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American Liberalism and Germany's Rejection of the National Socialist Past—The 1973 *Roe v. Wade* Decision and the 1975 German *Abortion I Case* in Historical Perspective

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A. Introduction

“The right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹

“The protection of life of the child *en ventre sa mere* takes precedence as a matter of principle for the entire duration of the pregnancy over the right of the pregnant woman to selfdetermination [sic] and may not be placed in question for any particular time.”²

These two holdings stem from the 1973 *Roe v. Wade* decision of the Supreme Court of the United States and the 1975 *First Abortion Judgment* of the German Federal Constitutional Court (FCC) on the constitutionality of the abortion laws. Both landmark decisions carved out the foundations of the penal law on abortion in the respective legal systems for years to come. The standards of the *First Abortion Judgment* governed the German norms on abortion for almost twenty years until reform became necessary in the wake of reunification.³ *Roe v. Wade*, which introduced the constitutional protection of women’s

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¹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

² BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVerfGE] 1 (1), 1975 (Ger.), translated in Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade—with Commentaries*, 9 JOHN MARSHALL J. OF PRAC. AND PROC. 605 (1976) (translating the *First Abortion Judgment*).

³ In 1992, the *Bundestag* (Federal Parliament) adopted a reformed abortion law in order to harmonize the laws of the Federal Republic of Germany and the German Democratic Republic. Even though the law was similar to the one overturned in the *First Abortion Judgment*, the FCC held in the *Second Abortion Judgment* of 1993 that in principle it was constitutional. However, the Court affirmed that generally abortion must be regarded as illegal. 88 BVerfGE 203 (203). See also Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 274 (1995). According to the reformed abortion law of 1995, which is in effect today, abortion during the first three months is illegal, but a woman who aborts during this time period after she received counsel will not face legal sanctions.

abortion rights,⁴ still remains the controversial milestone precedent. A broad pro-life movement has formed in the United States, which aims at overruling *Roe v. Wade*,⁵ while pro-choice groups do everything in their power to defend the 1973 case.⁶

As the introductory quotations indicate, the outcome of the abortion cases in the United States and Germany could almost not have been any more different. In *Roe v. Wade*, the majority of the justices held that the right to privacy as protected by the Fourteenth Amendment includes the right of the pregnant woman to decide—at least during the first twenty-four weeks of her pregnancy—whether or not to have an abortion.⁷ With one stroke, the Supreme Court declared all but one of the state penal laws on abortion constitutionally void.⁸ The FCC, in contrast, pronounced that in principle Article 2 of the German Constitution on the right to life requires treating abortion as a crime. Only in exceptional cases—when the pregnancy causes danger for the life or health of the mother (medical indication), when the pregnancy results from rape (ethical indication), when the fetus is likely to be handicapped (eugenic indication), or when the pregnancy causes danger of social or economic distress for the mother (social indication)—could abortion be legal.⁹ The FCC asserted that the federal abortion law of 1973, which unconditionally permitted abortion during the first twelve weeks of pregnancy, was unconstitutional.¹⁰

Hence, what was found to be required according to the U.S. Constitution was deemed to be a violation of the German *Grundgesetz*. Strongly put, the Supreme Court regarded abortion as a constitutionally protected right, while the FCC understood abortion to be a crime.¹¹ Even though the Supreme Court and the FCC were faced with the same legal

⁴ Even though *Roe v. Wade* was limited in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the U.S. Supreme Court upheld that the right of privacy encompasses the right to abortion and indicated that criminalization is forbidden until viability. For recent Supreme Court cases on abortion, see *Stenberg v. Carhart*, 530 U.S. 914 (2000) and *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁵ On the pro-life movement, see NATIONAL RIGHT TO LIFE COMMITTEE, <http://www.nrlc.org> (last visited 6 Nov. 2011).

⁶ See, e.g., *Roe v. Wade and the Right to Choose*, NARAL PRO CHOICE AMERICA FOUNDATION (1 Jan. 2011), <http://www.prochoiceamerica.org/media/fact-sheets/government-federal-courts-scotus-roe.pdf> (last visited 6 Nov. 2011).

⁷ See *Roe v. Wade*, 410 U.S. 113, 153, 160 (1973).

⁸ Only the 1970 abortion law of New York did not penalize abortion during the first 24 weeks, and thus corresponded to the standard set out in *Roe v. Wade*. See, e.g., EVA R. RUBIN, *ABORTION, POLITICS AND THE COURTS: ROE V. WADE AND ITS AFTERMATH* 24 (1987).

⁹ 39 BVERfGE 1 (49), translated in Jonas & Gorby, *supra* note 2, at 648.

¹⁰ *Id.* at 68, translated in Jonas & Gorby, *supra* note 2, at 663.

¹¹ E.g., Winfried Brugger, *Abtreibung—ein Grundrecht oder ein Verbrechen? Ein Vergleich der Urteile des United States Supreme Courts und des BVerfG*, 39 NEUE JURISTISCHE WOCHENSCHRIFT 896 (1986).

problem, the justices of both courts came to contrasting interpretations of their constitutional rules governing abortion. Given the similar constitutional traditions of the United States and Germany, the discrepancy is rather surprising.¹²

The goal of this paper is to offer an explanation why the highest courts of two western democracies came to contrasting results on the issue of abortion.¹³ After a short account of the historical and political context of the cases (Part B.), I examine various potential rationalizations for the differences in outcome (Part C.). I inquire into the textual difference of the constitutions (Part C.I.), investigate whether the religious attitudes of the adjudicators have influenced the cases (Part C.II.), study the impact of the feminist movement (Part C.III.) and examine the bearing of the justices' political background on the decisions (Part C.IV.). Thereafter, I explore differences in philosophical traditions (Part C.V.) and historical experiences as nation states (Part C.VI.) as explanations for the discrepancy in the rulings. I argue that the *First Abortion Judgment* was influenced by political provenience of the justices and, furthermore, can be read as a reaction to the National Socialist past. In contrast, the major factor shaping the majority opinion in *Roe v. Wade* was the Lockian tradition of liberalism and the American skepticism to state interference into private spheres. In the conclusion, I briefly address the consequences of the rulings and summarize my results (Part D.).

¹² See e.g., Donald P. Kommers, *Abortion and the Constitution: The Cases of the United States and West Germany*, 25 AM. J. COMP.L. 255 (1977). "That the highest tribunals of two robust constitutional democracies and secular political cultures should decide differently the question of the unborn child's right to life under the constitutions of their respective countries must excite curiosity, no matter one's stand or stake in the abortion controversy." *Id.* (referring to similarities between the German and American political systems and political cultures).

¹³ There exists some literature that explains the discrepancy in the rulings. Kommers suggests that inter alia divergent "social philosophies" between an American individual liberty approach and a German communitarian approach shaped the contrasting decisions. *Id.* at 280. Similarly, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW. AMERICAN FAILURES, EUROPEAN CHALLENGES 38 (1987), points out that the FCC majority chose to stress community values, while *Roe v. Wade* focused on privacy and autonomy. Marc Chase McAllister asserts that the abortion cases reflect the difference between the German Constitution of dignity and the American Constitution of liberty. Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined through Each Country's Leading Abortion Cases*, 11 TULSA J. COMP. & INT'L L. 491, 494 (2004). Douglas G. Morris argues that while the U.S. decision followed a model of *individual liberalism*, the German majority stood in a tradition of *authoritarian liberalism*. Douglas G. Morris, *Abortion and Liberalism: A Comparison Between the Abortion Decisions of the Supreme Court of the United States and the Constitutional Court of West Germany*, 11 HASTINGS INT'L & COMP. L. REV. 159, 183 (1988); Hartmut Gerstein & David Lowry, *Abortion, Abstract Norms and Social Control: The Decision of the West German Federal Constitutional Court*, 25 EMORY L.J. 849, 869 (1976) recognize a conservative and paternalistic philosophy in the German decision and put forward that the German Court resorted to an abstract analysis, while the Supreme Court undertook judicial balancing of conflicting rights and interests.

Even though the writings address many important issues (especially the influence of liberalism on *Roe v. Wade*), they underestimate the impact of the justices' political provenience and the National Socialist past on the *First Abortion Judgment*.

B. The Historical and Political Context of the Abortion Cases

A public debate about abortion started in the United States in the 1960s and reached Germany in the beginning of the 1970s. Reform advocates planned to reconfigure the effective punitive law, which allowed for abortion only in cases of strict medical indication, when the pregnancy endangered the life of the mother (United States) or the life and physical health of the mother (Germany). The debate polarized both societies like almost no other topic of domestic policy because the issue of abortion touched upon sensitive questions regarding the beginning of human life, self-emancipation, and attitudes towards gender roles, family values, and religious beliefs. Radical women's rights groups advocated a broad liberalization, arguing that all penal restrictions should fall, while the Catholic Church backed the existing laws.¹⁴ Between these two extremes, some supported the decriminalization in cases of ethical, eugenic, and social indication, while others favored an abortion law that allowed abortion, at least for a certain time period.¹⁵ In the United States, the first pro-choice and pro-life groups were born.¹⁶

The public debate led to action on the political level. In the United States, by 1972, eighteen of the fifty states had reformed their criminal statutes on abortion.¹⁷ Fourteen instituted moderate reform allowing abortion in cases of ethical, eugenic, and broader medical indication,¹⁸ while four chose more radical reform; they allowed abortion up to the twentieth week of pregnancy regardless of whether an indication existed.¹⁹ In Germany, where the federal government establishes the criminal law for the entire country, the newly elected center-left coalition of the Social-Democratic Party (SPD) and the Liberal Party (FDP) decided to address the abortion issue. After an extensive debate,

¹⁴ See, for example, on the debate for the United States, RAYMOND TATALOVICH, & BYRON W. DAYNES, *THE POLITICS OF ABORTION: A STUDY OF COMMUNITY CONFLICT IN PUBLIC POLICY MAKING* 82 et seq. (1981); LEE EPSTEIN & JOSEPH KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 137 et seq. (1992); for Germany, DIRK VON BEHREN, *DIE GESCHICHTE DES § 218 STGB* 409 et seq. (2004); MICHAEL GANTE, § 218 IN DER DISKUSSION. MEINUNGS- UND WILLENSBILDUNG 1945–1976 129 et seq. (1991).

¹⁵ For the United States, see, for example, TATALOVICH, & DAYNES, *supra* note 14, at 82 et seq. and EPSTEIN & KOBYLKA, *supra* note 14, at 137 et seq. For Germany, see, for example, VON BEHREN, *supra* note 14, at 409 et seq. and GANTE, *supra* note 14, at 129 et seq.

¹⁶ For the pro-choice movement, see SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 13 (1991); for the pro-life movement, see KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 126 (1984).

¹⁷ TATALOVICH & DAYNES, *supra* note 14, at 24.

¹⁸ Mississippi, Colorado, California, North Carolina, Georgia, Maryland, Arkansas, Delaware, Kansas, New Mexico, Oregon, South Carolina, Virginia, Florida, for example, TATALOVICH & DAYNES, *supra* note 14, at 24.

¹⁹ New York, Washington State, Hawaii and Alaska. See, e.g., TATALOVICH & DAYNES, *supra* note 14, at 24; however, there existed no general trend to abortion reform; four states considered repeal laws in 1971, and the proposals were rejected. EPSTEIN & KOBYLKA, *supra* note 14, at 151.

the coalition adopted a reform law in 1973—against the vote of the center-conservative opposition of the Christian Democratic/Christian Social Union (CDU/CSU)—that decriminalized abortion during the first twelve weeks of pregnancy.²⁰

In both the United States and Germany, discontent with the old and new laws led to legal challenges before the courts. Beginning in 1967, abortion rights advocates in the United States attacked the abortion laws of some states on constitutional grounds and flooded the courts with cases.²¹ In 1971, the Supreme Court granted certiorari to the companion cases *Roe v. Wade*, which concerned the Texas statute that allowed abortions only in cases of medical indication, and *Doe v. Bolton*, which concerned the reformed Georgia abortion law that permitted abortion in cases of ethical, eugenic, and medical indication.²² In Germany, delegates of the CDU/CSU and some *Länderregierungen* (state governments) challenged the federal, social-liberal law before the FCC.²³

C. Potential Explanations for the Contrasting Rulings

As shown in the introduction, the courts chose different paths on the constitutionality of abortion. Despite a more or less analogous political debate in the run up to the decisions, the Supreme Court embraced the position that, according to the U.S. Constitution, states must not criminalize abortion for most of the pregnancy, while the FCC held that the *Grundgesetz* requires the federal government to criminalize abortion. What motivated or influenced the justices to arrive at contrasting conclusions?

I. The Constitutional Texts

Even though the U.S. Constitution and the German *Grundgesetz* both stand in the same tradition of constitutional democracy, the texts are not identical. There exist differences in the way the founding documents organize the state apparatus²⁴ and also, at least to some

²⁰ Four different drafts were introduced to the *Bundestag*. One from SPD and FDP delegates together, one from a number of SPD parliamentarians and two from CDU/CSU delegates. The majority supported the most liberal SPD/FDP draft, see, for example, the detailed account in GANTE, *supra* note 14, at 160.

²¹ See, for example, RUBIN, *supra* note 8, at 31 or EPSTEIN & KOBYLKA, *supra* note 14, at 162, who describe the “litigation avalanche.”

²² In the public debate, *Roe v. Wade* has become the abortion case, because *Doe v. Bolton* refers in large parts to the reasoning in *Roe v. Wade*. *Doe v. Bolton*, 410 U.S. 179, 189 (1973).

²³ According to GG Art. 93(1) S.2 (Ger.), the FCC had jurisdiction in the “abstract norm control” procedure to declare whether a particular law is in line with the constitution. The case can be brought by the federal government, a *Länder* government, or one fourth of the members of the *Bundestag*. Before the revision of GG Art. 93(1) S.2 (Ger.) on 1 December 2009, the federal government, a *Länder* government or one third of the members of the *Bundestag* could bring the case.

²⁴ See, for example, the powers of the strong U.S. President in the U.S. CONST. ART. II, and the much weaker German President. GG Art. 54–61 (Ger.).

degree, in the rights they protect.²⁵ For the abortion context, it is striking that the *Grundgesetz* incorporates an explicit substantive “right to life,”²⁶ while the U.S. Constitution only includes procedural protection of life in the Due Process Clauses of the 5th and 14th Amendments.²⁷ Thus, the opposite outcomes of the abortion jurisprudence might simply be a result of the differing constitutional texts.

However, even though the *Grundgesetz* incorporates a substantive right to life in Article 2,²⁸ the provision does not display the point in time the protection for the right to life begins. The crucial question for the abortion issue, whether the *Grundgesetz* protects the unborn life, is not explicitly answered. Like the U.S. Constitution, the *Grundgesetz* is open to an interpretation, which either includes or excludes protection for the unborn life.

Moreover, it is remarkable that the “right to privacy”—imperative for the decision of the American court—²⁹ is not enumerated in the Constitution, but has been developed in the case law of the Supreme Court.³⁰ Similarly, the German “right to free development of [every person’s] personality” in Article 2 of the *Grundgesetz* had to be given detailed content through FCC jurisprudence.³¹ The issue of abortion—in which the “right to life of the unborn child” and the “right to privacy” or “right to free development of [every person’s] personality” conflict—is an area in which the constitutional texts do not provide much guidance. Constitutional abortion law is judge-made law and, thus, the question remains: Why did the justices decide to make the law the way they did?

II. Religious Attitudes

As a topic that is closely related to religious beliefs about the beginning of life, one might expect that the justices’ religious attitudes and feelings had an impact on the reasoning of both courts. In relation to the German judgment, the left-liberal press saw a bias toward

²⁵ See, for example, the right to keep and bear arms in the Second Amendment of the U.S. Constitution. U.S. CONST. amend. II.

²⁶ Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights maybe interfered with only pursuant to a law. GG Art. 2(2) (Ger.).

²⁷ “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV; *cf.* U.S. CONST. amend. V.

²⁸ GG Art. 2(2) (Ger.).

²⁹ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

³⁰ For the U.S. context, see, for example, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³¹ For the German jurisprudence, see, for example, 6 BVERFG 32 (41) (*Elfes-judgment*).

Catholic thought as foundational for the outcome.³² *Der Spiegel* criticized that the FCC had ruled as “Our Lords chancellery” and accused the Court of allowing Catholic justices to have a strong influence on the outcome.³³

However, the result of the *First Abortion Judgment* was not congruent with the Catholic position. While the majority opinion supported ethical, eugenic, and social indications as examples for legal abortions,³⁴ for the Catholic Church, these indications were deeply problematic.³⁵ Furthermore, only three of the six German majority justices were Catholic. A reading of the *First Abortion Judgment* as a *Catholic decision*, hence, is not persuasive.

Still, religious attitudes might have influenced the justices’ decision. The majority of the representatives of the German Evangelic Church had supported the more conservative abortion proposal of the CDU/CSU.³⁶ Thus, one could claim that by overturning the social-liberal law, the FCC adopted the position of the Evangelic Church.

Despite this overlap with the stance of the Evangelic Church, it is hard to find evidence for the influence of religious beliefs or ideas in the German ruling. When addressing whether Article 2 of the *Grundgesetz* protects human life, the justices concluded:

Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception (nidation, individuation) The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life.³⁷

Hence, when talking about the beginning of life, the justices discussed biology and not religion.³⁸ The majority was cautious not to mix religious arguments with secular

³² E.g., Rudolf Augstein, *Unseres Herrgotts Kanzlei*, DER SPIEGEL, 3 Feb. 1975.

³³ *Id.*

³⁴ 39 BVERFG 1 (49), translated in Jonas & Gorby, *supra* note 2, at 648.

³⁵ E.g., VON BEHREN, *supra* note 14, at 498.

³⁶ The Evangelic Church did not have a unified position. However the Protestants who embraced the liberal reform law were in the minority. See, e.g., SIMONE MANTEI, NEIN UND JA ZUR ABTREIBUNG: DIE EVANGELISCHE KIRCHE IN DER REFORMDEBATTE UM § 218 STGB 345 (2004).

³⁷ 39 BVERFG 1 (37, 648), translated in Jonas & Gorby, *supra* note 2, at 638.

³⁸ See, e.g., Kommers, *supra* note 12, at 279.

constitutional interpretation. Even though one cannot rule out entirely that the religious background of the adjudicators had some hidden influence on the individual decision of each justice, the language and the reasoning in the *First Abortion Judgment* were held secular.

Similarly, religion did not play a major role in the American context. By requiring that abortions were not illegal during the first 24 weeks of pregnancy, the *Roe v. Wade* Court took a stand, which differed from the positions of many churches in the United States.³⁹ Moreover, in its reasoning, the Supreme Court disassociated itself from religious argumentation. The majority opinion emphasized that it did not want to give a general answer to the question of the beginning of human life:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.⁴⁰

However, the Supreme Court explicitly held that the Catholic position, which recognizes the beginning of life from the moment of conception, had "substantial problems" with a precise definition of life "because new embryological data" would show that conception is a "process over time, rather than an event."⁴¹ The Supreme Court concluded that "[i]n short, the unborn have never been recognized in the law as persons in the whole sense."⁴² The Court in *Roe v. Wade*, therefore, similar to the FCC, used natural science instead of theology to support its decision. Religious attitudes did not, at least openly, have a strong impact on the abortion jurisprudence in the United States or in Germany.

III. Influence of Feminism

A further explanation for the contrasting outcome could be a different bearing of feminism on the two rulings. American newspapers interpreted *Roe v. Wade* as a victory of

³⁹ American Cardinals referred to the judgment as an "unspeakable tragedy for this nation" with "disastrous implications for our stability as a civilized society." Lawrence van Gelder, *Cardinals Shocked—Reaction Mixed; 2 Cardinals Denounce Decision; Other Leaders' Reactions Mixed 'Neutrality of State,'* N.Y. TIMES, Jan. 23, 1973, at 80. However, some churches generally supported a liberalization of the abortion laws; see, for example, STAGGENBORG, *supra* note 16, at 23.

⁴⁰ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

⁴¹ *Id.* at 161.

⁴² *Id.*

feminism⁴³ and members of feminist groups celebrated the ruling as pro-women's rights.⁴⁴ In Germany, the women's movement criticized the *First Abortion Judgment* as a disappointing blow against their cause.⁴⁵ Why were feminist goals achieved in the American context but not in the German context? Were the *pro-women's rights*—*Roe v. Wade*—and the *contra-women's rights*—*First Abortion Judgment*—the result of divergent size and strength of the respective feminist movements in each country? Or did a differing lobbying strategy influence the outcome of the decisions?

The so-called second wave of feminism, which fought for political and economic equality between men and women and stressed control over reproduction,⁴⁶ started in the United States in the 1960s and spread to other western countries in the late 1960s or beginning of the 1970s.⁴⁷ Booming economies needed women to become part of the workforce, which led to a new self-perception and self-confidence among women.⁴⁸ Betty Friedan's book, *The Feminine Mystique*, reflected the discontent many women of the American middle class experienced in their role as mothers and housewives in American society.⁴⁹ Women's rights organizations, such as the National Organization for Women (NOW), tried to influence American politics in the interest of social equality of women.⁵⁰ On the issue of abortion, which was a central topic of the feminist movement, women's rights groups campaigned for radical reform by arguing for complete abolition of the criminalization of abortion.⁵¹ Some of the most radical groups resorted to publicity-oriented practices like "storming" legislative hearings and organizing public speak outs on the "horrors" of illegal

⁴³ Lawrence van Gelder, *Cardinals Shocked-Reaction Mixed; 2 Cardinals Denounce Decision; Other Leaders' Reactions Mixed 'Neutrality of State,'* N.Y. TIMES 23 Jan. 1973.

⁴⁴ For instance, after *Roe v. Wade*, one of the reform advocates was quoted in the New York Times: "I am delighted to see that our position—that the women have the right to control their own bodies—has been vindicated." *Id.*; see also for the women's movement, RUBIN, *supra* note 8, at 89.

⁴⁵ *E.g.*, VON BEHREN, *supra* note 14, at 496.

⁴⁶ *E.g.*, ESTELLE FREEDMAN, *NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN* 4 (2002).

⁴⁷ For the United States, see, for example, WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II* 79 (2003); for Germany, see, for example, KRISTINA SCHULZ, *DER LANGE ATEM DER PROVOKATION: DIE FRAUENBEWEGUNGEN IN DER BUNDESREPUBLIK UND FRANKREICH 1968–1976*, at 34 (2002).

⁴⁸ For the U.S., see CHAFE, *supra* note 47, at 79; for Germany, see SCHULZ, *supra* note 47, at 34.

⁴⁹ *E.g.*, BARBARA RYAN, *FEMINISM AND THE WOMEN'S MOVEMENT: DYNAMICS OF CHANGE IN SOCIAL MOVEMENT, IDEOLOGY AND ACTIVISM* 42 (1992).

⁵⁰ *E.g.*, EPSTEIN & KOBYLKA, *supra* note 14, at 145.

⁵¹ *E.g.*, RUBIN, *supra* note 8, at 26.

abortions.⁵² “My body, my right” was the rallying cry of the radical American women’s rights movement on the issue of abortion.⁵³

In Germany, the “new women’s rights movement,” which was created during the student revolutions of 1967–68,⁵⁴ seemed at first to be smaller, less radical and less organized than the U.S. lobbyist groups.⁵⁵ However, abortion was the topic that invigorated the German women’s rights movement. In June 1971, 374 prominent women confessed in the news magazine *Der Stern* that they had received abortions, thereby publicly admitting a violation of § 218 Penal Code.⁵⁶ This campaign spurred the interest in the abortion topic among the broader German public. In the following months, hundreds of thousands of women solidarized with the ideas of repealing the abortion statute and thousands took part in demonstrations against § 218 of the Penal Code with the slogan: “My stomach is mine.”⁵⁷

Hence, for both American and German feminism, abortion was a key issue that made the feminist movement visible and attractive for large parts of the public. Both countries’ movements took the same position on abortion and seem to have had a significant impact on the public debate. Nonetheless, different lobbying strategies of the movements’ protagonists might have caused the contrasting outcomes of the Courts’ decisions.

⁵² *E.g.*, EPSTEIN & KOBYLKA, *supra* note 14, at 151.

⁵³ *E.g.*, LUKER, *supra* note 16, at 99. Compare the quote of one of the radical women’s movements’ supporters:

When we talk about women’s rights, we can get all the rights in the world—the right to vote, the right to go to school—and none of them means a doggone thing if we don’t own the flesh we stand in, if we can’t control what happens to us, if the whole course of our lives can be changed by somebody else that can get us pregnant by accident, or by deceit, or by force. So I consider the right to elective abortion, whether you dream of doing it or not, is the cornerstone of the women’s movement.

Id. at 97.

⁵⁴ *E.g.*, Ute Gerhard, *Frauenbewegung*, in *DIE SOZIALEN BEWEGUNGEN IN DEUTSCHLAND SEIT 1945: EIN HANDBUCH 199* (Roland Roth & Dieter Rucht eds., 2008).

⁵⁵ See, for example, the protest in the United States against the Miss America Election of 1968, which received wide public attention. Alice Echols, *Nothing Distant About It: Women’s Liberation and Sixties Radicalism*, in *THE SIXTIES: FROM MEMORY TO HISTORY* 149 et seq. (David Farber ed., 2000). At first the German women’s movement did not have a similar outreach.

⁵⁶ Alice Schwarzer initiated the “Aktion 218,” according to a French exemplar, and won the support of famous personalities like Romy Schneider, Senta Berger, Sabine Sinjen and Veruschka von Lehndorff. VON BEHREN, *supra* note 14, at 425.

⁵⁷ *E.g.*, VON BEHREN, *supra* note 14, at 427; EDGAR WOLFRUM, *DIE GEGLÜCKTE DEMOKRATIE: GESCHICHTE DER BUNDESREPUBLIK DEUTSCHLAND VON DEN ANFÄNGEN BIS ZUR GEGENWART* 318 (2006).

In Germany, lawyers associated with the social-liberal government litigated the case before the FCC. Established politicians, like Federal Minister of Justice, Dr. Hans-Jochen Vogel (SPD), Vice-President of the German Parliament Prof. Liselotte Funcke (FDP), and Prof. Horst Ehmke (SPD) defended the positions of their parties.⁵⁸ German women's rights activists did not take part in the proceedings before the FCC. Thus, the German feminist movement did not have a direct impact on the *First Abortion Judgment*.

The litigators of *Roe v. Wade*, in contrast, were not part of the political mainstream. Rather, they were supporters of the decentralized pro-choice movement that had emerged in the United States in the second half of the 1960s.⁵⁹ The pro-choice movement overlapped with the women's rights movement to a certain extent, but solely concentrated on the issue of abortion.⁶⁰ By targeting state legislatures and courts, the movement had significant impact on the development of the abortions laws at the state level.⁶¹ Sarah Weddington, who was involved in pro-choice circles, herself having had an illegal abortion in Mexico, argued *Roe v. Wade* before the Supreme Court. In the first oral proceeding, Weddington gave voice to the argument of the women's rights movement by enumerating the disadvantages of pregnancy for the woman: "[Pregnancy] disrupts her body, it disrupts her education, it disrupts her employment, and it often disrupts her entire family life."⁶² Weddington concluded that, "because of the impact on the woman, this certainly . . . is a matter which is of such fundamental and basic concern to the woman involved that she should be allowed to make the choice as to whether to continue or terminate her pregnancy."⁶³ Weddington's reasoning, particularly the language "disrupts her body," was reminiscent of the "my body, my right" slogan of the women's rights movement. The American women's rights movement presented its arguments directly before the Supreme Court.

There are a number of signs that the *feminist perspective* had some influence over the Supreme Court. The majority opinion reasoned that "[m]aternity, or additional offspring,

⁵⁸ 39 BVERFG 1 (33), *translated in Jonas & Gorby, supra* note 2, at 635. Horst Ehmke had been Federal Minister of Justice (1969), Chief of Staff at the *Bundeskanzleramt* (Federal Chancellery) (1969–72) as well as Federal Minister for Research, Technology, Post and Telecommunication (1972–74).

⁵⁹ Among the most influential groups were the National Association for Repeal of Abortion Laws (NARAL), the Association for the Study of Abortion (ASA) and Planned Parenthood. See EPSTEIN & KOBYLKA, *supra* note 14, at 144.

⁶⁰ *E.g., id.* at 144.

⁶¹ *E.g., RUBIN, supra* note 8, at 31.

⁶² Weddington's Argument, *Roe v. Wade*, in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 433 (Philip B. Kurland & Gerhard Casper eds., 1990).

⁶³ *Id.*

may force upon the woman a distressful life and future.”⁶⁴ Furthermore, in his concurring opinion, Justice Douglas elaborated on the “discomforts of pregnancy.”⁶⁵ The woman with an unwanted pregnancy had “to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers.”⁶⁶ In Douglas’s view, because “childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future,” a woman is “free to make the basic decision whether to bear an unwanted child.”⁶⁷ The potential disadvantages of unwanted pregnancy resonated within the Supreme Court judgment, particularly within Justice Douglas’s concurring opinion.

However, in other passages, one can see how the majority tries to disassociate itself from feminism. The majority explicitly dismissed the view that a woman “is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.”⁶⁸ The opinion underscored that “the privacy right involved, therefore cannot be said to be absolute.”⁶⁹ In his concurring opinion, Chief Justice Burger stressed that the Supreme Court rejects “any claim that the Constitution requires abortion on demand.”⁷⁰ These rulings were directed against the radical women’s rights movement, which had requested a repeal of all abortion restrictions and was associated by critics with the position of “abortion on demand.” The majority was eager to point to the limits of the abortion rights.

Furthermore, it is striking that the ruling emphasizes the role of the physician rather than the woman in the choice of abortion. *Roe v. Wade* clarified that “the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.”⁷¹ In reference to the advantages and disadvantages of pregnancy, the Supreme Court declared that “[a]ll these are factors the woman and her responsible physician necessarily will consider in consultation.”⁷² According to the majority opinion, “the abortion decision in all its aspects is inherently, and primarily, a medical decision, and

⁶⁴ *Roe v. Wade*, 410 U.S. 113, 153, 154 (1973).

⁶⁵ *Doe v. Bolton*, 410 U.S. 179, 215 (1973).

⁶⁶ *Id.*

⁶⁷ *Id.* at 214. (Chief Justice Burger, Justice Douglas and Justice White formulated their concurring and dissenting opinions in *Doe v. Bolton*).

⁶⁸ *Roe v. Wade*, 410 U.S. at 153.

⁶⁹ *Id.*

⁷⁰ *Doe v. Bolton*, 410 U.S. at 208.

⁷¹ *Roe v. Wade*, 410 U.S. at 164.

⁷² *Id.* at 153.

basic responsibility for it must rest with the physician.”⁷³ Contrary to the women’s rights movement, which understood the self-determination of the woman as the center of the abortion debate, the Supreme Court underlined the medical dimension of abortion.

Even though the women’s rights movement was to some degree successful with its lobbying strategy in front of the Supreme Court, the justices did not align with the feminist cause. The language in *Roe v. Wade* indicates that the justices did not want to be associated with the feminist movement or argument. The Supreme Court majority turned against the radical feminist “my body, my right” slogan. Hence, the influence of feminism is not a sufficient explanation for the difference in outcomes of the American and German decisions.

IV. Political Provenience of the Justices

The argument could be made that political pedigree of the adjudicators determined the outcomes of the abortion cases.⁷⁴ The liberal *Roe v. Wade* decision and the more conservative *First Abortion Judgment* might simply be indicative of the political composition of the benches. This explanation for the contrasting rulings would be plausible if liberal justices dominated the U.S. Supreme Court in 1973 and conservative justices controlled the First Senate of the FCC at the time of the First Abortion Judgment.

A comparison between the majority opinion and the dissenting opinion of the German decision displays the influence of the justices’ political background on the constitutional issue of abortion. The German majority consisted of justices who, all except one, owed their appointment to a proposal of the center-conservative CDU/CSU.⁷⁵ In line with their political background, the majority dismissed the social-liberal law as unconstitutional. Moreover, by indicating that a law, which incorporated exceptions in cases of ethical, eugenic, and social indications, would be constitutional, the justices indirectly embraced the proposed reform of the Christian-Union in parliament.⁷⁶ In contrast, the two SPD-supported dissenting justices held that the law of the governing social-democratic and liberal coalition was congruent with the *Grundgesetz*. The dissenting justices attacked the

⁷³ *Id.* at 166.

⁷⁴ On the *First Abortion Judgment* in this direction, see GERHARD BIEHLER, *SOZIALLIBERALE REFORMGESETZGEBUNG UND DAS BUNDESVERFASSUNGSGERICHT 197* (1990).

⁷⁵ The President of the Court Benda, Justice Brox, Justice Böhmer, Justice Ritterspach and Justice Faller all had been nominated following a proposal by the CDU/CSU. Only Justice Haager and the dissenting Justices Rupp-von Brünneck and Simon had been supported by the SPD, see, for example, CHRISTIAN STAHL, *SCHWANGERSCHAFTSABBRUCH UND BUNDESVERFASSUNGSGERICHT: DER EINFLUSS DER WELTANSCHAUUNG VON BUNDESVERFASSUNGSRICHTERN AUF DIE RECHTSPRECHUNG IN WELTANSCHAULICHEN FRAGEN 39* (2004). On the debate whether there might have been a third dissenting justice who did not make his dissent explicit, see, for example, *id.* at 46.

⁷⁶ *E.g.*, GANTE, *supra* note 14, at 160.

majority opinion for misinterpreting the constitution.⁷⁷ This division among party lines is a strong indicator of the impact of the justices' political background. Because there were more justices supported by the CDU/CSU on the bench, they were able to outvote the justices proposed by the SPD. The *First Abortion Judgment*, therefore, can be explained in part through the political provenience of the adjudicators.

Moreover, it is interesting to note that the CDU/CSU-proposed majority justices relied at times on arguments associated with conservative positions. The majority asserted that "the legal order may not make the woman's right to self-determination the sole guide-line of its rulemaking" and underscored the "duty to carry the pregnancy to term."⁷⁸ In a different passage on the effects of the social-liberal law, the justices emphasized: "Through the complete repeal of punishability, however, a gap in the protection has resulted which completely destroys the security of the developing life in a not insignificant number of cases by handing this life over to the completely unrestricted power of disposition of the woman."⁷⁹ The justices criticized the women who "decline pregnancy because they are not willing to take on the renunciation and the natural motherly duties bound up with it."⁸⁰ This was unconstitutional because "[t]he life developing itself is abandoned without protection to their arbitrary decision."⁸¹

The justices rejected the "completely unrestricted power of disposition of the woman," who "arbitrarily" decides whether to abort or not. The majority arguably shared the opinion of some critics of the reformed abortion laws, who rejected the social-liberal law as an expression of a hedonic value scheme, which set maximization of personal pleasure above the protection of the unborn life.⁸² Moreover, the "duty to carry the pregnancy to term" and the "natural motherly duties bound up with [pregnancy]" are reflective of an understanding that a certain role of the woman is to take care of children—an understanding that was dominant in Germany in the 1950s.⁸³ Arguably, the majority opinion was to some degree based on a traditional understanding of family roles and planning, according to which the woman had the duty to bear the child and take care of the child. That these conservative argumentation patterns became part of the justification

⁷⁷ For the minority opinion, see, for example, 39 BVERFG 1 (68), translated in Jonas & Gorby, *supra* note 2, at 663.

⁷⁸ *Id.* at 44, translated in Jonas & Gorby, *supra* note 2, at 641.

⁷⁹ *Id.* at 55, translated in Jonas & Gorby, *supra* note 2, at 653.

⁸⁰ *Id.* at 56, translated in Jonas & Gorby, *supra* note 2, at 653.

⁸¹ *Id.* at 56, translated in Jonas & Gorby, *supra* note 2, at 653.

⁸² *E.g.*, the critique of Robert Spaemann, *Am Ende der Debatte um § 218 StGB*, in ZEITSCHRIFT FÜR RECHTSPOLITIK 49 (1974).

⁸³ *E.g.*, WOLFRUM, *supra* note 57, at 152.

for invalidating the social-liberal law underscores that the political composition of the bench had a significant influence on the outcome of the *First Abortion Judgment*.

In the *Roe v. Wade* Court, the division among party lines was more remote.⁸⁴ Chief Justice Burger, Justice Blackmun and Justice Powell, who had been appointed by the Republican President Richard Nixon,⁸⁵ supported the liberal *Roe v. Wade* majority opinion. Even though Chief Justice Burger emphasized in a concurring opinion that the majority ruling should not be read too broadly, he signed and carried the decision.⁸⁶ Justice Blackmun was even the author of *Roe v. Wade* and thus responsible for inventing the tri-semester scheme and setting the standard of 24–28 weeks as the time period prior to which a penalization of abortion was illegal. Also, Justice White, who had been nominated by the Democratic President John F. Kennedy,⁸⁷ came to be the sharpest dissenter of the majority opinion.⁸⁸ Supposedly conservative justices supported the liberal majority opinion, while a seemingly liberal justice dissented from it. Thus, the division among party lines was not as clear-cut as in the German case.

Furthermore, it is interesting to note that *Roe v. Wade* went far beyond the positions taken by many state legislatures on abortion reforms. By 1973, only four state legislatures had adopted an abortion law decriminalizing abortion for a certain time period, usually twenty weeks, without grounds for justification.⁸⁹ *Roe v. Wade* not only declared this type of abortion law to be constitutional, but also extended the constitutionally protected time period to 24–28 weeks.⁹⁰ *Roe v. Wade* was thus a rather unique case and did not adopt the position of a particular party in the state legislature. Therefore, it seems that *Roe v. Wade* was not primarily determined by the political pedigree of the justices.

⁸⁴ One might question whether there was a unified party position on abortion in the United States. It was not until the 1980s that the national Republican Party took a position for restrictions on abortion; also, the Democratic Party did not formulate a binding position. N.E.H. HULL, WILLIAM JAMES HOFFER & PETER CHARLES HOFFER, *THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY: A LEGAL READER* 336 (2001). Nonetheless, there arguably was a tendency of Republicans supporting restrictions while Democrats favored liberal abortion laws.

⁸⁵ *E.g.*, *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 8 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

⁸⁶ *Doe v. Bolton*, 410 U.S. 179, 208 (1973).

⁸⁷ *E.g.*, *THE BURGER COURT*, *supra* note 85, at 18.

⁸⁸ Justice White argued that the majority opinion meant that “[d]uring the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim or caprice of the putative mother more than the life or potential life of the fetus.” *Roe v. Wade*, 410 U.S. at 221. Because “nothing in the language or history of the Constitution” would support this interpretation, the laws, which criminalized abortion, were not unconstitutional. *Id.*

⁸⁹ RUBIN, *supra* note 8, at 24.

⁹⁰ *Roe v. Wade*, 410 U.S. 113, 160 (1973).

V. Influence of Liberalism

In comparison to the abortion jurisprudence in other western nations, *Roe v. Wade* was exceptional. While the highest courts in France and Austria had declared their liberal abortion laws to be constitutional,⁹¹ no court had gone as far as the U.S. Supreme Court and ruled that the constitution *required* such a liberal law. For instance, the German dissent in the *First Abortion Judgment* regarded the social-liberal law to be constitutional,⁹² however, the dissent did not adopt the approach of the Supreme Court. In order to criticize the German majority, the minority explicitly referred to the earlier *Roe v. Wade* decision, stressing that “the Supreme Court of the United States has even regarded punishment for the interruption of pregnancy, performed by a physician with the consent of the pregnant woman in the first third of pregnancy as a violation of fundamental rights.”⁹³ The dissenting justices held, however, that “[t]his would, according to German constitutional law, go too far indeed.”⁹⁴ The SPD-supported justices, who tended towards a broad liberalization of abortion, were reluctant to embrace the *Roe v. Wade* ruling.

Moreover, in most western countries the liberal abortion reform laws decriminalized abortion during a period of ten to twelve weeks into the pregnancy,⁹⁵ whereas the Supreme Court declared that criminalization was constitutionally forbidden until the twenty-fourth or even the twenty-eighth week of pregnancy. In comparison, the U.S. abortion jurisprudence assumed that abortions were legal for twice as long as in other western countries. What can explain the extraordinary liberal abortion adjudication?

There is strong evidence in the reasoning of the majority that the philosophical concept of liberalism and the idea that the individual has to be protected from governmental intrusion shaped the outcome of *Roe v. Wade*. As demonstrated above, the holding that the woman is free to decide “whether or not to terminate her pregnancy” was based on the “right of privacy.”⁹⁶ Because this right of privacy was not explicit in the Constitution, the Court stressed that it has recognized the right of privacy as an unenumerated right in a line of

⁹¹ For example, VERFASSUNGSGERICHTSHOF [VFGH] [Constitutional Court] 1975, *Schwangerschaftsabbruch/Verfassungsmäßigkeit der Fristenlösung*, EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 74 (1975) (Austria); the German dissent also refers to this decision. 39 BVERFGE 1 (95).

⁹² 39 BVERFGE 1 (68), translated in Jonas & Gorby, *supra* note 2, at 663.

⁹³ *Id.* at 73, translated in Jonas & Gorby, *supra* note 2, at 667.

⁹⁴ *Id.* at 73, translated in Jonas & Gorby, *supra* note 2, at 667.

⁹⁵ For an extensive study of the different abortion laws, see ALBIN ESER & MICHAEL KOCH, *SCHWANGERSCHAFTSABBRUCH IM INTERNATIONALEN VERGLEICH: RECHTLICHE REGULUNGEN—SOZIALE RAHMENBEDINGUNGEN—EMPIRISCHE GRUNDDATEN* (1988).

⁹⁶ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

cases.⁹⁷ In the leading case on the right of privacy, the 1965 *Griswold v. Connecticut* decision, the Court concluded that the Bill of Rights “guarantee[d] zones of privacy”⁹⁸ as “peripheral rights.”⁹⁹ Based on this ground, the Supreme Court invalidated a Connecticut law prohibiting the use of contraceptives, on the grounds that it violated the “right of marital privacy.”¹⁰⁰ In subsequent cases, the Supreme Court developed a constitutionally protected sphere of privacy, in which the government was not allowed to intrude. *Roe v. Wade* built on this reasoning.

The majority in *Roe v. Wade* repeatedly emphasized the importance of a protected private sphere for the pregnant woman. The Court underlined that in the first three months of pregnancy, “the attending physician, in consultation with his patient, is free to determine, *without regulation by the State*, that, in his medical judgment, the patient’s pregnancy should be terminated.”¹⁰¹ Essentially, an abortion had to be “free of interference by the State.”¹⁰² In his concurring opinion, Justice Stewart quoted *Eisenstadt v. Baird*, a case to which the majority had also explicitly referred. In *Eisenstadt v. Baird*, the Court held that “if 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.”¹⁰³ Also, Justice Stewart cited Justice Harlan’s dissent in *Poe v. Ullman*; Justice Harlan stated that “[the right of privacy] is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.”¹⁰⁴ Even more explicit on the idea of personal freedom from state regulation was the concurring opinion of Justice Douglas. Justice Douglas elaborated on the idea of personal freedom from state regulation, asserting that “the ‘right of privacy’ includes the privilege of an individual to plan his own affairs, for every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.”¹⁰⁵

⁹⁷ *Id.*

⁹⁸ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁹⁹ *Id.* at 483.

¹⁰⁰ *Id.* at 486 .

¹⁰¹ *Roe v. Wade*, 410 U.S. 113, 165 (1973) (emphasis added).

¹⁰² *Id.* at 163 .

¹⁰³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁰⁴ *Roe*, 410 U.S. at 169, (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961)).

¹⁰⁵ *Doe v. Bolton*, 410 U.S. 113, 213 (1973).

These statements reveal that the idea of individual liberty from governmental action in certain spheres was the underlying rationale for *Roe v. Wade*. The Supreme Court intended to protect American citizens from unwarranted governmental intrusion. This strand of thought stems from the philosophical tradition of classical liberalism, which is strongly anchored in the American political culture.¹⁰⁶ John Locke has been the philosopher closest associated with this American liberalism. His works were central to the Founding Fathers of the American Constitution and have influenced American thought ever since.¹⁰⁷ Compared to other western states, such as France and Germany, one can recognize a particular resonance of the value of liberty in the United States, which is expressed in its stronger leanings toward capitalism, entrepreneurship, competition and individual productivity, as well as in its skepticism of big government, broad social programs, and the social welfare state.¹⁰⁸ A central element of the liberal idea is that the freedom and individuality of the American citizens are the ground rules of American society.¹⁰⁹

Because the protection of individual rights against governmental overreach is the task of courts, it is not surprising that it was the Supreme Court who took the role of protecting this notion of liberty in *Roe v. Wade*. The Court deemed itself to be the guardian of the American ideal of freedom from governmental intrusion.¹¹⁰ Arguably, the Lockian tradition of liberalism appealed to the more conservative justices of the majority, Chief Justice Burger and Justice Blackmun, who had been nominated by the Republican President Richard Nixon.¹¹¹ A Time Magazine commentary on *Roe v. Wade* noted: "With the Court's latest strengthening of the constitutional right to privacy, lawyers will doubtless try to use it to limit other kinds of government intrusions—a cause that is one of those closest to the hearts of conservatives."¹¹² Furthermore, it is illuminating that in the second oral pleading, Sarah Weddington changed the litigation strategy from an emphasis

¹⁰⁶ E.g., Hans Vorländer, *Politische Kultur, in LÄNDERBERICHT USA 299* (Peter Lösche & Hans-Dietrich von Loeffelholz eds., 4th ed. 2004); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN LIBERAL THOUGHT SINCE THE REVOLUTION* (1955).

¹⁰⁷ E.g., HARTZ, *supra* note 106, at 5–6.

¹⁰⁸ E.g., VORLÄNDER, *supra* note 106, at 299.

¹⁰⁹ E.g., JAMES P. YOUNG, *RECONSIDERING AMERICAN LIBERALISM: THE TROUBLED ODYSSEY OF THE LIBERAL IDEA* 6 (1996); HARTZ, *supra* note 106, at 3 et seq.

¹¹⁰ E.g., Kommers, *supra* note 12, at 282, who argues that *Roe v. Wade* "seems perfectly consistent with Madisonian liberalism: the constitutional order is to serve the individual and his interest."

¹¹¹ E.g., THE BURGER COURT, *supra* note 85, at 18.

¹¹² *The Law: A Stunning Approval for Abortion*, TIME MAGAZINE, Feb. 5, 1973.

on women's rights to an emphasis on the idea of liberty and freedom from state oppression:¹¹³

The Court has in the past, for example, held that it is the right of the parents and of the individual, to determine whether or not they will send their child to private school; whether or not their children will be taught foreign languages; whether or not they will have offspring . . . ; whether the right to determine for themselves whom they will marry [A]nd, since then, the courts—this Court, of course, has held that the individual has the right to determine, whether they are married or single, whether they would use birth control. So there is a great body of cases decided in the past in the areas of marriage, sex, contraception, procreation, child-bearing and education of children, which says that there are certain things that are so much part of the individual concern that they should be left to the determination of the individual.¹¹⁴

In her re-argument, Weddington focused on the liberty rationale in order to persuade the Court, arguably because she was convinced that a liberty right resonated more strongly with the justices than women's rights.

In comparison to the *First Abortion Judgment*, the relative strength of the liberty argument in *Roe v. Wade* becomes particularly clear. Even though the German justices recognized in the *First Abortion Judgment* that the "right of the woman to free exercise of her personality" includes the decision whether to have a child or not, the justices were quick to stress that the right of the unborn life has prevalence over this right of self-determination.¹¹⁵ In German constitutional interpretation, the philosophy of liberalism did not have as much traction as it did in the United States.¹¹⁶ One commentator of the

¹¹³ The second oral pleading was held because the first argument had taken place only before 7 justices (two justices had retired in 1971 for health reasons). The majority of the justices decided that there should be a reargument in front of a full bench with two newly appointed justices, see, for example, DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE*, 552 et seq. (1994).

¹¹⁴ Weddington's Argument, *Roe v. Wade*, in *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 433* (Philip B. Kurland & Gerhard Casper eds., 1990).

¹¹⁵ 39 BVERFG 1 (43), translated in Jonas & Gorby, *supra* note 2, at 643.

¹¹⁶ The divergent resonance of the argument about state limitation in the United States and Germany in the abortion debate has been analyzed in Jürgen Gerhards & Dieter Rucht, *Öffentlichkeit, Akteure und Deutungsmuster: Die Debatte über Abtreibungen*, in *DIE VERMESSUNG KULTURELLER UNTERSCHIEDE. DIE USA UND DEUTSCHLAND IM VERGLEICH 165, 179* (Jürgen Gerhards ed., 2000).

decisions has accurately explained: “Whereas American constitutionalism emphasizes a rugged individualism in the exercise of personal freedom, German constitutionalism has a larger communitarian thrust with a corresponding limitation upon the exercise of political freedom.”¹¹⁷ The contrasting judgment hence can be explained, at least to some degree, by the fact that freedom and individuality of the citizen had a higher value in U.S. society than in German society.

VI. Lessons from the National Socialist Past

The national narratives of the United States and Germany in the twentieth century are very different. By the 1970s the United States had become the leading western economic and military superpower and could look back on almost 200 years of democratic rule. The Federal Republic of Germany still had to figure out how to come to terms with the governmental mass murder under the National Socialist regime during 1933–45, when Germany had been the pariah of international politics. But how were these different pasts connected to the abortion debate? Was there a relation between the Holocaust and abortion? At first glance, it seems hard to imagine how these different national stories could have impacted the abortion jurisprudence. However, a closer look at the reasoning in the German abortion decision reveals that the years between 1933 and 1945 had a significant influence on the outcome of the *First Abortion Judgment*.¹¹⁸

As the introductory quotation demonstrates, central to the *First Abortion Judgment* was the holding that the right to life of the unborn child prevailed over the right to free exercise of the pregnant woman’s personality. Two questions arise immediately. Why did the justices interpret the right to life to encompass the unborn life from the first week of pregnancy? And why did this right have supremacy over the right to personality?

The answer to the first question can be found to a large degree in a historical argument. The justices began discussing the merits with the holding that “Article 2, Paragraph 2, Sentence 1, of the *Grundgesetz* also protects the life developing itself in the womb of the mother as an intrinsic legal value.”¹¹⁹ The adjudicators’ first reason to support their holding was the National Socialist past:

¹¹⁷ Kommers, *supra* note 12, at 280.

¹¹⁸ See Kommers, *supra* note 12, 278 for a different view: “The German decision mentioned two elements of contemporary experience, the widespread incidence of illegal abortion and the Nazi slaughter of defenseless and innocent persons; but in the end these considerations seemed not to loom very large in the reasoning of the Court, although the Court did note that the Founding Fathers had the Nazi experience in mind when they included a right to life in the Basic Law.”

¹¹⁹ 39 BVERFG 1 (36), *translated in* Jonas & Gorby, *supra* note 2, at 637.

The express incorporation into the *Grundgesetz* of the self-evident right to life, in contrast to the Weimar Constitution, may be explained principally as a reaction to the “destruction of life unworthy of life,” to the “final solution” and “liquidations,” which were carried out by the National Socialistic Regime as measures of state.¹²⁰

The adjudicators stressed that:

Article 2, Paragraph 2, Sentence 1, of the *Grundgesetz*, just as it contains the abolition of the death penalty in Article 102, includes “a declaration of the fundamental worth of human life and of a concept of the state which stands, in emphatic contrast to the philosophies of a political regime to which the individual life meant little and which therefore practiced limitless abuse with its presumed right over life and death of the citizen.”¹²¹

The justices concluded that as a reaction to the weak protection of the right to life during the National Socialist tyranny, the *Grundgesetz* requested a high standard of protection for the right to life. According to the justices, in the light of the National Socialist atrocities, the *Grundgesetz* had to be read to include the protection of the life of the unborn.

Having established the protected status of the unborn, the majority asserted the superiority of the right to (unborn) life over the right to self-determination: “Human life represents, within the order of the *Grundgesetz*, an ultimate value, the particulars of which need not be established; it is the living foundation of human dignity and the prerequisite for all other fundamental rights.”¹²² This led the justices to assert that “[a] decision oriented to Article 1, Paragraph 1, of the *Grundgesetz* must come down in favor of the precedence of the protection of life for the unborn over the right of the pregnant woman to self-determination.”¹²³ Even though the justices did not explicitly mention the National Socialist past in this passage, the earlier references to National Socialism influenced the argument on precedence. Because the unborn life received a similar protection to the born life as a lesson from the National Socialist past, the unborn life, like the born life,

¹²⁰ *Id.*

¹²¹ *Id.* at 36, translated in Jonas & Gorby, *supra* note 2, at 637 (quoting 18 BVERFGE 112 (117)).

¹²² *Id.* at 42, translated in Jonas & Gorby, *supra* note 2, at 642.

¹²³ *Id.* at 43, translated in Jonas & Gorby, *supra* note 2, at 643.

prevailed over the right to self-determination. The rejection of National Socialism was at the heart of the *First Abortion Judgment*.

The justices also addressed the German dictatorial past in a different context. In the 1970s, not only the U.S. Supreme Court, but also the *conseil d'état* in France and the Austrian Constitutional Court, held that the abortion reforms, which decriminalized abortion during the first three month of pregnancy, were in line with their respective constitutional rules.¹²⁴ Liberal abortion laws also survived in Denmark and Sweden, among other places.¹²⁵ There was a striking misbalance: While other western courts gave their blessing to the liberalization of the penal law on abortion, the FCC was the only court that deemed the liberal laws to violate the constitution.¹²⁶ Why did the court choose this unique path? The majority opinion defended its ruling with reference to the Third Reich:

Underlying the *Grundgesetz* are principles for the structuring of the state that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism. In opposition to the omnipotence of the totalitarian state which claimed for itself limitless dominion over all areas of social life and which, in the prosecution of its goals of state, consideration for the life of the individual fundamentally meant nothing, the *Grundgesetz* of the Federal Republic of Germany has erected an order bound together by values which places the individual human being and his dignity at the focal point of all of its ordinances.

The majority hence justified the special path in abortion jurisprudence with the National Socialist experience.

The majority felt compelled to react to the dissenting justices' critique that in other western states abortion reform laws with similar content as the German social-liberal law

¹²⁴ E.g., VERFASSUNGSGERICHTSHOF [VfGH] [CONSTITUTIONAL COURT] 1975, *Schwangerschaftsabbruch/Verfassungsmäßigkeit der Fristenlösung*, EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 74 (1975) (Austria).

¹²⁵ See ESER & KOCH, *supra* note 95.

¹²⁶ Even in Catholic Italy a liberal law similar to the German proposal was not over turned by the Italian Supreme Court in 1978. E.g., Johanna Bosch & Anna Menges, *Italien*, in *Schwangerschaftsabbruch im Internationalen Vergleich: Rechtliche Regelungen—Soziale Rahmenbedingungen—Empirische Grunddaten* 872 (Albin Eser & Michael Koch eds., 1988).

had not been declared constitutionally void.¹²⁷ As a lesson from the past, the abortion laws in Germany had to protect the unborn life more effectively than elsewhere. But what did the National Socialist past have to do with abortion? Did the National Socialist abortion reforms reveal the dangers inherent in liberal abortion laws?

The FCC majority did not elaborate on the specific National Socialist policies. However, some language in the ruling implies what the justices had in mind. The adjudicators explicitly disapproved of the “destruction of life unworthy of life” in the Third Reich¹²⁸ and stressed that the concept of human dignity demands “unconditional respect for the life of every individual human being, even for the apparently socially ‘worthless,’ and which therefore excludes the destruction of such life without legally justifiable grounds.”¹²⁹

The terms “destruction of life unworthy of life” and “worthless” life were references to the National Socialist policies of euthanasia, which claimed the lives of hundreds of thousands of handicapped throughout the war and has been regarded as the catalyst for the “final solution.”¹³⁰ Between the 1890s and 1930s, social Darwinist ideas of the survival of the fittest had circulated in Europe and elsewhere, according to which the body of the people (Volkkörper) had to be cleansed from its weak and foreign elements.¹³¹ So-called “race hygienists” defamed physically and mentally disabled persons as “life-unworthy” and advocated the use of forced sterilization and euthanasia in order to selectively regulate the population growth.¹³² With the takeover of the National Socialists, these theories became part of politics. The euthanasia policy began the forced sterilization of the handicapped

¹²⁷ 39 BVERFG 1 (67), translated in Jonas & Gorby, *supra* note 2, at 661:

The regulation encountered in the Fifth Statute to reform the Penal Law at times is defended with the argument that in other democratic countries of the Western World in recent times the penal provisions regulating the interruption of pregnancy have been “liberalized” or “modernized” in a similar or an even more extensive fashion; this would be, as the argument goes, an indication that the new regulation corresponds, in any case, to the general development of theories in this area and is not inconsistent with fundamental socio-ethical and legal principles.

¹²⁸ 39 BVERFG 1 (36), translated in Jonas & Gorby, *supra* note 2, at 637.

¹²⁹ *Id.* at 67, translated in Jonas & Gorby, *supra* note 2, at 662.

¹³⁰ *E.g.*, HANS-WALTER SCHMUHL, RASSENHYGIENE, NATIONALSOZIALISMUS, EUTHANASIE. VON DER VERHÜTUNG ZUR VERNICHTUNG “LEBENSUNWERTEN LEBENS,” 1890–1945 364 (1992); HENRY FRIEDLÄNDER, THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION 11 (1995); critical of this view, DIETER POHL, VERFOLGUNG UND MASSEMORD IN DER NS-ZEIT 1933-1945 34 (2d ed. 2008).

¹³¹ *E.g.*, Henry P. David, Jochen Fleischhacker & Charlotte Hohn, Abortion and Eugenics in Nazi Germany, 14 POPULATION AND DEV. REV. 81, 88 (1988).

¹³² *E.g.*, David, Fleischhacker & Hohn, *supra* note 131, at 88; SCHMUHL, *supra* note 130, at 360.

and reached its first cruel highpoint with the killing of approximately 70,000 inmates of sanatoria in the infamous action T-4 in 1940–41.¹³³ Although the T-4 program was halted after protests in the German public, especially from the Catholic Cardinal van Galen,¹³⁴ the euthanasia did not stop. Throughout the war, several hundreds of thousands of disabled people were killed.¹³⁵

In reaction to euthanasia, the majority justices developed the exceptionally high standard of protection for the unborn life under the German Constitution. The court implied that there was a relation between the National Socialist policies and liberal abortion laws. The justices stressed that, according to the *Grundgesetz*, the “apparently socially ‘worthless’ life has to be protected, wherefore it is forbidden, to eliminate such life without justified reason.”¹³⁶ This sentence was aimed at the reform law, which in the view of the majority, allowed abortion of the “social unworthy” unborn life during the first three months “without legally justifiable grounds.”¹³⁷ Strongly put, in the eyes of the FCC, the social-liberal abortion law took a step in the direction of the National Socialist past.

A look at the actual National Socialist policies on abortion is illuminating in this context. First, it is striking that the National Socialist policy measures had been twofold. On the one hand, the National Socialists decriminalized abortion in case of eugenic indication shortly after taking power.¹³⁸ By removing disabled people from the potential gene pool, the National Socialists hoped to cure and strengthen the German Volk.¹³⁹ On the other hand, in 1941—in line with their conception of supremacy of the Arian race—the death penalty for abortions in case the “vitality of the German people was continuously impaired” was introduced as a countermeasure against the falling birth rate.¹⁴⁰

¹³³ *E.g.*, SCHMUHL, *supra* note 130, at 362.

¹³⁴ *E.g.*, SCHMUHL, *supra* note 130, at 211; *see also* on Cardinal von Galen, MICHAEL BURLEIGH, DEATH AND DELIVERANCE: EUTHANASIA IN GERMANY 1900–1945 176 (1994). However, Burleigh argues that T-4 was not stopped because of the protest but because “the team of practiced murderers were needed to carry out the infinitely vaster enormity in the East that the regime’s leaders were actively considering.”

¹³⁵ *E.g.*, SCHMUHL, *supra* note 130, at 364.

¹³⁶ 39 BVERFGE 1 (67), *translated in* Jonas & Gorby, *supra* note 2, at 662.

¹³⁷ *Id.* at 67, *translated in* Jonas & Gorby, *supra* note 2, at 661.

¹³⁸ *E.g.*, SCHMUHL, *supra* note 130, at 161.

¹³⁹ *E.g.*, David, Fleischhacker & Hohn, *supra* note 131, at 91.

¹⁴⁰ For example, David, Fleischhacker & Hohn, *supra* note 131, at 89, who also stress that during the Nazi era the criteria for obtaining legal abortions were interpreted more strictly and illegal abortionists were punished more severely; *see also* the dissenting opinion, 39 BVERFGE 1 (76).

The concrete National Socialist laws on abortion therefore liberalized as well as criminalized abortion and hence could have been used as a daunting example for either strict abortion rules (the National Socialists introduced the death penalty) or for liberalization (the National Socialists introduced eugenic indication).¹⁴¹ The majority justices chose to implicitly stress the second line in their reasoning.

Second, the way in which the Nazis liberalized abortion, namely for cases of eugenic indication, was not even disputed in the discussion before the Court in 1975. In the proceedings, plaintiffs as well as respondents embraced the eugenic indication. The majority opinion recognized in passing that the eugenic indication was unproblematic from a constitutional perspective.¹⁴²

The argument that the majority opinion was based on the National Socialist past hence seems to be somewhat incomplete. The National Socialists had not advocated a law similar to the social-liberal law of 1973 and, as a result, their abortion laws are not the perfect “bad example” for the modern reform law. However, for the majority in the *First Abortion Judgment*, it was not important how the National Socialists had framed their laws in detail. Instead, national socialism and the politics of euthanasia stood as a symbol for a policy that did not sufficiently protect human life. The National Socialists killed millions of people without mercy or any recognition of the value of each individual life. The high protection for life under the *Grundgesetz* was, in the eyes of the majority justices, the logical reaction to the unrivaled magnitude of human suffering that had been brought over Europe and the world by the Nazis. In this more abstract sense, the Third Reich influenced the constitutional interpretation of abortion laws. Lessons from history motivated the majority of the FCC to take a unique path in its abortion jurisprudence.

D. Conclusion

As immediate consequences, both judgments invalidated the existing laws. While in the United States, forty-nine of the fifty states had to redraft or refrain from enforcing their abortion laws, in Germany, the *Bundestag* (Federal Parliament) adopted a reform in line with the FCC decision which permitted abortion in cases of ethical, eugenic and social indication.¹⁴³ In the long run, *Roe v. Wade* has spurred and fueled the debate on abortion in the United States through today. The amount of support for the previously rather marginal American *right to life* movement grew considerably as a reaction to *Roe v.*

¹⁴¹ For example, the dissenting opinion, which used the National Socialist past as support for the view that the state should be careful with criminalization of all kinds of behavior, 39 BVERFG 1 (76).

¹⁴² 39 BVERFG 1 (49), translated in Jonas & Gorby, *supra* note 2, at 648.

¹⁴³ In practice, the law opened the potential for abortion considerably since the social indication was interpreted rather broadly. Albin Eser, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. L. 369, 381 (1986).

Wade.¹⁴⁴ The discontent with the ruling mobilized many evangelical Christians, who decided to become politically involved.¹⁴⁵ After *Roe v. Wade*, the religious right, which felt strongly about themes such as the rise of criminality, growing divorce rates, homosexuality, and particularly abortion, became an important factor in American politics.¹⁴⁶ In contrast, the discussion waned in Germany. The women's rights movement—frustrated with the *First Abortion Judgment*—turned away from attempts to influence parliamentary politics and concentrated on more private issues like self-help for women.¹⁴⁷ Similarly, the Catholic Church was not able to mobilize broad support in the population against the more conservative reform of 1976.¹⁴⁸ While the German judgment, hence, appeased the political climate, *Roe v. Wade* infuriated evangelical Christians and contributed at least to some degree to the rise of the religious right as a political actor. The contrasting rulings had contrasting consequences for the abortion debate in each country.

There is no evidence that the deciding justices were aware of or influenced by concerns about potential reactions to the rulings. As laid out above, other factors shaped the contrasting outcomes. In the German case, the political provenience of the adjudicators had a significant impact on the ruling. The German justices in the majority, who owed their appointment to the centre-conservative CDU/CSU, overturned the social-liberal law. Arguably, the majority was influenced by conservative positions, which rejected hedonism and supported a more traditional assignment of roles between men and women. In addition to this political dimension, the *First Abortion Judgment* was also shaped by the rejection of the National Socialist past, which led the FCC justices to follow a unique path in its abortion jurisprudence, requiring stricter abortion laws than other western states. According to the majority, the *Grundgesetz* entailed an extraordinary high protection for the unborn life as an answer to the disregard of the value of human life during the Nazi regime. In contrast, *Roe v. Wade* was primarily shaped by the tradition of Lockian liberalism and the American skepticism of state interference in private spheres. Influenced by the idea of the freedom of the individual, the justices asserted a constitutional requirement not to criminalize abortion during the first six months of pregnancy. *Roe v. Wade*, which required the American states to introduce abortion laws that were (much) less restrictive than laws in other western states, was an expression of the American liberal heritage.

¹⁴⁴ *E.g.*, STAGGENBORG, *supra* note 16, at 58; LUKER, *supra* note 16, at 137.

¹⁴⁵ *E.g.*, ERICH GELDBACH, PROTESTANTISCHER FUNDAMENTALISMUS IN DEN USA UND DEUTSCHLAND 95 (2001). Geldbach mentions Jerry Falwell, a well-known Southern Baptist pastor, as an example for an evangelist who was mobilized by *Roe v. Wade*.

¹⁴⁶ *E.g.*, CHAFE, *supra* note 47, at 446.

¹⁴⁷ *E.g.*, VON BEHREN, *supra* note 14, at 496.

¹⁴⁸ *E.g.*, *id.* at 498.