In 2019, several states adopted new laws banning abortion. In Ohio, Mississippi, Alabama, Georgia, and Missouri, and Louisiana, these new laws criminalize abortions once a fetal heartbeat can be detected, when some women do not even know that they are pregnant. These laws are a deliberate attack on Roe v. Wade, the 1973 Supreme Court decision that has defined the American constitutional law of abortion for almost half a century. The case was argued in December 1971, between the House and Senate’s adoption of the Equal Rights Amendment, and decided a little over year afterwards. Roe v. Wade made it unconstitutional for states to ban abortion before the fetus is viable outside the womb, protecting a woman’s choice to have an abortion from most forms of state intervention. Roe v. Wade based the right to choose an abortion on the right of privacy, which the Supreme Court began to recognize in the 1960s as implied in the liberty enshrined in the Fourteenth Amendment.

Although Roe v. Wade is a single Supreme Court decision, it has become the shorthand in our nation’s hotly contested politics for the legality of abortion. When Donald Trump was elected President of the United States, he vowed to appoint federal judges, including those on the Supreme Court, who would overturn Roe v. Wade. With two of his appointees now on the Court, a majority of Justices is likely willing to overrule Roe v. Wade if the right opportunity arises. Supporters of abortion rights fear that the end of Roe will mean the end of safe and legal abortion in many parts of this country.
But it need not. The twenty-first century Equal Rights Amendment can help
America find a better path than Roe towards real reproductive justice for all. A better path
would protect life, born and unborn, by respecting the dignity and equality of pregnant
women and mothers as equal citizens. A constitutional approach based on the equal rights
of women need not stop the state from regulating abortion, as Roe v. Wade does. An
approach that is grounded in constitutional sex equality, rather than privacy, would allow
the state to protect the full range of women’s reproductive choices as well as unborn life.

This alternative constitutional approach to abortion has been developed in other
countries. But it is not foreign to the United States. In the decades after Roe v. Wade, now-
Justice Ruth Bader Ginsburg argued that equality, rather than privacy, would have made for
a better law of abortion in the United States. The reality is that Roe v. Wade has never
been an effective way of making abortion safe and legal for all women, nor has it facilitated
the reproductive choices that could truly equalize women’s status in society. While Roe v.
Wade has become synonymous in our political vocabulary with the woman’s right to
choose her reproductive future, it only protected a privacy right to non-interference by the
state. It did not establish a woman’s right to access an abortion when having one was
crucial to her ability to live as a free and equal person, nor did it help pregnant women who
wanted to choose motherhood but couldn’t because it would mean losing their jobs and
becoming destitute.

“Pro-choice” proponents of abortion rights cling to Roe because it is now assumed to
be the only way to protect abortion’s legality. But most countries around the world do not
have a Roe v. Wade. Indeed, after Roe v. Wade, the constitutional law of several other
countries in Europe shored up legal protections for unborn life. In the decades since, these countries have attempted to protect unborn life while also respecting the dignity and autonomy of the pregnant woman as a full citizen, equal in rights to men. Even countries with liberal abortion laws regulate abortion in ways that are contrary to the reasoning of Roe v. Wade. At the same time, the abortion laws of our peer democracies are more respectful of women and their right to control their reproductive futures than the heartbeat laws that are now being adopted by some American states in an effort to end the regime of Roe.

The constitutional law of abortion does not have to be either pro-choice or pro-life. As Americans got polarized over Roe, constitutional law in other countries made strong public commitments to protecting unborn life while quietly expanding women’s rights and access to abortion over time. In Germany, judicial decisions on abortion nudged the legislature to do more to support mothers and to reduce the economic pressures driving the choice to abort. In Ireland, a dialogue between Irish judges, European courts, and the people voting on constitutional amendments focused public support for women whose lives ended or nearly ended because of tragic pregnancies. This evolution occurred because reproduction was understood as a matter of public concern for the state, rather than a purely private matter for pregnant women, their doctors, and their families. A constitutionalism that was pro-women, pro-family, and pro-government paved the way to safe and legal abortion in Germany and Ireland. While a transplant to the United States is unlikely, the twenty-first century Equal Rights Amendment can benefit from some global insights to imagine twenty-first century reproductive justice beyond Roe v. Wade.
The Shortcomings of Roe v. Wade

The Texas law that was struck down by Roe v. Wade imposed criminal sanctions on doctors performing abortions, unless the abortion was medically necessary to save the life of the mother. Many states had similar laws on the books, and the new heartbeat laws are similar some respects. Because abortion was legal in many other states, women with means could travel out of state to obtain an abortion, then and now. In Roe v. Wade, an unmarried pregnant woman who could not afford to travel for an abortion brought a suit challenging the constitutionality of the Texas criminal abortion law.

The Supreme Court held that the “right of privacy” found in the Fourteenth Amendment’s “concept of personal liberty and restrictions upon state action” encompassed a woman’s decision whether or not to terminate her pregnancy. Prior to the viability of the fetus, the Court concluded that it was a purely private decision left to the pregnant woman and her doctor, upon which the state could not legitimately intrude. The Court offered the following explanation as to why such an intrusion would be detrimental to the pregnant woman:

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In
other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.⁥⁦

The Court appeared to be acknowledging a range of reasonable circumstances under which it would be understandable and therefore legitimate for a woman to terminate the pregnancy, including lack of means to raise a child, the financial stress that additional children would impose on a family, the difficulties of child care, and the stigma of unwed motherhood. And, as the word “stigma” in this paragraph signals, these are all reasons that might cause shame, such as the lack of resources and unwed motherhood. Thus, “privacy” seems to be the appropriate right to protect such decisions, which are none of the state’s business and not for public consumption.

The right to privacy had been recognized in a range of cases involving marriage, family life, and the home. Most significant among these were two prior cases invalidating state criminalization of contraception, Griswold v. Connecticut⁷ and Eisenstadt v. Baird.⁸ Griswold involved a married couple’s use of contraceptives, whereas Eisenstadt involved young unmarried women procuring contraceptives, presumably to engage in premarital sex. The Court declared in Eisenstadt that, “If the right to 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.”⁹ As Congress was sending the ERA to the states, the Court made the decision to become a mother or not a private and personal choice that should be shielded from governmental intervention.
This vision of motherhood and non-motherhood as private personal choices had some interesting logical extensions. Through appropriations legislation beginning in 1976, Congress adopted the Hyde Amendment, which made federal funds unavailable to reimburse abortions provided to Medicaid recipients, even abortions that were medically necessary to prevent long-lasting physical injury to the mother, or performed to terminate pregnancies resulting from rape or incest. Recognizing that such abortions were well within the liberty and privacy rights protected by Roe v. Wade, the Supreme Court nevertheless concluded that “although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation.” The Court declared, “Indigency falls in the latter category.” Accordingly, “Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”

It takes both a man and a woman to produce a pregnancy. But only women can get pregnant. Only women can turn an unborn life into a baby, and this biological process exacts a price on the participating woman. As rising maternal mortality rates indicate, women risk their lives and health when they continue a pregnancy and give birth. Gestation, childbirth, and lactation exact an economic price from women because they
cannot work to the same extent during this process. When a woman continues an unwanted pregnancy, she bears an unequal burden for a pregnancy that a man has played an equal part in producing. When she gives birth, the living being is not only her offspring, but also that of a father, and a citizen-worker of the society to which the child is born. Other constitutional democracies have recognized the gender-unequal burden endemic to pregnancy as well as the public contribution made by maternity.

Abortion, Dignity, and Equality in Germany

In Germany, there is no constitutional right against the state’s regulation of abortion. Many abortions that would be permitted under the Roe v. Wade framework would be illegal in Germany. However, many abortions are permitted under German law, and for those abortions that are legal, women are entitled to state funding for such abortions. The evolution of abortion law in Germany suggests the possibility of a safe, legal, and life-protective approach to abortions without making it a wholly private choice. German constitutional law tries to protect unborn life by making it easier and less costly for women become mothers, rather than by punishing women for avoiding the burdens of motherhood through abortion.

Before the 1970s, the German Criminal Code criminalized abortion. While the law regarded abortion as a form of murder, the courts in the 1920s began to recognize a defense in abortion prosecution proceedings. Women and doctors could escape criminal punishment if they could prove a necessity justification as a defense. If the abortion was necessary to preserve the pregnant woman’s life and health, no criminal punishment would
be imposed. In 1962, that defense was actually written into the Criminal Code of West Germany. As social norms and attitudes towards abortion changed, the number of abortions increased dramatically from 1962 to 1974. While there were 2,858 abortions in West Germany in 1962, the number went up to 17,814 in 1974. Whereas there were 596 criminal convictions for illegal abortion in 1962, the number of criminal convictions went down to a mere 94 by 1974. In an increasing number of cases, judges considered both medical and social factors in assessing the impact of a pregnancy on a particular woman's life and health. Accordingly, in an increasing number of cases, the determination was made that the abortion in question was necessary to preserve the woman's life or health. In the event of an illegal abortion conviction, even though the Criminal Code authorized imprisonment as a punishment, in practice, the typical punishment for illegal abortion consisted of criminal fines or probation.

In 1974, a year after the U.S. Supreme Court's decision in Roe v. Wade, the West German legislature adopted a new law to permit abortions. The law made it legal for women to obtain abortions, essentially on demand, in the first trimester. Up to the thirteenth week of pregnancy, abortions that were performed by a physician could no longer be punished under the criminal law. In addition, the law permitted abortions after this period if the doctor certified a grave danger to the life or health of the pregnant woman, or irreversible damage to the unborn child. The law required everyone who got an abortion to undergo counseling first.

The Constitutional Court of West Germany then stepped in to strike down this new law, declaring it insufficiently respectful of human life. Note the role reversal here – in
Germany, it was the legislature that tried to expand abortion rights, and the court that pulled the brakes on it, rather than the legislatures trying to restrict abortion rights, with the court protecting those rights. In both scenarios, however, the courts invoked the Constitution to conclude that the legislature had overstepped its authority. In this 1975 landmark decision, the German Constitutional Court rejected a framework that resembled Roe v. Wade, saying that the government had a duty to protect human life, including that of the unborn fetus. By allowing all abortions up until the 13th week of pregnancy, as though they were private decisions immune from state intervention, the Constitutional Court held that the state had neglected this duty.

In the United States, the Supreme Court has never held that the state has a duty to protect human life, born or unborn. Roe v. Wade recognized the state’s legitimate interest in protecting the fetus post-viability, but not a positive constitutional duty. In fact, our Supreme Court has said the opposite: that the state has no duty to protect the life of a live child from domestic violence. In DeShaney v. Winnebago County Department of Social Services, the U.S. Supreme Court said that the state did not violate the constitution when it failed to protect a young boy from severe, violent physical abuse at the hands of his own father, resulting over time in the boy’s permanent brain damage. Our Supreme Court said that our Constitution’s Fourteenth Amendment guarantee of life, liberty, and property forbids the state from itself attacking people’s life, liberty, or property, but it does not “impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.”16
By contrast, the German Constitutional Court said, “The duty of the State is comprehensive. It forbids not only – self-evidently – direct state attacks on the life developing itself but also requires the state to take a position protecting and promoting this life, that is to say, it must, above all, preserve it against illegal attacks by others.” The Constitutional Court acknowledged, however, that in the case of abortion, the duty to protect the unborn life had to be carried out while simultaneously respecting the pregnant woman’s constitutional rights. Every person has “the right to free development of their personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” The Court understood that the “[r]ight to life of the unborn can lead to a burdening of the woman which essentially goes beyond that normally associated with pregnancy.”

Most anti-abortion decisions don’t have a silver feminist lining, but this one did. The Constitutional Court acknowledged that abortion should be permitted when the burden of a pregnancy on the woman would be too great. But how is that determined? Can we really say what is “normally” associated with pregnancy and what is not? Abortions necessary to save a pregnant woman’s life would obviously be permitted. But what about abortions to save a mother’s physical and mental health, which was succeeding as a defense under the law before 1974? And what about social factors, like whether the woman could afford to raise a child without great economic hardship to herself and her family? Judges had begun to allow social justifications as well. The Constitutional Court said that the “general social situation of the pregnant woman and her family” should be considered in deciding whether an abortion was legitimate. While recognizing the possibility that these abortions should be legally permitted, the Constitutional Court rejected the 1974 statute because it allowed
additional abortions beyond these. By allowing abortion on demand up to 13 weeks, the legislature had taken an approach similar to Roe v. Wade – it treated the first trimester abortion as a personal choice with no state legitimate state interest in the reasons for that choice. However, the Constitutional Court took the view that the state should actually take a position—perhaps through criminal law but possibly through other means—disapproving of all other abortions that were not medically or socially justifiable. The law should only legitimize abortions that were justified by a “reason worthy of esteem within the value order of the German Constitution.” A woman suffering from “material distress” or “a grave situation of emotional conflict” would be justified in seeking an abortion, but abortion on demand went too far.

How would the law express disapproval of abortions lacking reasons based on constitutional values? The West German Constitutional Court suggested that a counseling requirement could possibly do the trick, but the one in the 1974 law was not strong enough— it simply required the pregnant woman to undergo counseling without saying what kind of counseling. But the Court wanted the counseling to be a more of a plug for keeping the baby. In the United States, perhaps the laws that require pregnant women to look at a sonogram image of the fetus plays this role. In 1975, the German Constitutional Court said that the counseling should inform the woman of the “financial, social, and family assistance” available to her. Counseling should address the sources of material distress or grave emotional conflict that the woman might be experiencing.

After the 1975 decision, the West German legislature went back to work. A new law in 1976 made abortion illegal except when a doctor separate from the one performing the
abortion issued a non-binding opinion saying that the pregnancy posed serious danger to the life or physical or mental health of the pregnant woman, which could not be averted by other means that the woman could reasonably be expected to bear. The statute allowed the doctor to consider the “present and future living conditions” of the woman. The law required counseling specifically about the social services available to the woman should she decide to continue the pregnancy. Although it was more restrictive than the law that the Constitutional Court struck down, it allowed abortions up to the 22nd week if the child was likely to be born with a severe defect. If the pregnancy resulted from an illegal act such as rape or incest, or placed the woman in a situation of serious hardship, abortions were permitted up until the 12th week.

Nonetheless, all abortions remained criminalized, and the abortions that the law permitted were recognized as defenses or exceptions to criminal liability. Generally, these exceptions for legal abortion can be divided into the following four categories:

(1) Medical – abortion is justified by serious risk to life or health of the pregnant woman.

(2) Embryopathic – abortion is justified by serious deformities in the fetus.

(3) Criminal – abortion is justified because pregnancy is result of an unlawful sexual act

(4) Social – abortion is justified because woman would undergo abnormal hardship (beyond that normally associated with pregnancy) if she became a mother.

These exceptions were left to doctors to enforce. Doctors made judgments about whether and when to recommend abortions, and another doctor would then perform the procedure.
In practice, under this new 1976 law, there were many “social” abortions. As long as a
doctor was convinced that the economic or emotional burden of motherhood would be too
much for a particular woman, the doctor would certify the abortion. At around this time,
the legislature also passed a social security reform law which provided more generous
benefits to support women with children. It established the right of every child to a
preschool spot. Promoting life – including unborn life – meant ramping up state support
for mothers and children.

After the fall of the Berlin Wall in 1989, East and West German abortion law had to
be harmonized for the purpose of German reunification. During Communism, East
Germany had permitted abortions on demand in the first trimester. In 1992, the reunified
German legislature adopted a new law, the Pregnancy and Family Assistance Act,\(^\text{18}\) that
permitted most abortions in the first trimester, as long as the pregnant woman self-
certified that the pregnancy caused distress to her. In 1993, a year after the U.S. Supreme
Court preserved the framework of Roe v. Wade in Planned Parenthood of Southeastern
Pennsylvania v. Casey,\(^\text{19}\) the Constitutional Court for the unified Germany struck the new
law down,\(^\text{20}\) reiterating the reasoning from the 1975 West German Constitutional Court
decision. This time, though, the Constitutional Court explicitly held that even if unjustified
first trimester abortions had to remain “unlawful,” the German Basic Law did not require
the legislature to **criminalize** unlawful abortions. Again, it spelled out that the counseling
requirement had to go beyond providing information to the pregnant woman; it had to
encourage her to continue the pregnancy.
How? By emphasizing the availability of state support for pregnant women and mothers. The German Constitutional Court gave new meaning to the state’s duty to protect life by closely linking it to both Article 6.4 of the Basic Law – guaranteeing mothers the special protection and care of the community – and Article 3.2 of the Basic Law – the German ERA. Article 3.2 guarantees equal rights between men and women. The Constitutional Court wrote, “The state does not satisfy its obligation to protect unborn human life simply by hindering life-threatening attacks by third parties. It must also confront the dangers attached to the existing and foreseeable living conditions of the woman and family which could destroy the woman’s willingness to carry the child to term,”21 the Court admonished. The state had a duty under Article 6.4 to “attend to the problems and difficulties, which the mother could encounter during the pregnancy.”22 The government’s could fulfill its constitutional duty to care for mothers by “[v]iewing motherhood and childcare as work, which lies in the interests of community and is deserving of its recognition.”23 The Court continued:

The care owed to the mother by the community includes an obligation on the part of the state to ensure that a pregnancy is not terminated because of existing material hardship or material hardship expected to occur after the birth. Similarly, if at all possible, disadvantages for the woman in her vocational training or work resulting from a pregnancy ought to be removed. In fulfillment of its obligation to protect unborn human life, the state must attend to problems likely to cause a pregnant woman or mother difficulty, and try, to the extent legally and realistically possible and justifiable, to alleviate or solve those problems.24
How? Note that, at this moment the Court refers to “parents,” not only “mothers.” It recognized that “[p]arents who raise children are performing tasks whose fulfillment lies in the interests of the community as a whole.”  The German court took the view that the decision to bear or raise children was not entirely private, as the U.S. Supreme Court suggested in cases like Roe v. Wade and Lafleur v. Cleveland Board of Education. It concerned the community, and by extension, the state. Therefore, the duty to protect life meant that “the state is bound to promote a child-friendly society” in all areas of law and public policy, including housing, work and vocational training for mothers, labor law, and other private law areas. The Court specifically mentioned a law prohibiting the termination of a lease because of the birth of a child. The duty to protect unborn life also entailed laws “which make it possible or easier for parents to meet their financial obligations following the birth of a child.”  This might involve, for instance, paid parental leave, as well as access to consumer loans.

The Constitutional Court explicitly pointed to the relevance of Article 3.2 of the Basic Law, guaranteeing equal rights between men and women:

The obligations to protect unborn life, marriage and the family and to ensure equal rights for men and women in the workplace compel the state and especially the legislature to lay the right foundations so that family life and work can be made compatible and so that childraising does not lead to disadvantages in the workplace. To achieve this it is necessary for the legislature to invoke legal and practical measures which allow both parents to combine childraising and work as well as to
return to work and progress at work after taking a break from work for childraising purposes.\textsuperscript{28}

The Constitutional Court recognized that the state’s efforts to equalize the burdens between mothers and fathers by providing childraising benefits and paid childraising breaks. Put simply, a “child-friendly society” equals anti-abortion policy. The Court recognized the value of childcare, and suggested that the state must compensate it: “Furthermore, the state must ensure that a parent, who gives up work to devote herself or himself to raising a child, be adequately compensated for any resulting financial disadvantages.”\textsuperscript{29} It is fascinating to see how a judicial opinion focused on condemning abortion ends up on paid parental leave for both father and mothers.

This leap occurs because the Court is looking for effective ways of protecting unborn life, finding criminalization of abortion counter-productive: “However, the further third persons intrude into a woman’s personal sphere, the greater the danger that she will seek to avoid this by inventing reasons for wishing to terminate or by resorting to the illegal. If this happens, any chance of using understanding and professional counseling to explore her conflict and to help her decide in favor of the child is lost straightaway.”\textsuperscript{30} Understanding the dilemma from the woman’s perspective, the Court determined that “effective protection of unborn human life is only possible \textit{with} the support of the mother.”\textsuperscript{31} The threat of criminal sanctions was futile as a means of persuading the woman to keep the baby. “A threat of criminal sanctions is of little effect at this point so that it is obvious that the law must use preventative means to help her overcome her conflict and meet her responsibility to the unborn.”\textsuperscript{32}
But could the legislature make abortion “unlawful” without criminalizing it? When the legislature went back to the drawing board to rewrite the abortion law, they made first trimester abortions unlawful by stipulating that health insurance could only pay for abortions whose lawfulness could be established. Such abortions would include those performed for medical reasons, ie to avert a serious risk to the pregnant woman’s life or health, or for embryopathic or criminal reasons. Because the law had always authorized legal abortions for women to whom pregnancy would pose a significant economic hardship (“social” exception), the logical policy conclusion was that social insurance would pay for poor women in all situations, even where the lawfulness could not be established. But, for those with means, health insurance would only cover “lawful” abortions. The new statute in 1995 required pregnant women to talk to a counselor and give reasons for having the abortion before it could be performed.

In Germany, abortion is not a private matter. The law makes judgments as to good and bad reasons for an abortion, and provides funding for the good ones and expresses disapproval – previously through criminal punishment, but now through other more effective means – of bad abortions. The state is vocal about its moral position, that it is better for fetuses to be born than to be aborted. An important way in which the state promotes this moral position is by recognizing that the unique costs that women bear for the socially valuable process of reproduction. The state has a duty to cover these costs, by promoting women’s opportunities at work and by compensating those whose participation in childbearing and childrearing prevent them from working. Easing the conflict between work and family is the new anti-abortion policy. These ways of protecting life are more
humane, and possibly more effective, than criminalization of abortion. In Germany, these twenty-first century pro-life policies vindicate women’s status as free and equal citizens.

**Abortion and Constitutional Change in Ireland**

From 1983 to 2018, the Irish constitution banned abortion. The Eighth Amendment acknowledged the right to life of the unborn, and said that the laws would defend it as far as practicable. In Ireland, the constitutional law of abortion evolved in the generation since the ERA deadline expired in the United States, culminating in the repeal of the abortion ban in 2018. The Irish constitutional story highlights the importance of transnational legal dialogue about women’s lives to the evolution of abortion rights. Roe v. Wade made headlines not only in the United States when it was decided in 1973; its influence spread throughout the world, as legal and political actors sought to expand abortion rights through many strategies. In Ireland, proponents of reproductive freedom were familiar with Roe v. Wade, Griswold v. Connecticut, and Eisenstadt v. Baird. As Roe v. Wade inspired advocates to decriminalize abortion in Europe throughout the 1970s, it also motivated opponents of abortion to propose new legal protections for unborn life in response. Both advocacy movements had constitutional success in Ireland.

A few months after Roe v. Wade was decided, an Irish woman challenged the constitutionality of an Irish law dating to 1935 that prohibited the sale and importation of contraceptives. Mrs. McGee, the plaintiff, was a married woman with four small children and a medical history of life-threatening toxaemia during her pregnancies. Her doctor had warned her that another pregnancy could kill her, and had recommended a contraceptive
jelly which the McGees ordered from England. The contraceptive jelly was seized by the customs authorities attempting to enforce the 1935 law, and the McGees sued, invoking the U.S. Supreme Court’s decision in Griswold v. Connecticut to illuminate their rights guaranteed under the Irish Constitution. Although these facts began before Roe v. Wade was decided, the McGees ended up before the Supreme Court of Ireland a few months after the U.S. Supreme Court’s decision in Roe. The Irish Supreme Court recognized the married couple’s right to privacy and struck down the 1935 contraceptive ban. The Justices in the majority acknowledged the relevance of the American privacy cases; they did not need to cite Roe for people to guess what was coming next. One of the Justices quoted and discussed Griswold at length. Even the dissenting Justice explicitly rejected the authority of these American cases. There is no doubt that the line of judicial reasoning about privacy and choice that culminated in Roe v. Wade had become a global force to be reckoned with.

Like the U.S. Constitution, the Irish Constitution does not specifically mention privacy. Mrs. McGee’s case was actually premised on Article 40.1 of the Irish Constitution, which, like the U.S. Equal Protection Clause, states that all persons are “equal before the law.” But unlike the Equal Protection Clause, the Irish guarantee of equality goes on to say that the State can have “due regard to differences of capacity, physical and moral, and of social function.” And furthermore, Article 40.3 of the Irish Constitution explicitly imposes a positive duty on the state to defend and vindicate individual rights, in sharp contrast to the U.S. Constitution as interpreted in both Harris v. McRae and DeShaney v. Winnebago County. Article 40.3 says, “The state guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.” Mrs. McGee was arguing that the contraceptive ban was unconstitutional because, as a woman
of childbearing age whose life could be threatened by pregnancy, the state, in seizing her contraceptives, had failed to defend and vindicate her rights. As one Justice put it:

The dominant feature of the plaintiff’s dilemma is that she is a young married woman who is living, with a slender income, in the cramped quarters of a mobile home with her husband and four infant children, and that she is faced with a considerable risk of death or crippling paralysis if she becomes pregnant. The net question is whether it is constitutionally permissible in the circumstances for the law to deny her access to the contraceptive method chosen for her by her doctor and which she and her husband wish to adopt.37

That Justice found the Article 40 argument to be the most compelling in her favor; the other Justices found a privacy right in Article 41 of the Constitution to strike down the contraceptive ban.

Article 41, the source of privacy in the Irish Constitution, says something that the U.S. Constitution does not, and at which American some feminists would cringe. The first few sections of Article 41 read as follows:

1.1° the state recognises the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° the state, therefore, guarantees to protect the family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the nation and the state.
2.1° in particular, the state recognises that by her life within the home, woman gives to the state a support without which the common good cannot be achieved.

2.2° the state shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3.1° the state pledges itself to guard with special care the institution of Marriage, on which the family is founded, and to protect it against attack.

In McGee, the Justices agreed that Article 41 granted rights to the family and valued it as a primary and fundamental unit of society, and accordingly, a married couple had a privacy right to contraception so that they can determine family size and allocate resources to the existing children of the family. Although the Justices did not cite Roe v. Wade, their generous citations and embrace of Griswold created a signal that stirred a panicked pro-life movement to constitutional action.

Fearing a judiciary enamored of American privacy jurisprudence, pro-life forces in Ireland mobilized to preserve existing laws banning abortion in Ireland. In 1981, the Pro-Life Amendment Campaign (PLAC) was established. In 1982, they proposed amending Article 40.3 of the Irish Constitution to prevent judges from expanding privacy to strike down abortion laws. One version read, “Nothing in this Constitution shall be invoked to invalidate, or to deprive of force or effect, any provision of a law on the ground that it prohibits abortion.” If adopted, this constitutional amendment would have simply
permitted the legislature to ban abortion by preventing judges from striking down the abortion statutes as American judges had done in Roe v. Wade. Worded this way, this proposed amendment did not obligate the legislature to ban abortion or take positive steps to protect unborn life.

As the pro-life constitutional amendment was being considered and debated, a woman named Sheila Hodgers died of breast cancer, shortly after giving birth to a baby. During her pregnancy, she was denied cancer medications due to their potential harmful effects on the fetus. Her husband requested that the birth be induced early, but doctors refused because such a premature delivery would result in the death of the fetus and thus amount to a criminally punishable abortion. Three days after delivering a live baby in March 1983, Sheila Hodgers died. The following month, the Justice Minister proposed that the pro-life amendment include more pro-life language, an acknowledgment of the mother’s right to life. It read:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This was the version that was eventually approved in the referendum that fall.

The Hodgers story was embraced by the amendment’s opponents, as illustrating maternal mortality as a consequence of criminalizing abortion. Pro-life forces inserted “the equal right to life of the mother” in an apparent if tacit acknowledgment of the legality of abortions that were truly necessary to save a woman’s life. Some pro-life groups to this day claim that the Eighth Amendment protected the rights of women in Sheila Hodgers’
The pro-life story with regard to Hodgers was that the Eighth Amendment could have saved her. The Irish people approved the Eighth Amendment of the Irish Constitution by 67% of the vote in September 1983. It remained the law in Ireland for thirty-five years, until its repeal by referendum in May 2018.

Article 40.3.3 never stood a chance of abolishing abortion in Ireland entirely. The globalization of women’s rights, including reproductive rights, had already begun, as evidenced by the citation of Griswold in McGee and legislative liberalization of abortion in Germany, France, England, the Netherlands, and the Scandinavian countries. As a practical matter, even though abortion under most circumstances remained a crime in Ireland, a pregnant woman could travel from Ireland to the United Kingdom for an abortion. Because the United Kingdom was not only nearby, but also, with Ireland, a member of a European Economic Community that was then gaining in strength, any efforts by Irish authorities to stop Irish citizens from traveling for abortions, or receiving information about abortions, would threaten Ireland’s good standing in the ever-closer political and economic union developing in Europe.

After the unborn life amendment was added to the Irish Constitution, pro-life groups attempted to stop the flow of information into Ireland about abortions available outside of Ireland throughout the Europe. The Society for the Protection of Unborn Children (SPUC) brought legal proceedings to stop students from distributing information about abortion clinics in England. Under European Union law, national courts – such as ordinary Irish trial courts – can refer any legal question involving European law to the Court of Justice of the European Union. If the ordinary national court did not send the
question to the European court, it would presumably get decided and appealed to the higher courts of Ireland, including eventually to the Irish Supreme Court. Irish courts had taken the position that disseminating information about abortions was prohibited under the Irish Constitution’s Eighth Amendment. When SPUC brought its case to stop the dissemination of information about English abortion clinics, the Irish court sent the question to the European Court. The European Court, in response, said that, if a patient pays to have an abortion, that abortion becomes a “service” within the meaning of “free movement of services” guaranteed by the foundational treaties establishing the European Union. That would mean that Irish women could travel for such services, and the Irish government, in stopping such travel, would be running afoul of its obligations under the treaties.

While dropping this bomb on Irish abortion law, the European Court of Justice lessened the blow by also saying that, because the students who were distributing information were not themselves service providers, nor were they charging money for anything or selling anything, those students were not doing anything protected by the treaty, and therefore the Irish government could stop them from disseminating information. But the opinion in Society for the Protection of Unborn Children v. Grogan, made clear that abortion providers within the EU and outside of Ireland could provide information in Ireland about their services, and that Irish nationals could travel to obtain abortion services, all protected so long as Ireland remained part of European Union.

This raised the stakes of the abortion conflict. Now, if Irish courts were to stop any Irish nationals from crossing borders for abortions, they would have to openly defy the
clearly articulated statements of the European Court of Justice. The Irish Supreme Court, when given the opportunity to do so in 1992, refrained and began to unravel Irish abortion law without admitting it. Avoiding conflict with the European Court, the Irish Supreme Court did not answer the question of whether it was legal for Irish women to receive abortion services in England, and instead strengthened the “equal right to life of the mother” in Article 40.3.3 to conclude that that abortions were legally permitted in Ireland under the Irish Constitution when the pregnant woman faced a risk to life by suicide.\(^{46}\)

In Attorney General v. X, the Irish Supreme Court had to determine whether to uphold the actions of Irish authorities that had attempted to stop a family from traveling to obtain an abortion for their 14-year old daughter. The girl had been raped, and the Irish police only learned about her intention to travel to England for an abortion when her parents requested that the DNA extracted from the aborted fetus be returned to Ireland as evidence to prosecute the rape. In holding that abortion was a service and that European law permitted free movement of persons and services, the clear implication of the European court’s ruling was that all Irish women, as residents of the European Community, were free – whether they were teenage rape victims or not – to travel to England for an abortion, regardless of their reasons for doing so, as long as the abortion was a service legally available in England. Could the Irish Supreme Court explicitly acknowledge European supremacy as the practical reality of Irish abortion law in an opinion of their own?

Instead, the Irish Supreme Court decided the X case based solely on Irish constitutional law, appearing not to rely on or enforce European law. The Irish Supreme
Court concluded that the pregnancy of the 14-year-old girl, a rape victim, posed a risk to her life because the circumstances created a credible threat of suicide. Article 40.3.3 of the Irish Constitution required “due regard for the equal rights of the life of the mother,” and therefore, permitted an abortion in Ireland in the circumstances presented. Therefore, the Irish Supreme Court could avoid taking a position on whether travel by Irish women for abortions on demand was an entitlement under European law.

Nonetheless, the X case helped move public opinion in the direction of liberalizing abortion. Three additional proposed constitutional amendments engaged some of the issues raised by the Grogan and X cases, all of which were resolved by referendum to favor abortion liberalization. In December 1992, Article 40.3.3. was amended to add two provisions. The Thirteenth Amendment provided that the right to life of the unborn would not prevent travel from Ireland to another state to obtain an abortion. The Fourteenth Amendment provided that the right to life of the unborn would not prevent the dissemination of information about abortion. Another amendment was proposed, which as intended to limit abortions only to situations where the pregnant woman’s life, rather than health, was at risk, with language explicitly excluding suicide risks from this exception (now found in the Alabama heartbeat law). Sixty-five percent of the voters rejected the suicide amendment, whereas similar percentages approved the other two amendments. In 2002, another referendum was held to revisit the question of whether suicide risk should be excluded from the risks to life justifying legal abortions. The Irish voters rejected that proposed amendment yet again. Even with a constitutional protection for unborn life, Ireland rejected the highly restrictive approach to suicide risks that now has new life in Alabama law.
As the European Court of Justice’s ruling on free movement created the landscape for X v. Attorney General, the European Court of Human Rights’ ruling in A, B, and C v. Ireland also nudged Ireland to change in a pro-women direction. Women seeking abortions challenged the Irish law of abortion – including the Constitutional provisions – before the European Court of Human Rights in 2010, invoking the European Convention on Human Rights’ Article 8, which guarantees right to respect for private and family life. They argued that, within Europe, Ireland was an outlier in banning most abortions, including those necessary to protect women’s mental or physical health. In countries like Germany, England, France, the Netherlands, and others, the law permitted abortions to protect women’s health. Ireland was an outlier in limiting legal abortions to the protection of the woman’s right to life, and the litigants argued that this was therefore contrary to the privacy guarantee in the European Convention. In A, B, & C v. Ireland, the European Court of Human Rights upheld the Irish Eighth Amendment – including the provisions protecting travel and information. Because it left the constitutional provision intact, it was a pro-life victory.

At the same time, the European Court of Human Rights, like the European Court of Justice two decades earlier, poked a hole in the Irish Constitution’s ban on abortion. A, B, & C v. Ireland also held that Ireland was in violation of the Convention insofar as it failed to provide a statutory framework clearly defining a process for deciding when a risk to the mother’s life warranted a legitimate abortion, and immunizing doctors from criminal prosecution when they performed abortions under such circumstances. The human rights violation was NOT in having a constitutional amendment banning almost all abortions except those necessary to save a woman’s life; the human rights problem arose because the
law did not create a legal infrastructure enabling women to vindicate their constitutional equal right to life in situations where the pregnancy threatened that right. Once the European Court of Human Rights made that determination, Ireland was under a treaty-based obligation to create such a legal framework. Although discussions began in Parliament, no law was adopted immediately following the European Court’s decision.

Then, in 2012, almost thirty years after Sheila Hodgers’ death, another woman died under circumstances where an abortion might have saved her. Savita Halappanavar was 17 weeks pregnant when she went to a hospital in Galway with back pain. She was having a miscarriage, and although her water broke, her body did not expel or deliver the fetus. Because the fetus had a heartbeat, doctors refused to complete the miscarriage or perform an abortion, for fear of violating the criminal statute. Meanwhile, Halappanavar developed sepsis, an infection caused by tissue that was not expelled quickly enough during her miscarriage. The infection became fatal, and caused her to have a heart attack, from which she died at the age of 31.49

Halappanavar’s death created a sense of urgency around the need for Irish law to comply with the European Court of Human Rights’ 2010 decision. Within less than a year of Halappanavar’s death, the Irish Parliament enacted the Protection of Life During Pregnancy Act of 2013,50 which authorized abortions when two doctors – an obstetrician and a specialist in the field of the relevant condition -- agreed that there was a risk of death from physical illness. In emergency situations, one doctor was authorized to make the decision. In cases of risk to life by suicide, three doctors, including a psychiatrist
specializing in maternity and a psychiatrist treating the pregnant woman requesting the abortion, would have to certify the abortion.

The adoption of the 2013 law in Ireland reduced the chilling effect that had prevented doctors from performing life-saving abortions in the past. In reality, the line between risks to the mother’s life and risks to the mother’s physical and mental health is hazy and shifting. As long as the correct number of doctors made a medical judgment that the medical condition constitutes a risk of loss of life, the 2013 immunized such abortions from criminal prosecution and punishment. While this is far from abortion on demand, it was a significant step in that direction. Halppanavar’s death also mobilized pro-choice activism in Ireland, and gave new life to the movement to repeal the Eighth Amendment.

The constitutional movement to repeal the Eighth Amendment called itself “Together for Yes” and built coalitions across the social and political spectrum. It benefited from an earlier constitutional amendment by referendum in the direction of greater gender equality. In 2015, the movement for marriage equality led to a referendum which constitutionalized the right of same-sex couples to get married in Ireland. Although Ireland’s 1937 constitution never defined marriage as between a man and a woman, Article 41.3.1 obligates the state to “guard” marriage “with special care,” and case law often presumed that marriage could only include opposite-sex couples. To clarify, Article 41.4 was added to the Irish Constitution in 2015: “Marriage may be contracted in accordance with law by two persons without distinction as to their sex.”

The “Together for Yes” movement grew out of the Coalition to Repeal the Eighth Amendment, led by activists Ailbhe Smyth, Grainne Griffin, and Orla O’Connor. They
focused on the experiences of women who experienced tragic pregnancies, some of whom had survived. They did not seek to replace the Eighth Amendment with a privacy-based right to abortion under all circumstances. They sought to authorize the state to regulate abortion in a manner that would avoid the injuries and deaths that its criminalization had caused.

In 2017, the Irish Parliament agreed to put the repeal of Article 40.3.3 in its entirety up for repeal, including the provisions on travel and information. The referendum succeeded by a vote of 66 percent. Initially, Parliament debated what, if anything, should replace the repealed text. The constitutional text that replaced the protection of life for the unborn simply reads, “Provision may be made by law for the regulation of termination of pregnancy.” It does not guarantee abortion on demand, and the text did not automatically invalidate the 2013 law that only authorizes abortions when the pregnant woman’s life is endangered.

Nonetheless, Parliament took the next step of replacing the 2013 statute in December 2018 with a legal framework that is similar to Germany’s and that of many other Western European countries: It permits abortions, upon the choice of the pregnant woman, within the first 12 weeks, as long as a three-day waiting period is observed. Beyond the twelfth week of pregnancy, abortions are only permitted to save the woman’s life, or to avert serious health risks, following doctor decisionmaking procedures similar to those established by the 2013 law.

Within a generation, the constitutional law of abortion in Ireland changed dramatically by way of constitutional amendments. But neither of these amendments were
radical changes in the context in which they occurred. The 1983 amendment was a constitutional entrenchment of the criminal law that was already in effect at the time. Because the constitutional entrenchment included the language on the “equal right” of the mother, it became a significant opening which enabled incremental liberalization of abortion, with help from the law developing outside of Irish borders. By the time the constitutional abortion ban was repealed in 2018, thousands of Irish women had already had legal abortions outside of Ireland.

The transformation of constitutional abortion law in Ireland is also part of larger transformation of constitutional gender equality. In addition to the marriage equality referendum of 2015, another referendum in May 2019, a year after the abortion referendum, liberalized divorce in Ireland. The 1937 Constitution of Ireland had prohibited divorce altogether, but in 1995, Ireland voted by a thin majority to remove the constitutional ban on abortion and replace it with a provision that required married couples to separate for four out of the previous five years before a divorce could be legally authorized. In May 2019, by an overwhelming 82% majority, the constitution was amended again, removing the five-year waiting period and thereby authorizing the legislature to decide the conditions under which married couples may divorce.

Meanwhile, since the abortion referendum of 2018, there have been proposals to remove the language of the Constitution in Article 41.2 that refers to women’s contributions and duties within the home. The clauses on “woman in the home” and working mothers reflect an obsolete stereotype of women as homemakers and caregivers. In practice, in recent years, Irish courts have interpreted the provision as a recognition of
work within the home as socially valuable, particularly childbearing and childrearing work within the home, whether performed by mothers or fathers. Therefore, as the Irish Parliament debates another referendum repealing Article 41.2, an important question is whether Article 41.2 should be deleted, or if gender-neutral language terms like “persons” and “parents” should replace the words “woman” and “mother” in these clauses.

The new dynamics of abortion liberalization point to an important new role that Article 41.2 can play. After the new abortion law went into effect in Ireland in early 2019, essentially permitting abortion on demand within the first twelve weeks, a new problem for women’s equality has surfaced. Some airlines are now requiring women pilots who become pregnant to terminate their pregnancies as a condition of continuing to work. These women pilots are independent contractors, and therefore not covered by employment laws that require job-protected paid maternity leave for employees. Doctors typically suspend the medical clearance to fly for pilots who become pregnant. Whereas abortion was not a legal option in the past, airlines are now able to use this new option to pressure women to obtain unwanted abortions instead of devising humane policies that accommodate pregnancy and working motherhood. While this problem is new in Ireland, it is reminiscent of the facts that gave rise to Susan Struck’s 1970 case against the Air Force, discussed in Chapter 4, for which Ruth Bader Ginsburg wrote a Supreme Court brief as the ERA was being sent to the states for ratification. Although the Air Force decided not to fire Susan Struck for getting pregnant and refusing an abortion after all, the Equal Protection law that developed in the 1970s and 1980s was not responsive to the needs of pregnant women or mothers.
I believe that Article 41.2 can help resolve this issue humanely. Article 41.2.2 says that mothers should not be forced by economic necessity to work to labour to the neglect of their duties in the home. Once a person has decided to become a mother, one’s duties in the home could encompass pregnancy, breastfeeding, and infant care. This clause should be read to prevent employers from requiring women to choose between their jobs and their pregnancies by threatening termination unless they get abortions.

Article 41.2 currently recognizes the public value of the biological and social costs that go into reproduction, disproportionately borne by women. There may be good reason to abandon the gendered language of Article 41.2 to avoid the entrenchment of gender stereotypes. Changing this language to gender-neutral “persons” and “parents” would not change the protection that a pregnant woman could get from this provision when faced with economic pressures to reject motherhood in favor of abortion. However, repealing the provision altogether would erase the state’s duty to recognize and support the valuable work that reproduction entails in pregnancy and childrearing. Obviously, childrearing can be done equally by people of all genders, and pregnancy can be recognized as one of many ways in which citizens contribute to “home” life.

**Conclusion: How the ERA Can Enforce Reproductive Justice**

There are many ways in which government can protect life. Criminalization of abortion is only one of them. Other avenues include helping a pregnant woman bear and raise a healthy child, and preventing the creation of unwanted unborn life. Professor Reva Siegel calls for an approach that she calls “prochoicelife.” It involves protecting life by
supporting the full range of reproductive choices, including the choice to become a mother. The German Constitutional Court has developed a “prochoicelife” approach. In Ireland, the dynamics between constitutional amendments by popular referendum and judicial decisions by supranational European and national Irish judges have synthesized a “prochoicelife” outlook as well.

In the United States, as Roe v. Wade gets eroded by the new judiciary, the Equal Rights Amendment can also usher in a “prochoicelife” vision of reproductive justice. A “prochoicelife” constitutional law is pro-women, pro-children, pro-family, and pro-freedom. A society cannot promote these values by getting the government to stay out of them. Most Americans cannot exercise meaningful reproductive freedom simply by having laws that allow them to pay for abortions in a few clinics that offer them at a price. For most people, meaningful reproductive freedom is the ability to bear and raise children without risking one’s health or economic security. Meaningful reproductive freedom entails the availability of maternity health care, reduction of the maternal mortality risk, not being fired for being pregnant, paid parental leave for both parents, free or affordable childcare, decent educational options compatible with the duties of parents who work, support for mothers who devote their time to raising children instead of engaging in market work, and the possibility of safely terminating a pregnancy when circumstances are not ripe for a humane reproductive experience.

This brings us back to the new laws that criminalize abortion after the detection of a fetal heartbeat. Take, for example, Georgia’s Living Infants Fairness and Equality (LIFE) Act, adopted in May 2019. In its statement of findings, the law claims its purpose to be
“specifically to protect the fundamental rights of particular classes of persons who and not previously been recognized under law” when the 14th Amendment was ratified, namely “infants in the womb.” The findings claim to be giving a “more expansive level of protection of a fundamental right than the minimum required by the United States Constitution.” In recognizing unborn children from the moment that a fetal heartbeat can be detected as natural persons, the Georgia law treats most abortions as homicides, with exceptions to save the mother’s life, or in the case of rape or incest, written into the definition of “abortion” in the statute. Thus, both the doctor performing the abortion and the pregnant woman who seeks the abortion would be criminally liable.

Legal analysis under the Equal Rights Amendment would ask whether Georgia was abridging or denying equality of rights on account of sex through the LIFE Act. The ERA is not constrained by the Equal Protection Clause precedents that only allow intentional discrimination, such as a formal sex distinctions, to trigger heightened scrutiny. In interpreting the ERA, judges would be free to adopt a different trigger for heightened scrutiny, such as laws that impose unequal burdens on women and men, or have disparate impacts on women and men. Given that men and women both make pregnancy happen, but pregnancy disproportionately burdens women, abortion restrictions could trigger heightened scrutiny under the ERA. This would not make all abortion regulations unconstitutional, but it would require the state to prove that it had a compelling purpose – such as protecting unborn life – and that the means adopted – criminalization of nearly all abortions – was narrowly tailored to reach that purpose. This is where the heartbeat laws would fail, unless the state could show that it was already engaged in other more effective efforts to protect unborn life.
Georgia claims that the LIFE Act’s purpose is to protect unborn life. But Georgia is the state with the highest maternal mortality rate in the nation, particularly for black women. Twenty-seven states now have laws that protect pregnant workers in the workplace from exposure to working conditions that could be harmful to themselves and the unborn child. Georgia is not one of them. Five states now have laws that require paid parental leave, which would enable pregnant women to take time off in the interest of the unborn child’s life, both before birth, and then to protect the early health interest of the born baby. Georgia is not one of them. Georgia also has one of the highest rates of infant mortality among U.S. states, with the leading causes of infant mortality being preterm birth, low birth weight, and maternal pregnancy complications.

The purported purpose of the statute is to protect fetal life, and the statute says that it intends to go further in protecting human life than is required by the U.S. Constitution. Even if we were to accept this as not only a legitimate, but compelling governmental interest to justify the unequal burden on women, an ERA analysis could require states to prove their seriousness about protecting unborn life by adopting methods of protecting unborn life that are (1) less of a burden on the mother’s health and economic security; and (2) likely to protect unborn life. In reviewing heartbeat bills that impose criminal punishment on mothers and doctors to restrict abortion access, judges should not take them as sincere or effective efforts to protect fetal life unless and until the state has also made additional legislative efforts to reduce maternal and infant mortality, accommodate pregnancy in the workplace, and ensure adequate conditions for working women such that their unborn infants are safe. The ERA provides a new constitutional ground for building
this judicial analysis, unclouded by the Fourteenth Amendment precedents that have been unsatisfactory and inadequate.
Notes to Chapter 7

1 See S.B. 23 (Ohio); H.B. 126 (Missouri); H.B. 314 (Alabama); H.B. 481 (Georgia); S.B. 184 (Louisiana).


3 Note, for instance, that Senator Kirsten Gillibrand, who has identified a woman's right to choose as a central issue in her 2020 presidential campaign, has stated that she would only appoint judges who would uphold Roe v. Wade. See Elena Schneider, Gillibrand pledges to only nominate judges who would forcefully back Roe v. Wade, Politico, May 7, 2019.


5 Arguably the 2019 Alabama heartbeat law is even more restrictive than the Texas law that was struck down in Roe v. Wade. The Texas law at issue in Roe v. Wade remained silent on whether the risk posed by pregnancy to the woman's life could be a suicide risk; the twenty-first century Alabama law explicitly defines serious health risks to exclude most suicide risks. See Alabama HB 314.


8 Eisenstadt v. Baird, 405 U.S. 438 (1972). Incidentally, the Supreme Court issued its decision in this case on the very same day that the Senate adopted the ERA on the floor vote.

9 Id. at 454.

10 Harris v. McRae, 448 U.S. 297, 316 (1980).

11 Id. at 318.


14 These statistics and facts are largely drawn from Albin Eser's account, id.
15 See BVerfGE 39,1 (Schwangerschaftsabbruch I) (1975).

16 DeShaney w. Winnebago County Dep’t of Social Services, 489 U.S. 189, 195 (1989).

17 Fifteenth Criminal Law Amendment Act of May 18, 1976.


22 Id., ¶ 167.

23 Id.

24 Id., ¶ 168.

25 Id., ¶ 170.

26 Id.

27 Id., ¶ 170.

28 Id., ¶ 171.

29 Id., 172.

30 Id., ¶ 182.

31 Id.

32 Id., ¶ 184.


34 Irish Constitution, Article 40.3.3 (repealed 2018).

35 It should be noted that the Irish Constitution is considerably easier to amend than ours. Article 46 of the Irish Constitution says that any provision of the Constitution can be changed, as long as both houses of Oireachtas (Parliament) adopt the bill and send it to the voters for a referendum. Article 47 provides that, in any referendum, including those
proposing a constitutional amendment, a simple majority of the votes cast in the referendum is sufficient to be held to have been approved by the people.


37 Id. at 298 (Henchy, J.).

38 For an account of the Pro-Life Amendment Campaign's origins, and particularly the reaction to abortion liberalization abroad, see Tom Hesketh, The Second Partitioning of Ireland? The Abortion Referendum of 1983 (Brandsma Books Ltd., 1990), ch. 1.


41 Eighth Amendment of the Constitution Bill, Dáil Debates, April 27, 1983.


48 A, B, & C. v Ireland, Application No. 25579/05, ECtHR Grand Chamber, December 10, 2010.

49 See Kitty Holland, Savita: The Tragedy That Shook A Nation (Transworld Ireland, 2013).

51 See https://www.togetherforyes.ie/real-stories/
