—once during one legislative session and then again during the next legislative session.

Eighteen states have a process for initiated constitutional amendments.

These states izona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi[4], Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon and South Dakota.

Constitutional Conventions

- Forty-four states have laws that lay out how a constitutional convention can be called in their state. The main differences between these laws are as follows:
- In some states, a ballot measure asking the people to approve or disapprove of holding a convention appears automatically on the ballot every 10 or (in some states) 20 years.
- In some states, the state legislature can act to place on the ballot a question asking the voters whether they wish to call a convention. These states vary with respect to:
- What percentage of those in the state legislature must vote to place such a question on the ballot.
- Whether the legislature must vote in favor of placing such a measure before the people in one or more legislative sessions.
- Once a constitutional convention question has been placed before the voters, what percentage of them must approve it for it to become part of the state's constitution.

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- In some states, the legislature can call a convention without asking voters for approval.

See also: Commission-referred ballot measure

- Florida has a commission, the Florida Taxation and Budget Reform Commission, that has the authority to propose amendments to the Florida Constitution. This group convenes once every 20 years. Florida also has a Constitution Revision commission that convenes every 20 years. The first CRC meeting was held in 1977.
- With the passage of Amendment 4 in 1996, New Mexico created a process where a commission can develop and submit proposals for constitutional amendments to the state legislature.

Constitutional Commissions.

92. This strange constitutional provision made any infant "born alive" at any gestational age a legal person, a protection that already exists under a federal law passed 20 years ago. It would criminalize health care providers who do not make every effort to save the life of an infant "born during an attempted abortion" or after labor or C-section. Doctors say they are concerned that the law will limit palliative care for infants who are born but will not survive.

93. Consider for example cases involving teen pregnancy. How should facts that exist now about the number of unwanted teen pregnancies impact the Constitutional analysis of the rights of the women involved, and the rights of their parents, and the rights of any other interested parties. See e.g. Planned Parenthood of Central New Jersey v. Farmer, https://www.aclu.org/legal-document/planned-parenthood-v-farmer See: L. Earner-Byrne and D. Urqhuart, The Irish Abortion Journey, 1968–2018 (Basingstoke: Palgrave, 2019); C. Hug, The Politics of Sexual Morality in Ireland (Basingstoke: Palgrave Macmillan, 1999); L. Smyth, Abortion and Nation: The Politics of Reproduction in Contemporary Ireland (Abingdon: Ashgate, 2005). Cf., Sylwia Kuzma-Markowska and Laura Kelly, *Anti-abortion Activism in Poland and the Republic of Ireland c.1970s–1990s**

94. Journal of Religious History, Vol. 46, No. 3, September 2022 doi: 10.1111/1467-9809.12870, (where the authors argue that the differences between Ireland and Poland also stem from an effective use by Polish anti abortionists of three strategies, 1) science, (purported showing "life" at early stages from the DNA and human formation in the first trimester, from 2) need to protect women from the health effects of abortions, and 3) the need to protect women from men who were pressuring them to have abortions.)

    LePage v Mobile Infirmary Clinic, https://law.justia.com/cases/alabama/supreme-court/2024/sc-2022-0579.html IVF starts with the harvesting of eggs, which can be a painful process. Then the eggs are fertilized and multiple embryos are created and frozen. It is not uncommon for some frozen embryos to fail to develop or to be discarded during the IVF process, including when genetic abnormalities are identified or when a patient does not wish to have any more children. The Alabama ruling raises the question of whether healthcare providers (or their subcontractors that transport and store frozen embryos) could be charged for wrongful death or other civil or criminal charges in the event any embryos are lost or discarded during the normal IVF process

95. See: L. Earner-Byrne and D. Urqhuart, The Irish Abortion Journey, 1968–2018 (Basingstoke: Palgrave, 2019); C. Hug, The Politics of Sexual Morality in Ireland (Basingstoke: Palgrave Macmillan, 1999); L. Smyth, Abortion and Nation: The Politics of Reproduction in Contemporary Ireland (Abingdon: Ashgate, 2005). Cf., Sylwia Kuzma-Markowska and Laura Kelly, *Anti-abortion Activism in Poland and the Republic of Ireland c.1970s–1990s**

    Journal of Religious History, Vol. 46, No. 3, September 2022 doi: 10.1111/1467-9809.12870, (where the authors argue that the differences between Ireland and Poland also stem from an effective use by Polish anti abortionists of three strategies, 1) science, (purported showing "life" at early stages from the DNA and human formation in the first trimester, from 2) need to protect women from the health effects of abortions, and 3) the need to protect women from men who were pressuring them to have abortions.)