A COMPARATIVE LAW GUIDE TO A POST-*DOBBS* AMERICA

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INTRODUCTION

The Supreme Court of the United States' 2021 *Dobbs v. Jackson Women's Health Organization*[1] decision has shaken much of the country.[2] It is perhaps the most consequential decision in decades, as it is the first time that the Court has taken away individual personal rights that it previously granted.[3] Though the country is bitterly divided over the decision, the one thing that is certain is that the field of battle has shifted away from the courts to the state legislatures and Congress.[4] As such, the contrasting model of civil law countries in Europe, such as France, can provide guidance as the United States moves forward.[5]

This article provides a comparative study of common law and civil law traditions; examining the specific ways that the United States (U.S.) may learn and adopt as we make our way forward as a nation. This article argues for a federal solution that has needed clarity, proposing a law that makes an individual's right to an abortion absolute pre-viability, and with additional safeguards post-viability. It further explores additional legal safeguards that could be implemented.

Part I examines abortion and individual rights in the common law tradition. Subpart A discusses our common law heritage and Subpart B the history of substantive due process. Part II examines individual and abortion rights in the civil law tradition. Subpart A examines the history behind the French legal system and civil law jurisdiction. Subpart B examines the history of access to abortions in these countries. Part III suggests three areas wherein the United States can learn from the civil law tradition. Subpart A argues for the need of clarity in any resulting statutes to avoid the confusion that resulted from the "undue burden" and "substantial obstacle" test.[6] Subpart B argues for a national solution. Subpart C argues for interlocking protections. Part IV concludes that the future of abortion rights in the United States depends on adopting these recommendations.

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1 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2 *See id*.

3 *See* Roe v. Wade, 410 U.S. 113 (1973) (establishing the basic framework for abortion rights).

4 The *Dobbs* decision has removed judicial protection for abortion rights, leaving decisions up to state legislatures or Congress. *See Dobbs*, 142 S. Ct. 2228 (2022).

5 In civil law countries, protections are historically found in legislation rather than in courts. For more about the differences between civil law and common law systems, *see* Max Rheinstein, *Common Law and Civil Law: An Elementary Comparison*, 22 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO 90 (1952).

6 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

I. ABORTION AND INDIVIDUAL RIGHTS IN THE COMMON LAW TRADITION

A. Our Common Law Heritage

The legal system of the United States is, of course, based largely on the English common law.[7] One of the great intellectual conflicts that existed upon the formation of the United States was that at the same time we declared independence from England, the English common law system was still prevalent in the United States.

Even prior to the American Revolution, King James I instructed the Virginia Council in 1606 that "the disposing of all causes happening within the same [should be] done as near to the common laws of England and the equity thereof as may be."[8] Professor John Henry Wigmore noted that "[o]n the very eve of the colonial revolution, in 1774 the Continental Congress, 'asserting and vindicating their rights and liberties,' deem it fitting to 'declare that the respective colonies are entitled to the Common Law of England.'"[9] So, we are presented with the following contradiction, even from the same Justices in different cases: 'We must do it like this because England did' and 'We can't do it like this because England did.' It was the rebellious child chafing at the bit of the parents' bridle, only to become them.

We can stipulate that England did and does not employ our Federalist system. As Justice Kennedy has written, the genius of the Framers was that they "split the atom of sovereignty."[10] Yet creating a unified legal system was so much of England's history, and therefore such a part of our heritage, that it is worth remembering some of that history. As one of the authors has written:

> William arrived with his conquering army from northern France in 1066. At first no effort was made to adapt to the customs of the inhabitants of the Island. The Normans viewed the Britons as 'louts and boors,' and ruled by the 'force of sharpened steel.'
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> Any such progress was greatly halted by William's death in 1087. His son William II then another son Henry I succeeded him, but there was much disagreement as various relatives asserted rights to the throne. The young country dissolved into civil war for decades. Upon this chaotic scene emerged Henry II, the grandson of Henry I, in 1154.

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[7] *See generally Common Law*, CORNELL L. SCHOOL, https://www.law.cornell.edu/wex/common_law (last visited Apr. 17, 2023).

[8] JOHN HENRY WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 1098 (Washington Law Book Co., 1928).

[9] *Id.* at 1100.

[10] U.S. Term Limits, Inc., v. Thornton, 514. U.S. 779, 838 (1995) (Kennedy, J., concurring).

> It was Henry's purpose to unify the island. To achieve that, he knew that he had to have a cohesive structure of law throughout the land. The new King had the wisdom to know that the Norman conquest was recent enough that had he attempted to impose any foreign law on the Britons, it would be rejected. Digests and codes imposed in the Roman manner by an omnipotent state on a subject people were alien to the spirit and tradition of England.' Rather, he sent advisors to the corners of the island to study the customs that already existed. Henry II is known as the father of the English common law because he created structures that preserved existing customs, not because his court arrived at new legal principles *per se*.
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> These structures of preservation included a system of royal courts designed to handle the increasing number of cases; an increased use of the jury; and a system of writs. Through these structural changes, Henry 'gave to English law a conservative spirit which guarded and preserved its continuity from that time on in an unbroken line.'[11]

The question becomes: where do we draw the line for what we accept of our English legal and governmental heritage, and what we reject? For instance, in his dissent in the 2015 case *Obergefell v. Hodges*, Justice Clarence Thomas relied heavily on English tradition in interpreting the Constitution.[12] In one case, the word "liberty," in the Fifth and Fourteenth Amendments, meant only freedom from bodily restraint:

> As used in the Due Process Clauses, 'liberty' most likely refers to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure. Both of the Constitution's Due Process Clauses reach back to Magna Carta. The 1225 [version changed the] wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land."
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> [Coke] defined "the right of personal liberty" as "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property." The seeds of this articulation can also be found in Henry Care's

[11] James Hart, *Our Conflicting Liberty Heritage from England and France*, 54 CREIGHTON L. REV. 19 (2020).

[12] Obergefell v. Hodges, 576 U.S. 644, 723 (2015) (Thomas, J., dissenting).

> influential treatise, English Liberties. [He]described habeas corpus as the means by which one could procure one's "Liberty" from imprisonment.[13]

Yet at the same time, we see numerous instances of distancing ourselves from the English legal system. An amusing instance occurred when Justice Thomas and Justice Scalia trade insults over who is acting more English; Justice Scalia accuses Justice Thomas of treating the executive branch as "a presidency more reminiscent of George III than George Washington," and Justice Thomas accuses Justice Scalia of "creating a supreme legislative body more reminiscent of the Parliament in England than the Congress in America."[14]

So, the question now becomes: what does the United States do with this heritage? One way in which the United States changed from its English history is establishing a system of federalism, wherein some things are left up to the states, and other things are left up to the federal government: "As Justice Anthony Kennedy has noted, Federalism was our Nation's own discovery. The Framers split the atom of sovereignty."[15] How much power went to each side, of course, defined the Framers' discussions, with, generally speaking, Alexander Hamilton, John Marshall, George Washington, and John Adams on one side, and Thomas Jefferson, James Madison, and James Monroe on the other.[16]

Under the U.S. Constitution, the states have a grant of police powers, while the federal government does not have such a grant; a state has all power not forbidden by the U.S. Constitution, while the federal government only has that power that is specifically granted by the U.S. Constitution.[17] A state, with no positive grant, may pass laws concerning criminal law, state taxes, state roads, state schools, etc.[18] The Federal Government must have the grant of power given to it, or the law must be "reasonably adapted" under the Necessary and Proper Clause as related to an enumerated power.[19] The real question remains: where is the proper split between the obligation of the states and obligation of the federal government? The answer is perhaps

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[13] *Id*. at 723 (citations omitted).

[14] Zivotofsky v. Kerry, 135 S. Ct. 2076, 2109 (2015) (Thomas, J., concurring in part and dissenting in part).

[15] U.S. Term Limits, Inc., v. Thornton, 514 U.S. 779, 838 (1995).

[16] *See generally* DAVID MCCULLOUGH, JOHN ADAMS (Simon & Schuster, 1991). As with much of debate surrounding ratification of the Constitution, the split was largely section, with the Virginians favoring a weaker federal government, and the northerners a stronger one. *Id.* Thomas Jefferson felt so strongly about this that he thought the strongest governmental unit should be the smallest one, the family. *Id.*

[17] U.S. CONST. amend. X.

[18] *Id.*

[19] Comstock v. United States, 660 U.S. 126, 135 (2010).

clearer than it seems: the protection of the individual rights and freedoms that were so foreign to 1789 Europe belongs to the federal government.[20]

We may start with the Bill of Rights itself. The rights therein were considered so important to individual liberties that they were enshrined in the Constitution and not left up to the states.[21] A brief review is warranted. The First Amendment protects the rights of the people to speak their minds, associate with whom they wish, not associate with a message they do not wish, not have a religion forced upon them, yet free to pray to the God and Church whom they choose.[22] Amendments IV, V, VI, and VIII provide the individual rights with which we are so familiar: the rights against unreasonable searches and seizures, the obligation of a warrant, the rights against double jeopardy, the right not to testify against oneself, the right to a speedy trial by jury, and against cruel and unusual punishment.[23] It is hard to imagine greater individual rights than these, and the Framers had already placed these individual rights with the federal government, not the states.

Which brings us to the greatest individual right of all, so continuously violated throughout human history and staining the fabric of the creation of the United States: the right to be free from slavery. Henry Clay and Daniel Webster sought a solution where the great question of slavery would be up to the states, with Clay authoring the Missouri Compromise of 1820[24] and the Compromise of 1850,[25] being joined in the latter by Webster, who's joining likely cost him the presidency.[26]

In an odd quirk of history, Chief Justice Roger B. Taney thought a national solution was needed in order to decide the slavery question once and for all. Yet, Chief Justice Taney took the opposite approach of our sixteenth and arguably greatest President, Abraham Lincoln, who also thought a national solution was warranted. In *Dred Scott v. Sanford*,[27] Chief Justice Taney and the Court held that both compromises violated the Takings Clause of the Fifth Amendment. As Abraham Lincoln responded in his *House Divided* speech in 1858, "We shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their State free; and we shall

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[20] U.S. CONST. amends. I-VIII.

[21] *Id*.

[22] *See* W. Va. State Bd. Of Educ. v. Barnette, 319 U.S. 624 (1943).

[23] U.S. CONST. amends. IV-VI, VIII.

[24] Missouri Compromise (Missouri Enabling Acts), 3 Stat. 545 (1820). The Compromise of 1820, also known as the Missouri Compromise, admitted Maine as a free state and Missouri as a free state. *Id.*

[25] *See* Compromise of 1850 (Ca.), 9 Stat. 452 (1850). The Compromise of 1850 admitted California as a free state and Utah and New Mexico as states who could decide the slavery issue for themselves. *Id.*

[26] *See* JOHN F. KENNEDY, PROFILES IN COURAGE (Harper & Brothers, 1956).

[27] Dred Scott v. Sandford, 60 U.S. 393 (1856); U.S. CONST. amend. V (in which the Takings Clause reads "nor shall private property be taken for public use, without just compensation . . .").

awake to the reality, instead, that the Supreme Court has made Illinois a slave State."[28]

President Lincoln, of course, also viewed slavery as needing a national solution to decide the slavery issue for all time but took the opposite approach. First, President Lincoln issued the Emancipation Proclamation in 1863, stating in relevant part "[t]hat on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free."[29] Then, in 1865 the Thirteenth Amendment[30] was ratified, stating in Section 1: "Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[31]

Then-Senator John F. Kennedy, with his ever-perceptive brilliant weaving of U.S. (and European) history with current events,[32] made the following his opening remarks in the first debate against Richard Nixon in Chicago in October 1960: "In the election of 1860, Abraham Lincoln said that the issue was whether the country could exist half slave and half free. Today, and with the world around us, the issue is whether the world can exist half slave and half free."[33] In his inaugural address, President Kennedy noted that "the rights of man come not from the generosity of the state, but from the hand of God."[34] However, the hand of God often gives us little direction (other than perhaps finding that He always coincidentally agrees with our personal beliefs). Perhaps President Kennedy acknowledged this with his last line: "With a good conscience our only sure reward with history, the final judge of our deeds, let us go forth to lead the land we love, asking His blessing and His help, but knowing that here on Earth, God's work must truly be our own."[35] So, our job as "Americans," as President Lincoln said, is "to

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[28] REPUBLICAN STATE CONVENTION, PROCEEDINGS OF THE REPUBLICAN STATE CONVENTION, HELD AT SPINGFIELD [SIC], ILLINOIS, JUNE 16TH, 1858, 9-12 (Bailhache & Baker, 1958).

[29] *Transcript of the Proclamation*, NAT'L ARCHIVES, https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html (last visited April 16, 2023).

[30] U.S. CONST. amend. XIII.

[31] *Id.*

[32] *See generally* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT 1960 (Atheneum Publishers, 1961).

[33] Kennedy-Nixon Presidential Debate (Sept. 26, 1960) (available at https://www.debates.org/voter-education/debate-transcripts/september-26-1960-debate-transcript/) (referring to the Cold War struggles with Nikita Khrushchev).

[34] President John F. Kennedy's Inaugural Address (1961), NAT'L ARCHIVES (Jan. 20, 1961), https://www.archives.gov/milestone-documents/president-john-f-kennedys-inaugural-address.

[35] *Id*.

do right, with the capacity that God gives us the ability to see right."[36] Perhaps we may stipulate that in our nation's history, certain basic liberties have not been up to the individual notions of the states. This then leads us into an examination of Substantive Due Process, the twentieth century, and the recent *Dobbs* decision.[37]

B. Substantive Due Process and Individual Rights

Procedural due process asks whether the proper procedure has been followed in any given case.[38] Substantive due process, on the other hand, asks whether the right in question is so fundamental that a law abridging it must pass what the Court calls (or has called) "strict scrutiny;" to survive, the law must be narrowly tailored to a compelling state interest.[39] The test for the finding of a fundamental right is whether it is part of the nation's history and tradition.[40]

Abortion first landed firmly under the Fourteenth Amendment and Substantive Due Process in *Roe v. Wade*.[41] Justice Blackmun wrote:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[42]

In *Planned Parenthood v. Casey*,[43] the Court adopted a new "undue burden" standard, but affirmed the expansive view of liberty under the Fourteenth Amendment that *Roe*[44] had endorsed:

> These matters [bodily autonomy], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[45]

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36 ABRAHAM LINCOLN, ABRAHAM LINCOLN'S SECOND INAUGURAL ADDRESS (DigiCat, 2022).

37 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

38 Mathews v. Eldridge, 424 U.S. 319 (1976).

39 Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977).

40 *Id.*

41 Roe v. Wade, 410 U.S. 113 (1973).

42 *Id.* at 153.

43 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

44 *Roe*, 410 U.S. 113.

45 *Casey*, 505 U.S. at 851.

The abortion question, despite Justice Samuel Alito's protests,[46] must properly be seen not as an isolated question, but as a broader question of individual rights. In this query, both England and France instruct us. England, because of our history of a shared legal system, and France, because it encompassed the broad definition of liberty passed from the French Enlightenment.

We start with England. In the nature of things, it has been the pattern of history that democracies or republics get swallowed up by an emperor or tyrant: the Republic of Rome fell to the Roman Empire,[47] the Directory of France to Napoleon,[48] and the Weimar Republic to Adolf Hitler and Nazi Germany.[49] England has presented somewhat of the opposite story. For over 1,000 years, power passed from the Monarch and the House of Lords to the 'House of the People': the House of Commons.[50] William the Conqueror reigned supreme.[51] The first functional Parliament was called in 1295 by Edward I,[52] though it was not called so until the reign of Edward III.[53] Despite this, Elizabeth I still reigned nearly supreme, and certainly so in reality, but things changed under the Stuarts.[54] James I saw himself as "schoolmaster of the whole Island."[55] A conflict developed as to what result should occur when a Royal Prerogative conflicted with an Act of Parliament.[56] The learned Judge Edward Coke argued that an Act of

[46] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). Justice Alito made a point of limiting the holding to abortion, but the basis of his holding was that abortion was not part of the nation's history and tradition. *See id.* However, many things, such as same-sex marriage, are much less part of the nation's history and tradition, so there is internal conflict in the majority opinion on this point.

[47] *Rome's Transition from Republic to Empire*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/romes-transition-republic-empire (last visited Jan. 4, 2023).

[48] *Directory: French History*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Directory-French-history (last visited Jan. 4, 2023).

[49] *The Weimar Republic*, HOLOCAUST ENCYC., https://encyclopedia.ushmm.org/content/en/article/the-weimar-republic (last visited Jan. 4, 2023).

[50] For general information on this subject, *see* 1 WINSTON CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES (Dodd, Mead and Company, 1956).

[51] *See* William Hollister, *King Henry I· King of England,* ENCYC. BRITANNICA, https://www.britannica.com/biography/Henry-I-king-of-England (last visited on Nov. 11, 2023).

[52] *Model Parliament*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Model-Parliament (last visited Jan. 4, 2023).

[53] *Edward III and Parliament*, BRITAIN EXPRESS, https://www.britainexpress.com/History/Edward-II-and-Parliament.htm (last visited Jan. 4, 2023).

[54] *See* Gareth H. Jones, *Sir Edward Coke,* ENCYC. BRITANNICA, https://www.britannica.com/biography/Edward-Coke (last visited Nov. 11, 2023).

[55] *Id*.

[56] *Id*.

Parliament must prevail.[57] Though King James I objected, royal power was already waning. Judge Coke then pressed for the Petition of Right, wherein as a matter of grace,[58] Parliament could allow a citizen to sue the Crown, a right unheard of until this moment.[59] Power slipped further from the Monarchy once the Hanovers took control.[60] The general weakness of that Royal House, and the specific insanity of George III compared with the brilliance of members of Parliament such as Pitt the Elder and Sir Robert Walpole, made such a transfer of power nearly inevitable.[61] Things continued in this fashion, with perhaps the death of Queen Victoria marking the end of a one thousand year transition. The decision to declare war in World War I was that of the Prime Minister in all real senses.[62] By World War II, there was no pretense of royal power left.

This passage of power from the Monarchy to the People indicated an increasing awareness of individual rights. Some famous examples in this thousand year of English history highlighting this shift include the Magna Carta (1215),[63] the Habeas Corpus Act (1679),[64] the English Bill of Rights (1689),[65] the Race Relations Act (1965),[66] the Sex Discrimination Act (1975),[67] the Disability Discrimination Act (1995),[68] and the Human Rights Act (1998).[69] Regarding abortion, this one thousand year trend of increasing the acknowledgment of individual rights led to the Abortion Act of 1967, which essentially makes abortions in the United Kingdom legal for the first twenty-four weeks, overturning sections of the Offences against the Person Act of 1861, which had made it a crime for a woman to procure her own miscarriage, or for any person to assist in procuring a miscarriage.[70]

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57 *See* Jones, *supra* note 54.

58 *Id.*

59 Adam Zeidan, *Petition of Right, Britsh History,* ENCYC. BRITANNICA, https://www.britannica.com/topic/Petition-of-Right-British-history (last visited Nov. 12, 2023).

60 *House of Hanover*, GLOBALSECURITY.ORG, https://www.globalsecurity.org/military/world/europe/uk-hanover.htm (last visited Jan. 4, 2023).

61 *Id*.

62 Betsy Reed, *How the Guardian reported the first world war: England declares war on Germany*, THE GUARDIAN (Aug. 5, 2014), https://www.theguardian.com/world/2014/aug/05/england-declares-war-germany-1914.

63 *See* Magna Carta (1215) (Eng.).

64 *See* Habeas Corpus Act 1679, 31 Cha 2 c 2 (Eng.).

65 *See* The Bill of Rights (1689), I Will & Mary, session 2, c. 2 (Eng.).

66 *See* Race Relations Act 1965, c. 73 (Eng.).

67 *See* Sex Discrimination Act 1975, c. 65 (Eng.).

68 *See* Disability Discrimination Act 1995, c. 50 (Eng.).

69 *See* Human Rights Act 1998, c. 42 (Eng.).

70 *See* Abortion Act 1967, c. 87 (Eng.); *see also* Offences Against the Person Act 1861, 24 & 25 Vict c 100 (Eng).

In one sense, U.S. history concerning individual rights continued this trend towards increasing respect for such rights. A major difference was that it occurred in the courts, not the legislative body. Substantive due process and the doctrine of fundamental rights got off to such a rocky start that the Court attempted to abandon it for nearly half a century.[71] During the late nineteenth century and early twentieth century, the Court used substantive due process to strike down social legislation.[72] For instance, "yellow dog contracts," wherein the prospective employee was not allowed to be a member of a union, were prevalent in the early twentieth century.[73] The Court struck down a federal law prohibiting such contracts under the guise of substantive due process, stating that "[n]o doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances."[74]

These cases continued for a time, perhaps culminating in *Lochner v. New York*.[75] In this famous case, a New York law prohibited employees from working more than ten hours a day or sixty hours a week.[76] This was, by all modern sensibilities, a much-needed law. If a state cannot protect its laborers, of what use is the state? Yet, the Court found that the right of freedom of contract was a substantive due process right and held the law to violate the Constitution of the United States.[77]

This finding caused great upset to sitting Justices such as Oliver Wendell Holmes, who famously noted that "[t]he [Fourteenth] Amendment did not enact Mr. Herbert Spencer's Social Statics,"[78] and future Justices such as Felix Frankfurter, who wrote in an unsigned editorial in the Atlantic Monthly that "[t]he Due Process Clauses ought to go."[79] Towards the end of his life, Justice Holmes wrote in a letter to the English economist Harold Laski, "The [Fourteenth] Amendment is a roguish thing."[80]

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71 *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965). Perhaps the clearest example of this comes from Justice Douglas' opinion when he stated "we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. New York, 198 U.S. 45 (1905) should be a guide. But we decline that invitation." *Id.*

72 Adair v. United States, 208 U.S. 161 (1908).

73 *Id.*

74 Coppage v. Kansas, 236 U.S. 1, 17 (1915).

75 Lochner v. New York, 198 U.S. 45 (1905).

76 *Id.*

77 *Id.*

78 *Id.* at 75 (Holmes, J., dissenting). Justice Holmes argued that the Fourteenth Amendment did not adopt one economic theory over another; in this case he objected to the Court seeming to adopt Mr. Herbert Spencer's Social Statics, which espoused a very conservative social theory. *Id.*

79 FELIX FRANKFURTER, LAW & POLITICS 16 (Harcourt, Brace and Company, Inc., 1939).

80 MARK DEWOLFE HOWE, HOLMES-LASKI LETTERS (Harvard University Press, 1953).

Without quite saying so, this opinion subsequently embarrassed the Court. This led to the juxtaposition of the Court increasingly recognizing individual liberties, without quite agreeing on a rationale.[81] As the twentieth century progressed, the Court recognized the individual liberties of the right to teach and raise one's children as they wished,[82] not to be sterilized against one's will,[83] the right to live together as an extended family,[84] the right to conception for married couples,[85] the right to for contraception for unmarried couples, and finally, in 1973, the right to an abortion.[86]

The cases dealing with the right to control one's own body drew the line through history leading up to abortion. In the highly unfortunate case *of Buck v. Bell*, the Court upheld a Virginia law mandating the sterilization of the "feeble-minded." [87] In perhaps the worst sentence that the great Justice Holmes ever wrote, "[t]hree generations of imbeciles is enough."[88] Mercifully, the Court soon changed direction, and began its decades long trend in recognizing a constitutional right to control one's body. In the 1942 case of *Skinner v. Oklahoma*,[89] the Court overruled *Buck*, holding that procreation was "one of the basic civil rights of man."[90]

This trend of affording rights of bodily autonomy continued. The Court recognized the right to control one's body in terms of legal access to contraception in *Griswold v. Connecticut*,[91] and extended the right to unmarried couples in *Eisenstadt v. Baird*.[92] The Court noted that an individual had the right to refuse medical treatment, noting that at common law, forced medical treatment was a battery.[93] This line of cases culminated in *Roe v. Wade*.[94]

The *Roe* accomplishment was two-fold.[95] First, which is well known, *Roe* found a constitutional right to an abortion pre-viability.[96] *Roe's* second accomplishment was to place abortion rights under the umbrella of

81 *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965).
82 Pierce v. Society of Sisters, 268 U.S. 510 (1925).
83 Skinner v. Oklahoma, 316 U.S. 535 (1942).
84 Moore v. City of E. Cleveland, 431 U.S. 494 (1977).
85 *Griswold*, 381 U.S. 479.
86 *Roe*, 410 U.S. 113.
87 274 U.S. 200 (1927).
88 *Id*. at 207.
89 316 U.S. 535 (1942).
90 *Id*. at 541.
91 *Griswold*, 381 U.S. 479.
92 405 U.S. 438 (1972).
93 Washington v. Glucksberg, 521 U.S. 702 (1997).
94 *Roe*, 410 U.S. 113.
95 *Id.*
96 *Id.*

Substantive Due Process rights.[97] The Court's reaction against *Lochner* was so strong that for fifty years it avoided the substantive due process question. *Roe* disposed of this tradition: "This right of privacy, whether it be founded in the [Fourteenth] Amendment's concept as we feel it is, or, as the District Court determined in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[98] One cannot help but feel for the district court in question, as it was doing its job and following the precedent set by *Griswold*.[99]

This clarity lasted nineteen years. In 1992, the Court ostensibly affirmed the viability of *Roe.*[100] In *Planned Parenthood of Southeastern Pa. v. Casey*, the Court introduced the "undue burden" test, under which a state could not place an undue burden on a woman seeking a pre-viability abortion.[101] Anticipating the question (asked by Justice Scalia and others) of exactly what constituted an undue burden[102], Justice O'Connor explained that an undue burden was something that created a "substantial obstacle" for a woman seeking a pre-viability abortion.[103] This, of course, asks as many questions as it answers: what constitutes a substantial obstacle?

This question was tested, case after case.[104] The results seemed to chip away at the fundamental holding of *Roe*,[105] until the *Dobbs* case,[106] which chipped away at nothing, but instead obliterated fifty years of jurisprudence. Regardless of what one thinks of the *Dobbs* opinion, it is undeniable that the field of battle has shifted from the courts to the legislatures. This makes the civil law tradition relevant as a guide. To review that tradition, we turn our attention to that fairest country on earth, France.

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97 *Id.*

98 *Id.* at 153.

99 *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

100 Roe v. Wade, 410 U.S. 113 (1973).

101 *Id.*at 843.

102 *Id*. at 993 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist C.J., White, J. and Thomas, J.).

103 *Id*. at 883.

104 See a discussion of these specific cases in Part III, Subpart A.

105 *Roe*, 410 U.S. 113.

106 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

II. ABORTION AND INDIVIDUAL RIGHTS IN THE CIVIL LAW TRADITION

France decriminalized abortion in 1975 with the passage of the Law Veil.[107] The Law Veil is the first law in France decriminalizing abortion, originally up until the tenth week of pregnancy.[108] It was named after Simone Veil, who was at the time the *Ministre de la Santé*, a governmental position within the executive branch.[109] The *Ministre de la Santé* is responsible for developing social policies to promote public health.[110] Ever since 1975, laws have been passed by the French Parliament to construct a comprehensive system of protections surrounding abortion .[111] For example, in France, voluntary interruption of a pregnancy is possible until the fourteenth week of pregnancy and a medical interruption of the pregnancy can be practiced until the end of the pregnancy.[112] However, the latter is only available for significant medical reasons.[113] Such medical reasons include when the patient is showing signs of psychological and/or social distress, risk to the fetus or the woman's life, extreme poverty etc.[114] Furthermore, trying to prevent or interfere with an abortion procedure is a crime, punishable by two years of imprisonment and a fine, as set out by Article L2223-2 from the French Public Health Code.[115] Other civil law jurisdictions have had similar paths in the codifications of access to abortive procedure: Finland authorizes abortion on a large spectrum and several other civil law countries allow it on request, such as Italy, Spain, and the Netherlands.[116]

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[107] Loi Veil n°75-17, 17 janvier 1975, relative à l'interruption volontaire de grossesse [Law No. 75-17 of 17 January 1975 on the Voluntary Termination of Pregnancy], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE, [J.O.] [OFFICIAL GAZETTE OF THE FRENCH REPUBLIC], Jan. 18, 1975, p.739.

[108] *Id.*

[109] *Feminism & French Women in History: A Resource Guide: Simone Veil*, LIB. OF CONG., https://guides.loc.gov/feminism-french-women-history/famous/simone-veil (last visited: April 17, 2023).

[110] Missions du ministère des Solidarités et de la Santé [Missions of the Ministry of Health and Prevention], MINISTERE DE LA SANTE ET DE LA PREVENTION, https://sante.gouv.fr/ministere/missions-du-ministere/article/missions-du-ministere-des-solidarites-et-de-la-sante (Fr.) (last visited Jan. 13, 2022).

[111] *See France's Abortion Provisions*, CTR. REPROD. RTS., https://reproductiverights.org/maps/provision/frances-abortion-provisions/ (last visited Apr. 16, 2023).

[112] *Id*.

[113] *See* Code de la santé publique, Partie législative, Deuxième partie, Livre II, Titre I, Chapitres III-IV, Articles L2213-1 à L2214-3 [Public Health Code, Legislative part, Second part, Book II, Title I, Chapters III-IV, Articles L2213-1 to L2214-3].

[114] Alizee Magnier & Jaqueline Wendland, *Le vécu de l'interruption médicale de grossesse par les sages-femmes: étude quantitative et qualitative* [The experience of midwives on medical interruptions of pregancy : a quantitative and qualitative study] 13 PÉRINATALITÉ 190 (Fr).

[115] *See* Article L2223-2. Code de la Santé Publique, Partie legislative, Deuxième partie, Livre II, Titre II, Chapitres II-III (Fr).

[116] *See European Abortion Law: A Comparative Overview, 2021*, CTR. REPROD. RTS (Mar. 3, 2021), https://reproductiverights.org/european-abortion-law-comparative-overview-0/.

The framework surrounding abortion in France is directly linked to its legal system and the way it has been construed. The first part of this section will therefore focus on the constitutional history of the French legal system before analyzing the way people were able to legally access abortion.

C. The French Legal System as an Example of a Civil Law Jurisdiction

i. The History Behind the French Legal System

Civil law derives from the Latin phrase *Ius Civile*: to apply to all citizens.[117] Roman law has had an overwhelming influence on civil law as we now know it.[118] The origins and models from such systems can be found in large compilations of Roman law that were commissioned by the Emperor Justinian I in the sixth century.[119] These compilations were lost but later "discovered" and used in Italy, ten centuries later, as the *Corpus Iuris Civilis*.[120]

Roman law had a heavy influence on medieval scholars that relied on canon law.[121] These sources were thus integrated into medieval systems of law.[122] Throughout Europe in the eighteenth century, scholars unified law within codes as inspired by the Roman tradition.[123] These reforms set the basis to most of today's civil law systems such as the Napoleonic Code in France, which is still in use today, albeit heavily modified since its creation, and despite its name reflecting the voice of the French people rather than Napoleon himself.[124] Natural law also gained significant importance in the eighteenth century through the input of scholars such as Hugo Grotius.[125]

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[117] *Ius civile*, OXFORD REF., https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1106;jsessionid=2E523C93486EBE9736183DF6E4A6B5B8 (last visited Apr. 17, 2023).

[118] Hessel E. Yntema, *Roman Law and Its Influence on Western Civilization*, 35 CORNELL L. REV. 77 (1949).

[119] *Roman Legal Tradition and the Compilation of Justinian*, BERKLEY L., https://www.law.berkeley.edu/wp-content/uploads/2019/08/romanlaw.pdf (last visited Apr. 16, 2023).

[120] *Introduction to Roman Law Through Emperor Justinian*, GEORGE WASHINGTON UNIV.: THE JACOB BURNS L. LIBRARY, https://law.gwu.libguides.com/romanlaw/corpusjuriscivilis (last updated Mar. 13, 2023).

[121] JOHN C. WEI & ANDERS WINROTH, THE CAMBRIDGE HISTORY OF MEDIEVAL CANON L. (Cambridge University Press ed., 2022).

[122] *Id*.

[123] RAFAEL DOMINGO, ROMAN LAW: AN INTRODUCTION (Routledge ed., 2018).

[124] Christian Atlas, *L'influence des doctrines dans l'élaboration du Code Civil,* [*The influence of doctrine in the development of the Civil Code*], HISTOIRE DE LA JUSTICE 2009/1 (N°19),107-20, https://www.cairn.info/revue-histoire-de-la-justice-2009-1-page-107.htm (Fr).

[125] *Hugo Grotius*, STANFORD ENCYC. PHIL., https://plato.stanford.edu/entries/grotius/ (last visited Apr. 16, 2023).

Natural law was originally a religious concept with the idea that some laws came directly from God.[126] It evolved to the understanding that, by their very own nature, human beings enjoyed certain sets of rights that are beyond the law of the state in which they reside.[127] France's legal system's evolution has impacted the approach it has had towards abortion, which will be explored later in this paper.

Abortion raises questions of fundamental rights, rights to privacy, rights to bodily autonomy, etc., that have various sources within French law and go back to constitutional considerations.[128] To comprehend a legal system, its ramifications, and its inner mechanisms, it is necessary to look back at France's constitutional history.

The construction of the French legal system has been imbued by Roman law and natural law through the influence of the *Lumières* movement.[129] Indeed, the French Declaration of Man and of the Citizen from 1789, motivated by the *Lumières,* starts as follows:

> The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties; in order that the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be more respected, and, lastly, in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all.[130]

This body of law became binding in 1946 and is part of the French Bloc Constitutionel. The Bloc Constitutionnel is the legal corpus of norms with constitutional value. This principle was developed by the French doctrine and

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126 *Id*.

127 *Id*.

128 Agnès Guillaume & Clémentine Rossier, *L'avortement dans le monde. État des lieux des législations, mesures, tendances et conséquences,* [Abortion in the world. State of legislation, measures, trends and consequences], 73 POPULATION 225 (Fr.).

129 *See Le Siècle des Lumières* [Enlightenment], LAROUSSE, https://www.larousse.fr/encyclopedie/divers/siècle_des_Lumières/130660 (Fr.) (last visited Apr. 16, 2023). The Lumières movement was predominant in Europe in the Eighteenth century. *Id.* It advocated for fighting the shadows of ignorance through the enlightenment of knowledge and progress. *Id.* It is the rejection of the traditional religion-centered understanding people had of the world. *Id.* The Lumières want to use science to understand the world. It led to major social progress and advances in terms of politics, understanding of the individual etc. *Id.*

130 *The Avalon Project: Declaration of the Rights of Man - 1782*, YALE L. SCHOOL: LILLIAN GOLDMAN L. LIBRARY, https://avalon.law.yale.edu/18th_century/rightsof.asp (last visited Apr. 16, 2023).

is a pedagogic analogy to interpret the value of French constitutional norms as an inviolable block.[131] The Declaration, along with the *bloc de constitutionalité* (also referred to as *bloc constitutionnel*), is at the very top of the Hierarchy of Norms, a theory developed by Hans Kelsen at the start of the twentieth century.[132] Under Kelsen's theory, there is a superior legal norm that each inferior norm has to respect in order to be valid; arguing that each inferior norm must respect their superior norm, that in turn must respect their superior norm, until the supreme norm.[133] This theory is often represented as a pyramid, with the supreme norm at its top.[134] The Declaration is a real cornerstone within the system from which various principles of law are derived such as the right to privacy which was used in the development of abortion laws.[135]

As opposed to the United States, the French legal system is a unitary republic, as asserted in 1782.[136] It is not a federal state, and the central government is the ultimate and sole sovereign of the country.[137] The Republic still has territorial divisions; it is a system that establishes a relationship between the citizens and the central power as separate entities.[138] It is a form of delegation to elected authorities at the local level that still represents the central state.[139] Therefore, the law will be homogenously applied throughout the entire territory. On the issue of abortion, it reduces territorial disparities in terms of access to the procedure.

Returning to the eighteenth century, the French *Lumières* established a set of norms, which are rules that go beyond the mere private protection of civil law.[140] The *Lumières* advocate to the importance of individuals rather than the importance of the mass—as society was understood before in history.[141] Indeed, Roman law governed mostly property and related

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131 *Présentation générale* [*General Introduction*] CONSEIL CONSTITUTIONNEL, https://www.conseil-constitutionnel.fr/le-conseil-constitutionnel/presentation-generale (last visited Oct. 22, 2023) (Fr).

132 *The Pure Theory of Law*, STANFORD ENCYC. PHIL., https://plato.stanford.edu/entries/lawphil-theory/ (last visited Apr. 16, 2023).

133 *Id.*

134 *Id.*

135 *See The Avalon Project: Declaration of the Rights of Man – 1782, supra* note 130.

136 *See id.*

137 PHILLIPE ARDANT & BETRAND MATHIEU, DRIOT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES [POLITICAL INSTITUTIONS AND CONSTITUTIONAL LAW] (34th ed., 2022-23) (Fr.).

138 *Id.*

139 *Id.*

140 STÉPHANE GACON, L'EUROPE: HISTOIRE ET CIVILISATION 77 [EUROPE: HISTORY AND CIVILIZATION] (Armand Colin ed., 2017) (Fr.).

141 *Id.*

disputes.[142] These norms, touching upon the intrinsic nature of men, have shaped fundamental rights and the very concept of freedom.

Beginning in 1789, following the collapse of the French Monarchy and the *Ancient Régime* (i.e., the French political and social regime from the sixteenth to the end of the eighteenth century), there was a long period of institutional instability that lasted until the creation of the French Third Republic in 1870.[143] The transition from an absolute monarchy—with a divine right to rule—to a system where the people have power and a say in the conduct of the State's politics and organization was not the smoothest path.[144] Building institutions from scratch to represent the people takes time, adaptation, and a few mistakes.

Other major shifts occurred within the French legal system after the French Revolution. After the Revolution, a consensus was set upon a written constitution to secure the order of the institutions shaping the system.[145] A constitutional monarchy was thus established in 1791.[146] A written constitution to be dictated by the people was identified as the proper course of action, reluctantly accepted by King Louis XVI.[147] There was a strong call by political philosophers like Montesquieu and John Locke (both in France and at the international level) for the separation of powers to mark a clear distinction between the Monarchy and the new trifurcated branches of powers.[148] This shift was motivated by the abuses of power that, when laying in the hands of a sole person, occurred under the Monarchy. It was clearly envisioned in the 1789 Declaration that such division was fundamental to the protection of human rights, as illustrated in Article 16, which read, "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution."[149] Many enumerated fundamental rights can be found at the roots of abortion laws: freedom, safety, and security—both for the people and also for the individual.

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[142] MICHEL VILLEY, LE DROIT ROMAIN: CHAPITRE III LE DROIT SUR LES CHOSES [ROMAN LAW: CHAPTER III RIGHTS OVER THINGS], *in* Que sais-je ? (Univ. of France Press, 2002) (Fr.).

[143] LOUIS FAVOREU, PATRICK GAIA, RICHARD GHEVONTIAN, JEAN LOUIS MESTRE, OTTO PFERSMANN, ANDRE ROUX & GUY SCOFFONI, DROIT CONSTITUTIONNEL 2021 [CONSITUTIONAL LAW 2021] (Dalloz, 23e ed. 2007) (Fr.).

[144] Lorraine Boissoneault, *Why is France in its fifth Republic?*, SMITHSONIAN MAG. (Apr. 20, 2017), https://www.smithsonianmag.com/history/why-france-its-fifth-republic-180962983/.

[145] JOHN ARTHUR RANSOME MARRIOTT, THE REMAKING OF MODERN EUROPE: FROM THE OUTBREAK OF THE FRENCH REVOLUTION TO THE TREATY OF BERLIN, 1789-1878 21-31 (1910).

[146] *Western Civilization II (HIS 104) -Biel: Constitutional Monarchy,* LUMEN LEARNING, https://courses.lumenlearning.com/suny-fmcc-worldcivilization2-1/chapter/constitutional-monarchy/ (last visited Apr. 16, 2023).

[147] *Id.*

[148] Sahil Patel, *Separation of Power*, 5 INT'L J. L. MGMT. & HUMAN. 1668 (2022).

[149] *See The Avalon Project: Declaration of the Rights of Man - 1782*, *supra* note 130.

The constitutional monarchy failed, and royalty was abolished with the execution of King Louis XVI, giving rise to the establishment of the first French Republic.[150] However, this new system was never officially proclaimed, undermined by the Second Reign of Terror from September 1793 to July 1794.[151]

The French conception of the separation of powers differs from the one of the United States. The French interpretation of the separation of powers was established by its Constitutional Council in a decision made on January 23, 1987.[152] The French judicial branch is different from the American judiciary, in that in France, "constitutional review"[153] is exercised by an entity separate from the judicial branch.[154] France's judicial branch is constituted of "ordinary" tribunals and courts (that can hear any case aside from ones of administrative law).

These tribunals and courts cannot exercise any form of judicial review, as established through the laws of the 16th and 24th of August 1790 and the 16th Fructidor year III (September 2, 1795).[155] The rationale behind these laws was that the "ordinary judge" (sitting in ordinary courts as detailed above) does not accurately represent the people as the judicial branch is non-elected through universal suffrage. Therefore, a non-elected judge does not have the authority, nor legitimacy, to judge acts emanating from institutions that directly represent the people.[156] There is a specific administrative judicial branch that has jurisdiction over administrative acts.[157] The Conseil

[150] *Paris: Capital of the 19th Century, The First Republic*, BROWN UNIV. LIB. CTR. DIGITAL SCHOLAR., https://library.brown.edu/cds/paris/chronology1.html (last visited Feb. 8, 2023).

[151] MICHEL BRIARD AND PASCAL DUPUY, LA REVOLUTION FRANÇAISE. 1787-1804 [THE FRENCH REVOLUTION, 1787-1804] 67-88 (Armand Colin, 4th ed. 2020). Two Reigns of Terror occurred during the French Revolution. *Id.* The first one occurred in 1792 and suspended most governmental institutions. *Id.* The Second one resulted in about 40,000 deaths and consisted in the arrest of any detractors of the Revolution without due process. *Id.*

[152] Conseil Constitutionnel 1804 [CC] [Constitutional Court] Decision No. 86-224 DC, Jan. 23, 1987] (Fr.) (describing a law transferring to the judicial court the litigation of the decisions of the Competition Council).

[153] There is no judicial review per se in France as the power itself is "constitutional review" and it cannot be exercised by the judiciary, but by the Constitutional Council which is a separate entity. *See* Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel, and the U. S. Supreme Court*, 34 AM. J. COMP. L. 45 (1986).

[154] Bradley C. Canon, *British, French and American Systems of Justice Compared,* 61 CURRENT HISTORY 97, 97 (1971).

[155] *Pourquoi Existe-t-il une Justice Administrative?* [Why is there administrative justice?], VIE PUBLIQUE (May 9, 2022), https://www.vie-publique.fr/fiches/20284-justice-administrative-origines-role-et-specificites (Fr.).

[156] Philippe Rémy, *La part faite au juge* [The Part Given to the Judge], 107 POUVOIRS 22 (2003) (Fr.).

[157] *See Pourquoi Existe-t-il une Justice Administrative?, supra* note 155.

d'Etat sits at the top of the administrative judicial branch and has appellate jurisdiction, as well as the power to advise the government.[158]

The French Parliament today operates through bicameralism, a system which was adopted by the Third Constitution, comprised of a chamber of the *Conseil des Anciens* and the *Conseil des Cinq-Cents*.[159] The chambers are designed in such a way to balance their respective powers, ultimately in an effort to avoid descending into an authoritarian regime.[160]

However, placing Parliament at the center of France's political system proved to be a mistake during World War II.[161] During this tumultuous period, Parliament conferred the full powers to the Maréchal Pétain, the head of the Vichy France regime, and passed antisemitic laws.[162] France's contemporary system of checks and balances was not sufficient to prevent this shift of power towards an authoritative leader, with a judiciary lacking the authority to review legislation. [163] Judicial review would have been a critical tool to prevent this shift, but previously, it had been hard to reconcile entrusting the judiciary with such powers with the lack of trust the French people had for the nation's judiciary—particularly following the events of World War II, during which judges collaborated with the Nazi occupation and Vichy France.[164] A new institution was therefore created: the Constitutional Council, by adopting the Constitution on October 4, 1958, which established the Fifth Republic[165] under the initiative of the General Charles de Gaulle.[166]

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158 *Id.*

159 Hugues Portelli, *Bicamérisme Ou Pouvoir Régional* [Bicameralism or Regional Power], 159 POUVOIRS 101 (2016) (Fr.). Parliament was divided in two chambers. *Id.* The *Conseil des Cinq Cents* (Council of the 500) would propose bills and the *Conseil des Anciens* (Council of the Wise) would approve them. *Id.* The *Conseil des Cinq Cent* was the lower chamber, while the *Conseil des Anciens* the upper chamber. *Id.*

160 *Id.*

161 BENEDICTE VERGUEZ-CHAIGNON, PETAIN 435-478 (Éditions Perrin, 2018*)*.

162 *La période de la guerre, le régime de Vichy et le Gouvernement provisoire de la République française* [The period of the war, the Vichy regime and the Provisional Government of the French Republic], ASSEMBLEE NATIONALE, https://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/histoire-de-l-assemblee-nationale/la-republique-dans-la-tourmente-1939-1945 (Fr.) (last visited Feb. 12, 2023).

163 LOUIS FAVOREU & LOÏC PHILIP, *LE CONSEIL CONSTITUTIONNEL* [THE CONSTITUTIONAL COUNCIL], *in* Que sais-je ?, Introduction (Univ. Of Control Press, 2005).

164 Denis Salas, *La Transition Démocratique Française Après La Seconde Guerre Mondiale* [The French Democratic Transition After the Second World War], 18 HISTOIRE DE LA JUSTICE 7 (2008) (Fr.).

165 *General Overview*, CONSEIL CONSTITUTIONNEL, https://www.conseil-constitutionnel.fr/en/general-overview (last visited Oct. 23, 2023).

166 The Fourth Republic is not discussed in this Paper as it extended over a short period of time (from 1944 to 1958). If its Preamble and Constitutions created major advancements in individual protections through the adoption of economic and social rights, the Republic lacked the means to enforce them and that laws would respect them: hence the creation of the Constitutional Council. For more about the Fourth Republic, *see* Edward W. Fox, *The Failure of the Fourth Republic*, 26 CURRENT HISTORY 267 (1959).

ii. French Law-Making and the Constitutionality of Laws

Institutional and structural similarities can be found between France's Constitutional Council and the Supreme Court of the United States. The French Constitutional Council was created to regulate public powers (the branches of power) and has jurisdiction over various matters, but mainly the conformity of laws to the French Constitution.[167] Like the Supreme Court of the United States, the French Constitutional Council is composed of nine members, however, these members each have a nine year mandate and are appointed by the President of the French Republic and the respective presidents of the parliamentary assemblies (i.e., the National Assembly and the Senate).[168] As opposed to the Supreme Court of the United States, this system ensures that no monopoly on the review is formed within the institution, nor the choice of its composition relying on a sole person that could abuse their discretion to serve their own motives.[169] However, this system is not entirely unbiased since former Presidents can sit with the Council and likewise have a right to vote.[170] Furthermore, a third of the Council is renewed every three years, and the Presidents mentioned above each appoint a new member. [171]

The Constitutional Council has three main functions: to decide on normative issues, to advise the government on exceptional powers, and to ensure national elections (both presidential and legislative) are held in conformity with the law.[172] This Article will mostly refer to the Council's jurisdiction over normative issues. This jurisdiction over laws is divided in two categories: (1) prior to the adoption of a law; and (2) after the enactment of a law.[173] The Council needs to be consulted before the promulgation and enactment of organic laws (which are laws on the organization of the state and its powers) and regulations of the assemblies.[174] The French Constitutional Council can also be interrogated prior to the ratification of

167 *The Constitutional Council and Judicial Review in* France, LIBRARY CONG. BLOGS (Nov. 4, 2020), https://blogs.loc.gov/law/2020/11/the-constitutional-council-and-judicial-review-in-france/.

168 *Id.*

169 *See* Pascal Jan, *Le Conseil Constitutionnel* [The Constitutional Council], 99 POUVOIRS 71 (2001) (Fr.).

170 *See id.*

171 *Statut des Membres* [*The Status of Members*]. CONSEIL CONSTITUTIONNEL, https://www.conseil-constitutionnel.fr/les-membres/statut-des-membres (Fr.) (last visited Oct. 22, 2023).

172 *Id.*

173 *Le contrôle de constitutionnalité des lois* [The Control of the Constitutionality of Laws], LA GALAXIE SENAT, https://www.senat.fr/role/fiche/controle_constit.html (Fr.) (last visited Feb. 12, 2023).

174 *Fiche de synthèse n°1 : L'Assemblée Nationale et le Sénat - Caractères Généraux du Parlement* [*Fact Sheet n°1 : The National Assembly and the Senate -General Characteristics of Parliament*] ASSEMBLEE NATIONALE, https://www2.assemblee-nationale.fr/decouvrir-l-assemblee/role-et-pouvoirs-de-l-assemblee-nationale/les-institutions-francaises-generalites/l-assemblee-nationale-et-le-senat-caracteres-generaux-du-parlement (Fr). (last visited Oct. 23, 2023).

international agreements as well as for ordinary laws.[175] The Council can be asked to intervene by either sixty deputies or senators or by a public authority, such as the Prime Minister or one of the Presidents.[176]

If, *a priori*[177] to the adoption of a law, the Constitutional Council declares parts or the entirety of a law as unconstitutional, said provisions will be void. The French Parliament would then need to rewrite the bill for it to conform with the French Constitution.[178] When the Council was created, this was supposed to be its only function—as Charles de Gaulle was wary of the reaches of the institution.[179] In practice, it became apparent that this power was too limited as it was only applicable prior to the adoption of laws.[180] No control could be exercised after their promulgation.

After decades, the *Question Prioritaire de Constitutionnalité* ("Priority Preliminary Ruling") was introduced through a 2008 constitutional amendment to grant the Constitutional Council to review the constitutionality of laws after their enactment.[181] This type of jurisdiction is the most similar to that of the Supreme Court of the United States.[182] Indeed, with *a priori* rulings, the Constitutional Council was slightly apart from the judiciary. Before that, its role was mainly to advise Parliament, and it was not part of the judicial branch. This reform confirmed the Constitutional Council's role as a court of law, by enabling it to hear cases from the judicial branch.

Priority Preliminary Rulings can be requested by the parties of a case in litigation, enabling constitutional review to citizens when they feel their rights have been violated, and opening them a forum to challenge laws.[183] The disputes are referred to the Council by the *Conseil d'Etat* (i.e., the higher administrative court) or the *Cour de Cassation* (i.e., the highest private law

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175 *General Overview, supra* note 165.

176 *Fiche de synthèse n°57: Le contrôle de la constitutionnalité des lois* [*Fact Sheet n° 57 : The constitutional review of laws*] ASSEMBLEE NATIONALE, https://www.assemblee-nationale.fr/dyn/synthese/fonctionnement-assemblee-nationale/travail-legislatif/le-controle-de-constitutionnalite-des-lois (Fr) (last visited Oct. 23, 2023).

177 Formed or conceived beforehand. *See A priori definition and meaning*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/apriori (last visited Oct. 22, 2023).

178 *See Fiche de synthèse n°57: Assemblée Nationale, Le contrôle de constitutionnalité des Lois, supra* note 176.

179 *Le Conseil constitutionnel: du gardien des institutions à la défense des droits des citoyens* [The Constitutional Council: from the guardian of institutions to the defense of citizens' rights], PUBLIC SENAT (July 27, 2021), https://www.publicsenat.fr/article/politique/le-conseil-constitutionnel-du-gardien-des-institutions-a-la-defense-des-droits-des (Fr.).

180 *Id.*

181 *Id.*

182 *Vers une Cour supreme?* [Towards a Supreme Court?], CONSEIL CONSTITUTIONNEL, https://www.conseil-constitutionnel.fr/les-membres/vers-une-cour-supreme (Fr.) (last visited Feb. 12, 2023).

183 *Id.*

court).[184] These courts are appellate courts where the parties can submit a writ of certiorari on the constitutionality of certain laws. The Council will thus rule on the provisions of a law, or its entirety, that has already been enacted and will check whether this law infringes rights and freedoms guaranteed by the Constitution.[185] This power is similar to the Supreme Court of the United States' power of judicial review, as French citizens can challenge Parliamentary Acts that have harmed them, inviting scrutiny and review of these laws.

To understand French abortion laws, it is necessary to analyze the mechanisms of the creation and adoption of a law – the legislative process. Either the government or each chamber of Parliament have the power to initiate the introduction of a law, it is a shared competence.[186] The bill is then given to one of the chambers of Parliament, either the National Assembly or the Senate, that will examine it and vote on it.[187] If the text of the bill is adopted, it will then be submitted to the other chamber, who will then also vote on it.[188] Amendments can be voted on and if the text is modified, a system of *navette parlementaire* ("parliamentary shuttle") is triggered in order for the two chambers to agree on the final text and subsequently adopt it.[189] Through the *navette parlementaire*, a bill will go back and forth between both houses of Parliament until it is adopted in identical terms, similar to the legislative process of the United States Congress.[190] Once a law has been adopted in identical terms, it needs to be signed (approved) by the President of the Republic, or, he can request a new examination of the text and the Constitutional Council can be asked to determine its constitutionality.[191]

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184 *Qu'est-ce qu'une QPC?* [What is a priority issue of constitutionality (QPC)?], MINISTERE DE L'INTERIEUR (Dec. 1, 2022), https://www.demarches.interieur.gouv.fr/particuliers/qu-est-ce-qu-une-question-prioritaire-constitutionnalite-qpc (Fr.).

185 *Id*.

186 *Quelles sont les étapes du vote d'une loi?* [What are the steps of voting on a law?], VIE PUBLIQUE (Sept. 5, 2022), https://www.vie-publique.fr/fiches/19521-quelles-sont-les-etapes-du-vote-dune-loi (Fr.).

187 *Procédure législative ordinaire* [The legislative process], LA GALAXIE SENAT, https://www.senat.fr/connaitre-le-senat/role-et-fonctionnement/la-procedure-legislative.html (Fr.) (last visited Apr. 16, 2023).

188 *Id*.

189 *Id*.

190 Salmi Abdesselam, "Navette Parlementaire : Outil Efficace Pour Résolution Des Désaccords Entre Les Deux Assemblées Dans Un Système Bicaméral ?" [Parliamentary Shuttle : A Useful Tool to Solve Disagreements Between the Two Assemblies in a Bicameral System?], 62 LA REVUE ADMINISTRATIVE 638 (2009). (Fr).

191 *Fiche n°46, La Procédure législative,* [*Fact Sheet n°46, Legislative Procedure*], ASSEMBLEE NATIONALE, https://www.assemblee-nationale.fr/dyn/synthese/fonctionnement-assemblee-nationale/travail-legislatif/la-procedure-legislative (Fr.) (last visited November 8th 2023).

In assessing the constitutionality of a law, the Constitutional Council must ensure that the law respects the bloc de constitutionalité, which lies at the very base of the French Normative system.

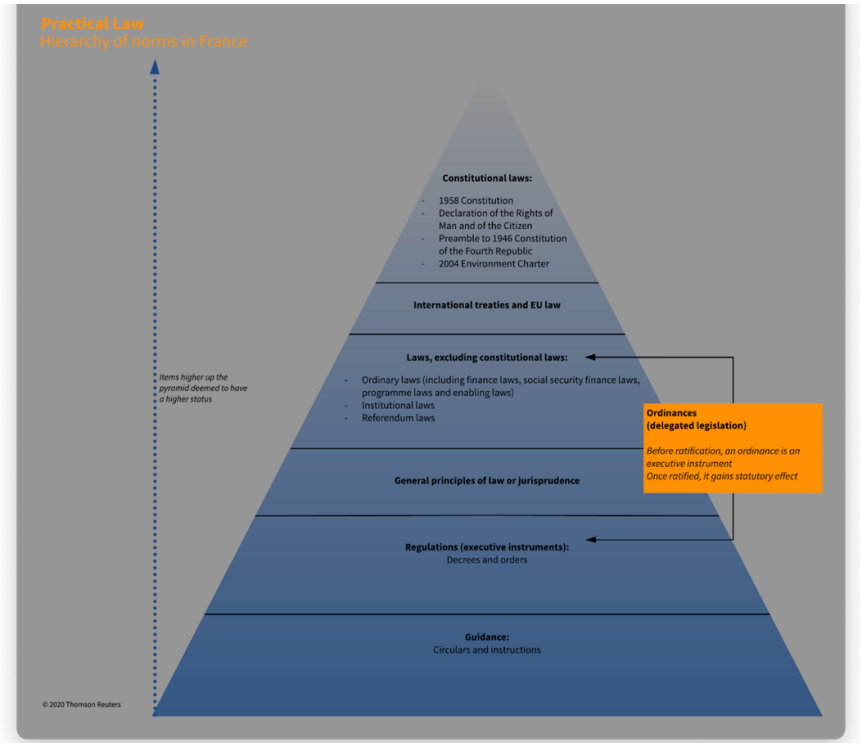
iii. The French Normative System

The French normative system can be understood through the Hierarchy of Norms, according to the theory of Hans Kelsen, as detailed above.[192] If the Hierarchy of Norms is often depicted as a pyramid, a good way to understand its ramifications and how it shapes the French legal system may be as an upside-down pyramid. The *bloc constitutionnel* would be at its base, from which every single law or statute derives from. The *bloc constitutionnel* is composed of various texts, listed by the Constitutional Council.[193] It contains the Constitution of October 4, 1958, and its *Préambule* (Preamble), the Declaration of the Rights of Man and Citizens, the Preamble from the 1946 Constitution, the Environmental Charter of 2004, as well as principles elaborated through the interpretation of the Council.[194]

[192] Denys de Bechillon, *Sur La Conception Française De La Hiérarchie Des Normes. Anatomie D'une Représentation* [On the French conception of the hierarchy of standards. Anatomy of a representation], *in* 32 REVUE INTERDISCIPLINAIRE D'ETUDES JURIDIQUES 81 (1994) (Fr.).

[193] *Qu'est ce que le bloc de constitutionnalité?* [What is the constitutionality block?], VIE PUBLIQUE (July 28, 2020), https://www.vie-publique.fr/fiches/275483-quest-ce-que-le-bloc-de-constitutionnalite (Fr.).

[194] *Id.*



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It is of primary importance to understand the legal foundations of French laws and their normative power in order to understand how abortion laws can be promulgated in France. Indeed, this will enable the reader to understand the mindset of French law-makers and why the system is the way it is. Through its complex history and system, France has established numerous safeguards protecting abortion access. Several legal barriers still stand in the way of abortion being outlawed in France, protecting the country from following in the United States's footsteps.

B. The Legalization of Abortion in France

i. The Rights Leading to the Legalization of Abortion

In civil law systems, codes and statutes are used to enunciate private rights and their remedies.[196] The law surrounding abortion within civil law jurisdictions can be found in corpuses of law (bodies of law). Legal codes ensure a certain degree of traceability as well as predictability with clear and

195 Claire Dubourg & Philippe Dupichot, *Law-making in France,* THOMSON REUTERS PRACTICAL LAW (Feb. 19, 2021), uk.practicallaw.tr.com/W-023-6932.

196 *What is Civil Law?*, LSU LAW, https://www.law.lsu.edu/clo/civil-law-online/what-is-the-civil-law/ (last visited Apr. 16, 2023).

delineated rules.[197] It is important to analyze the ramifications surrounding this notion as the right to privacy, right to life, and bodily autonomy, as well as integrity, are important concepts that necessarily have effects on the legal concept of abortion. In France, the right to privacy as it could be understood nowadays appeared quite late in history. The right to privacy is absent from the Constitution of 1958 or the Introduction of the 1946 Constitution.[198] The French legal corpus adopted the concept in 1970 through a law that codified the right to respect to one's privacy within the Article 9 of the Civil Code.[199] It is understood to be the right to freely live one's life without external interferences and extends to areas such as health, religion, relations etc.[200]

Personal rights, or individual rights, are a construction of the last quarter of the twentieth century, answering to the call of international law set by the Universal Declaration of Human Rights of 1948 and the European Convention on Human Rights of 1950 that both have provisions on the right to privacy.[201] The European Convention on Human Rights advocates in its Article 8 to the respect of private life, home, family and one's correspondence.[202] This notion has been explored in the European Convention on Human Rights' guide to Article 8 to encompass one's physical and mental integrity with an idea of personal autonomy at the core of the notion.[203]

In France, a shift towards the protection of the individual was built through judicial intervention and the input of scholars, such as the work of E.H. Perreau in 1909,[204] after litigation about privacy breaches began to significantly rise. There was not yet a right to privacy per se, only the obligation to repair any prejudice caused to another person in the old Article

197 *Id.*

198 Vincent Mazeaud, *La constitutionnalisation du droit au respect de la vie privée* [The constitutionalization of the right to respect for privacy]*, in* 48 NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL 5 (2015) (Fr).

199 Loi n° 70-643 du 17 juillet 1970 tendant à renforcer la garantie des droits individuels des citoyens (1) [Law n°70-643 of July 17, 1970 on Strengthening the Individual Rights of Citizens], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jul. 19, 1970, p.6751. (Fr).

200 *France*, LA GALAXIE SENAT, https://www.senat.fr/lc/lc33/lc333.html (Fr.) (last visited Jan. 18, 2023).

201 *See Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810, Art. 12 (1948); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.1950, Council of Europe, Art. 8 (1950).

202 *See European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.1950, Council of Europe, Art. 8 (1950).

203 *Guide on Article 8 of the Convention – Right to respect for private and family life*, EUROPEAN COURTS HUMAN RTS. (Aug. 31, 2022), https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

204 ETIENNE-ERNEST-HYPPOLYTE PERREAU, DES DROITS DE LA PERSONNALITÉ [ON PERSONALITY RIGHTS] (Editions L. Larose et L. Tenin, Paris, 1909) (Fr.).

1382 of the French Civil Code (now 1240).[205] Historically, French law had little codification of the right to privacy.[206] The right to privacy was generally understood as a protection of property interests, as illustrated by Articles 675 to 679 of the Civil Code of 1804, now amended.[207]

The Constitutional Council played a crucial role in developing the right to privacy in France, through its constitutional interpretation of Article 2 of the French Declaration of Man and of the Citizen.[208]

French law has never recognized a fetus as having a right to life, but it did entitle the fetus to some protections—without granting them the same legal safeguards awarded to human beings and material objects. Fetuses are thus the object of a vague area of the law: not a human being, not an object, not the recipient of a right to life, but nonetheless entities that still have the right to certain protections.

Articles 16[209] and 16-1[210] of the Civil Code protects bodily integrity without going as far as recognizing a right to life starting at conception, as was asserted by the Constitutional Council when it was asked to assess the constitutionality of the Veil Law in 1975.[211] French law does not recognize a right to life per se; however, the notion of this right exists in European and International law. France ratified the European Convention of Human Rights[212] and the Universal Declaration of Human Rights, that both recognize the right to life.[213] However, French judges have always been reluctant to give a legal definition to this notion. The Constitutional Council expressed that the point where life starts is a metaphysical and scientific question, not within their power to determine, as part of their commentary on their decision n° 2001-446 DC, on the law n°2001-558 that extended the delay for abortions to twelve weeks, in 2001.[214]

In the landmark human rights case *Boso v. Italy*, the European Court of Human Rights refused to establish whether the right to life extended to the

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205 Code civil [C. CIV.] [Civil Code] art. 1240 (Fr.).

206 Basile Ader, *La Protection De La Vie Privée en Droit Positif Français* [The Protection Of Privacy In French Positive Law], 20 LEGICOM 5 (1999) (Fr.).

207 Code civil [C. CIV.] [Civil Code] art. 675-679 (Fr.).

208 *See* Alder*, supra* note 206.

209 Code civil [C. CIV.] [Civil Code] art. 16 (Fr.).

210 Code civil [C. CIV.] [Civil Code] art. 16-1 (Fr.).

211 Conseil Constitutionnel [CC] [Constitutional Court], décision n° 74-54 DC, Jan.15 1975 (Fr.).

212 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.1950, Council of Europe, Article 2, (1950).

213 *See Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810, Art. 3 (1948).

214 *Commentaire de la décision n° 2001-446 DC du 27 juin 2001* [Commentary on Decision No. 2001-446 DC of June 27, 2001], 11 LES CAHIERS DU CONSEIL CONSTITUTIONNEL, (Dec. 2001), https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/commentaires/cahier11/ccc_446dc.pdf (Fr.).

fetus but confirmed that abortion fell within the realm of right to privacy protected by Article 8 of the Convention.[215] Still, the European Court of Human Rights did not go further to say that this Article protected a right to abortion.[216]

ii. The History Behind the Legalization of Abortion in France

Prohibitions on abortion in French history can be traced back to at least 1556, when King Henry II issued an Edict criminalizing abortion that remained valid until the start of the French Revolution.[217] The Napoleonic Code of 1810 criminalized abortion and punished those who received the procedure, or performed it, with imprisonment and forced labor.[218] This provision was enshrined within the Article 317 of the Penal Code of the Third Republic.[219]

The criminalization of abortion was reinforced during the Vichy Regime[220] with a law establishing abortion as a high crime, passed in February 15, 1942.[221] Under this law, abortion seekers and abortion providers could be sentenced to death.[222] However, even when abortion was prohibited, it did not stop people from seeking these procedures outside of the law.[223] Many practitioners took the role of "faiseuses d'anges" (backstreet abortion providers), performing illegal and secret abortions.[224] These illicit procedures faced dangerous repercussions: during the Vichy Regime, Marie-Louise Giraud was executed by guillotine in 1942 for

215 Boso v. Italy, 2002-VII Eur. Ct. H.R. appl. no. 50490/99 (Sept. 5, 2002).

216 *Id.*

217 Jean de Viguerie, *Quelques précisions sur l'histoire de l'avortement en France sous l'Ancien Régime, la Révolution et l'Empire* [Some details on the history of abortion in France under the Ancien Régime, the Revolution and the Empire], 91(3) REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 523 (2013) (Fr.).

218 *La marche vers la loi, La répression* [The March Towards the Law: The Repression], ASSEMBLEE NATIONALE, , https://www2.assemblee-nationale.fr/14/evenements/2015/anniversaire-loi-veil/la-marche-vers-la-loi (Fr.) (last visited Feb. 14, 2023).

219 Code penal [C. PEN.] [Penal Code] art. 317 (Fr.).

220 *Vichy et la Résistance (1940-1944): deux légitimités concurrentes* [Vichy and the Resistance (1940-1944): two competing legitimacy], VIE PUBLIQUE (Oct. 10, 2022), https://www.vie-publique.fr/fiches/268978-regime-de-vichy-et-resistance-1940-1944 (Fr.) The Vichy Regime was the government of Unoccupied France during the World War II Nazi Occupation. *Id.* The Vichy Leader was the Maréchal Pétain, and his government is often considered as a constitutional pause within French legal history as he obtained the full powers and led an authoritarian regime. *Id.*

221 *See La marche vers la loi, La répression*, *supra* note 218.

222 *Id*.

223 *Id*.

224 *Marie-Louise Giraud, "faiseuse d'anges"* [Marie-Louise Giraud, "angel maker"], L'HISTOIRE PAR LES FEMMES, https://histoireparlesfemmes.com/2014/09/18/marie-louise-giraud-faiseuse-danges/ (Fr.) (last visited Apr. 16, 2023).

performing twenty-seven abortions.[225] She had been anonymously reported to the police and, during her trial, the prosecutor used arguments against her that were derived from State propaganda, calling abortions "attacks against the State."[226] The Maréchal Pétain (Marshall Pétain, head of the state during the Vichy Regime)[227] refused to grant her a pardon.[228] A year later, in 1943, another faiseuses d'anges named Désirée Pioge was executed for helping three women seek abortions.[229]

After World War II, anti-abortion sentiments were strengthened due to rising movements seeking to repopulate post-war France.[230] While the extremely harsh abortion law from 1942 was struck down after the liberation of France in 1945, abortion remained a crime punishable by law.[231] The rise of feminism and the recognition of bodily autonomy made waves internationally throughout the 1950s.[232] For example, the International Planned Parenthood Federation was created in 1952, and contraception was then commercialized in Germany in 1956.[233] On the other hand, France was late to adopt the rights that these movements were advocating for since contraception was not legalized until 1967 with the passage of the Neuwirth Law.[234] However, even when women could finally determine whether they may become pregnant or not through the use of contraception, other bodily rights on pregnancy—importantly including abortion—remained unprotected.

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225 *Id.*

226 *Id*.

227 *Philippe Pétain,* LAROUSSE; ENCYCLOPEDIE https://www.larousse.fr/encyclopedie/personnage/Philippe_Pétain/137768 (Fr). (last visited Oct. 7, 2023)

228 *See Marie-Louise Giraud, "faiseuse d'anges , supra* note 224.

229 *See La marche vers la loi, La répression, supra* note 218.

230 Fabrice Cahen, *La Poursuite De La Répression Anti-Avortement Après Vichy* [The Continuation of Anti-Abortion Repression After Vichy], *in* 111 VINGTIEME SIECLE 119 (2011) (Fr).

231 *Id*.

232 *La marche vers la loi, La pilule* [The March Towards the Law: The Pill], ASSEMBLEE NATIONALE, https://www2.assemblee-nationale.fr/14/evenements/2015/anniversaire-loi-veil/la-marche-vers-la-loi#node_9803 (Fr.) (last visited Feb. 14, 2023).

233 *Id*.

234 Loi n° 67-1176 du 28 décembre 1967 relative à la régulation des naissances et abrogeant les articles L. 648 et L.649 du code de la santé publique [Law n° 67-1176 of December 28 1967 on the Regulation of Births and Revoking Articles L. 648 and L. 649 of the Public Health Code], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 29, 1967, p12861. (Fr). The Neuwith Law, named for member of Parliament Lucien Neuwirth, was passed in 1967 and repealed previous laws prohibiting the use of contraceptives (L. 648 and L.649 of the Public Health Code). Bibia Pavard, *The Right to Know? The Politics of Information about Contraception in France (1950s–80s)*, 63 MEDICAL HISTORY 173 (2019).

The goal of legalizing contraception was to limit the number of illegal abortions.[235] However, more than 300,000 women still sought abortions every year following the passage of the Neuwirth Law in 1967, until the passage of the Veil Law in 1975.[236] Women seeking abortions would either go to countries where abortion was legal, such as the United Kingdom or Switzerland, or abort clandestinely in France.[237] This history illustrates the veracity of today's medical consensus: prohibiting abortion simply prohibits *safe* abortions.[238] Furthermore, with back-alley abortions, aseptic procedures were rarely followed, which subjected patients to significant risks.[239] Criminalizing abortion created huge disparities between socioeconomic classes; wealthy women, who had the means to travel abroad, had easier access to abortion as compared to indigent women, who had to refer to clandestine abortion providers and subject themselves to significant health risks, as well as potential criminal charges. [240]

Feminist movements such as the Mouvement de Libération des Femmes ("MLF"), created in 1970, set the legalization of abortion as its primary goal.[241] The *Manifesto of the 343* (Manifesto) was published in 1971, in which 343 women, including prominent celebrities like Simone de Beauvoir, declared publicly that they had had abortions.[242] This Manifesto was highly publicized, even criticized and shamed by certain newspapers, but was one of the first milestone towards the adoption of the Veil Law.[243] It was not until 1974 that the first step towards positive change was announced, when then-President Valéry Giscard d'Estaing announced that until a law was passed to decriminalize abortion, no charges would be pressed against women who sought abortions.[244]

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235 Arnaud Régnier-Loilier, *Henri Leridon & Fabrice Cahen, La loi Neuwirth quarante ans après: une révolution inachevée?* [Four Decades of Legalized Contraception in France: An Unfinished Revolution*?*], 439 POPULATION & SOCIÉTÉS 1 (2007) (Fr.).

236 *See La marche vers la loi, La pilule, supra* note 232.

237 *Id*.

238 *Toutes les 9 minutes une femme meurt des suites d'un avortement clandestin* [Every 9 minutes a woman dies as a result of a clandestine abortion], MEDECINS DU MONDE, https://www.medecinsdumonde.org/medecins-du-monde/toutes-les-9-minutes-une-femme-meurt-des-suites-dun-avortement-clandestin/ (Fr.) (last visited Apr. 16, 2023).

239 Hugo Melchior, *La pratique militante des avortements illégaux en France: Le parcours d'un étudiant en médecine précurseur et insoumis* [The Activist Practice of Illegal Abortions In France: The Journey of a Pioneering and Rebellious Medical Student], 66 LES TRIBUNES DE LA SANTE 89 (2020). (Fr).

240 *Id*.

241 *Le MLF, histoire d'un combat féministe* [The MLF, The Story of a Feminist Fight], L'INA ECLAIRE L'ACTU, (Aug. 26, 2020), https://www.ina.fr/ina-eclaire-actu/le-mlf-histoire-d-un-combat-feministe (Fr.).

242 *See La marche vers la loi, La répression*, *supra* note 218; *La marche vers la loi, La pilule*, *supra* note 232.

243 *Id*.

244 *Id.*

The 1972 "*Bobigny* trial" stood out to the French public as confirmation that the legal environment surrounding abortion needed to change.[245] Marie-Claire Chevalier was a sixteen-year-old rape survivor that became pregnant.[246] Coming from a low-income family, Marie-Claire's mother did not have the financial means to raise another child.[247] She tried to gather information on a clandestine abortion conducted by family doctors.[248] However, because the procedure was expensive, Marie-Claire resorted to an unsafe and unhygienic clandestine abortion, in which the provider used a piece of electric cable to end the pregnancy.[249] Three weeks later, Marie-Claire developed an infection that became septic, leading to hospitalization.[250] Hospital staff was sympathetic and simply reprimanded the girl.[251] However, after surviving this traumatizing ordeal, Marie-Claire confronted the man who raped her and shared that she had received an abortion.[252] Her rapist was later arrested for an unrelated larceny, and in exchange for leniency from the prosecutor, offered to testify against Marie-Claire for having an illegal abortion.[253]

At only sixteen years old, Marie-Claire was prosecuted for her abortion, alongside her mother and the abortion provider.[254] Her mother's two colleagues were also charged for giving Marie-Claire the name of the abortion provider.[255] Gisèle Halimi, a young lawyer famous for defending women's rights in the courtroom (in cases such as the Djamila Boupacha case)[256] and for publishing the *Manifesto of the 343*,[257] came to the defense

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245 *Le procès de Bobigny* [The Bobigny trial], MINISTERE DE LA JUSTICE (July 28, 2020), http://www.justice.gouv.fr/histoire-et-patrimoine-10050/proces-historiques-10411/le-proces-de-bobigny-24792.html (Fr.); Alice Blackhurst & Pierre-Yves Anglès, *France's Roe v. Wade was the trial of a 16-year-old girl*, WASH. POST (June 25, 2022), https://www.washingtonpost.com/history/2022/06/25/bobigny-trial-roe-wade-france/.

246 *See* Blackhurst & Anglès, *supra* note 245.

247 Me Emmanuel Pierrat, *Le procès de Bobigny: La cause des femmes* [The Bobigny trial: The cause of women], *in* LES GRANDS PROCES DE L'HISTOIRE - DE L'AFFAIRE TROPPMANN AU PROCES D'OUTREAU, (2020), https://www.lagbd.org/Le_procès_de_Bobigny_:_La_cause_des_femmes_(fr) (Fr.).

248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.*

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.*

256 Djamula Boupacha was an Algerian woman victim of torture by the French army during the war in Algeria. *See* Ryan Kunkle, *We Must Shout the Truths to the Rooftops: Gisèle Halimi, Djamila Boupacha, and Sexual Politics in the Algerian War of Independence,* 4 THE IOWA HISTORICAL REVIEW 5 (2013).

257 *See La marche vers la Loi, La pilule, supra* note 232.

in 1972.[258] Despite significant challenges to her defense, Halimi prevailed by introducing testimony from a variety of influential voices to provide a thorough defense of abortion rights as a whole, resulting in Marie-Claire's ultimate acquittal.[259] Gisèle Halimi took this opportunity to publicize Marie-Claire's trial and demonstrate the horrors the young girl had endured because of the criminalization of abortion.[260] This case illustrated the need to legalize abortion in France.[261]

Following this highly publicized trial, the Veil Law was enacted in 1975.[262] Simone Veil, who introduced the law decriminalizing abortion and for whom the law is named, famously spoke before the National Assembly which at the time was comprised 95% of men.[263] This one-hour speech remains a very important moment for the French feminist movement.[264] The text of the Veil Law was debated within the Assembly for three days and two nights before being voted on.[265] However, the law was temporary, extending only for a five year period.[266] The Constitutional Council was asked to assess the constitutionality of the law and concluded the statute was constitutional.[267]

While the French Constitutional Council did not establish abortion as a constitutional right, it did declare the right to abortion as being aligned with existing constitutional rights, conferring additional layers of protection.[268] Furthermore, in practice, it is extremely rare for the Constitutional Council to go back and declare a certain law unconstitutional when the Council has previously deemed that law as being in conformity with the Constitution.[269]

In 1992, French Parliament passed a law to decriminalize abortion; as such, today, it is no longer a crime to receive or perform an abortion in

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258 Judith Surkis*, Ethics and Violence: Simone de Beauvoir, Djamila Boupacha, and the Algerian War*, 28 FRENCH POL., CULTURE & SOC'Y 38 (2010).

259 *See* Pierrat*, supra* note 247*;* Marie-Claire's mother was required to pay a fine, but the mother's friends were also acquitted, and the abortion provider received a suspended one-year sentence. *Id.*

260 *See* Blackhurst & Anglès*, supra* note 245.

261 *Id.*

262 Loi Veil n°75-17, 17 janvier 1975, relative à l'interruption volontaire de grossesse [Law No. 75-17 of 17 January 1975 on the Voluntary Termination of Pregnancy], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE, [J.O.] [OFFICIAL GAZETTE OF THE FRENCH REPUBLIC], Jan. 18, 1975, p.739.

263 Simone Veil (26 novembre 1974) [Simone Veil (November 26, 1974)], ASSEMBLEE NATIONALE, https://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/grands-discours-parlementaires/simone-veil-26-novembre-1974 (Fr.) (last visted Apr. 16, 2023).

264 *Id*.

265 *Id.*

266 *Id.*

267 Conseil Constitutionnel [CC] [Constitutional Court], décision n° 74-54 DC, Jan.15 1975 (Fr.).

268 *Id.*

269 *See Pourquoi Existe-t-il une Justice Administrative?*, *supra* note 155.

France, but said abortion must be conducted pursuant to the authorized procedures.[270] Law n°93-121, passed on January 27, 1993, made it a crime to create undue obstacles that would prevent abortion access.[271] These abortion regulations were later transferred to the Health Code, demonstrating the French government's dedication to erasing the stigma surrounding abortion and facilitating abortion access as a way to protect women, their right to choose, and their right to privacy.[272]

Law n°2001-588, passed on July 4, 2001, permitted abortions to be performed up until the twelfth week of pregnancy.[273] The Constitutional Council was asked to determine the validity of this law and did not find any nonconformity with the Constitution.[274] The Council went one step further and declared that it had never recognized a right to life directly after conception.[275] In its Comments on the Decision, the Council even established that protecting the integrity of a "potential person to be" could not outweigh protecting women's mental and physical health, nor their personal freedom.[276]

III. A COMPARATIVE GUIDE TO POST-*DOBBS* AMERICA

A. The Need for Clarity

The first lesson the United States may learn from civil law countries regards clarity. While there have been numerous calls to codify the protections *Casey* gave into legislation,[277] French history shows us that this is not necessarily the best option.

The clarity of French law provides good guidance that the United States could benefit from. The French civil code protects a right to privacy and a right to self-determination and bodily autonomy, while the French penal code prohibits any attempt at preventing, limiting, and/or discouraging

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270 Bernadette Furcy, *Les 40 ans de la loi sur l'IVG* [40 years of the abortion law], BALISES (Mar. 7, 2015), https://balises.bpi.fr/les-40-ans-de-la-loi-sur-livg-1/ (Fr.).

271 Loi 93-121 du 27 janvier 1993 portant diverses mesures d'ordre social [Law 93-121 of January 27 1993 on Various Social Policy Measures], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 30, 1993 pp.1576-1588 (Fr.).

272 Code de la santé publique [PUBLIC HEALTH CODE] L1110-1 a L6441-1 (Fr.).

273 Loi 2001-588 du July 4th 2001 relative à l'interruption volontaire de grossesse et à la contraception [Law No. 2001-588 of 4 July 2001 on the voluntary termination of pregnancy and contraception], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jul. 7, 2001 n°0156. (Fr.).

274 Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2001-446 DC, Jun. 27, 2001. (Fr.)

275 *See Les cahiers du Conseil Constitutionnel*, *supra* note 214.

276 *Id.*

277 Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L. J.1318 (2009).

abortion up to fourteen weeks.[278] Though pre-viability is a standard more consistent with France's legal history, codifying *Casey*[279] with legislation is not the best solution; while *Casey* was correctly decided—and *Dobbs* was not—*Casey* is not without its limits.[280]

Casey established the legal test to determine whether a state-sanctioned obstacle to obtaining an abortion violates the Constitution, holding the standard to be that a state could not place an "undue burden" on a woman seeking an abortion before viability (also established by *Casey* to overturn *Roe*'s federally-spanning trimester framework, in favor of allowing each state to determine when fetal viabilty begins, and the right to an abortion in that state ends).[281] In response to the authored dissents, Justice O'Connor attempted to clarify what an undue burden was; i.e., placing a substantial obstacle in the way of a woman seeking an abortion.[282] However, Justice O'Connor's winding attempt to establish parameters around the meaning of "undue burden" offered no useful clarity.[283] The question remained unanswered: what constitutes an undue burden or a substantial obstacle? This lack of clarity led to a path of confusion, giving the *Dobbs* Court ample ammunition to attack *Casey* at its core.[284]

The *Casey* decision had a profound impact on many aspects of the abortion process.[285] The Court found that: requiring a pregnant woman to receive permission from her spouse was an undue burden;[286] requiring a minor to receive permission from her parents was an undue burden,[287] unless there is a judicial bypass, in which case it was not;[288] requiring a 24-hour waiting period was a burden, but not an *undue* burden;[289] requiring an abortion to be performed at a hospital rather than a clinic was an undue burden;[290] prohibiting facilities that receive government funds from performing abortions was *not* an undue burden;[291] requiring that a physician

278 Code civil [C. CIV.] [Civil Code] art. 16 (Fr.); Code de la santé publique [PUBLIC HEALTH CODE] art. 37 (Fr.).

279 *Casey*, 505 U.S. 833.

280 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

281 *Casey*, 505 U.S. 833; Roe v. Wade, 410 U.S. 113 (1973).

282 *Casey*, 505 U.S. 878.

283 *See id.*

284 *Id.*; *Dobbs*, 142 S. Ct. 2228.

285 *Casey*, 505 U.S. 833.

286 *Id.*

287 *Id*

288 *Id.*

289 *Id,*

290 *Id.*

291 *Id.*

have admitting privileges was an undue burden;[292] requiring that an abortion facility be must within 30 miles of a surgical center was also an undue burden;[293] outlawing "partial birth abortions" was not.[294]

If Congress is to provide a legislative protection to abortion rights, it should be guided by the clarity of the French law. For pre-viability abortions, the right to an abortion should be absolute and unquestioned. In our proposed legislation, viability would be defined at 24 weeks by Congress.[295] This is both clearer than *Casey*,[296] and goes further than that decision ever did, as it grants an absolute right rather than one subject to the undue burden standard. In addition, French law has substantial guarantees for post-viability abortions that the United States Congress should similarly look towards for inspiration.[297] The exceptions for post-viability not only include rape but also the health of the mother, as well as physically and psycho-social threats such as domestic violence, financial insecurity, personal danger, emotional and psychological distress.[298] These post-viability protections should be adopted in any relevant federal statute.

In 2020, Senator Linsday Graham's proposed a bill regarding abortion that had gained national attention (mostly negative, as he has almost no support from Senators in either party).[299] This bill can stand as an example of a legislative proposal that is distinguishable from the present proposal, also demonstrating the opportunties versus the risks of relying on federal legislation. First, Senator Graham placed numerous conditions on an individual seeking an abortion in the first fifteen weeks.[300] Section (3)(b)(2)(D) requires the presence of a "physician trained in neo-natal resuscitation" be present during an abortion.[301] Section(3)(b)(2)(G)(ii)(I) requires signed consent that the individual knows the approximate gestational

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292 *Id.*

293 *Id.*

294 Gonzales v. Carhart, 550 U.S. 124 (2007).

295 Within the medical community, the general consensus as to when a fetus becomes viable, in other words able to live outside the mother's womb, is at twenty-four weeks of gestation. M.R.G. Carrapato, *Can we establish a universal lower limit of viability? What are the medical and ethical implications?, in* ASIM KURJAK & FRANK A. CHERVENAK, TEXTBOOK OF PERINATAL MEDICINE 61 (2nd ed., 2006). ("'Viability', therefore, would be around 24 weeks.").

296 *Casey*, 505 U.S. 833.

297 Loi n°2021-1017 du 2 août 2021 relative à la bioéthique [Law No. 2021-1017 of August 2, 2021 relating to bioethics], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 3, 2021. (Fr).

298 Loi n° 2021-1017 du 2 août 2021, relative à la bioéthique, Article 28 [Law No. 2021-1017 of August 2, 2021 relating to bioethics, Art. 28], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 3, 2021 (Fr).

299 Pain-Capable Unborn Child Protection Act, S. 3275, 116th Cong. (2020).

300 *Id*. at § 3(b)(2)(D)

301 *Id*. at § 3(b)(2)(D)

age of the "pain-capable unborn child."[302] Section (3)(c) would allow anyone who violates section (a) to be imprisoned for five years.[303] In contrast, we proposes no such conditions pre-viability.

Secondly, Senator Graham calls for a federal ban after fifteen weeks of pregnancy with few exceptions, which are discussed below. [304] Here, in opposition, we call for no federal ban whatsoever, rather a complete prohibition on any state preventing a pregnant individual from getting an abortion for *any* reason whatsoever pre-viability. Where Senator Graham places a federal ban post-fifteen weeks, we simply acknowledge, consistent with *Roe*[305] and *Casey*,[306] that after fetal viability has been reached, a state's interest grows in proportion to the age of the fetus.

Finally, Senator Graham provides exceptions for his federal ban on abortion in just three instances: rape, rape or incest against a minor, and the physical health of the mother.[307] As mentioned above, the authors advocate much stronger prohibitions against state restrictions post-viability, borrowed from the French.[308] These include rape, incest, and health of the mother, but here, health of the mother is much more inclusive and broader. It is understood to encompass not only medical threats, but also psycho-social threats such as: domestic violence, financial insecurity, personal danger, emotional and psychological distress.[309] This article advocates including these protections in the federal legislation we are proposing.

B. The Need for a National Solution.

France is a unitary republic, decentralized through regions and territories.[310] If these regions have their own authorities, they do not make nor enforce their own laws as simply being extensions of the central power.[311] French regions do not have independent sovereignty; they are simply territories with local authorities that can exercise administrative power and are always subject to the power of the government.[312] They are extensions

302 *Id.* at § 3(b)(2)(G)(ii)(I).

303 *Id*. at § 3(c).

304 *Id.* at §3(b)(2)(A).

305 Roe v. Wade, 410 U.S. 113 (1973).

306 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

307 Pain-Capable Unborn Child Protection Act, at §3(b)(2)(A).

308 Loi n° 2021-1017 du 2 août 2021, relative à la bioéthique, Article 28 [Law No. 2021-1017 of August 2, 2021 relating to bioethics, Art. 28], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 3, 2021 (Fr).

309 *Id*.

310 *Qu'est-ce que la décentralisation?* [What is decentralization*?*], VIE PUBLIQUE, https://www.vie-publique.fr/fiches/20168-quest-ce-que-la-decentralisation (Fr.) (last visited Feb. 14, 2023).

311 *Id*.

312 *Id.*

of the government over the land, and therefore French law will apply homogenously throughout the entire all of France.[313] In France, a national protection of abortion rights was, frankly, the only option. Applying a singular legislative solution for the entire country proved itself to be an extremely efficient protection for abortion access.

On March 2, 2022, Law No. 2022-295 was passed in France to facilitate ease of access to abortion.[314] This law amended provisions of the Health Code that already protected abortion in its Articles L2212-1 to L2223-2: amending Article L2212-2 to expand the timeframe during which a woman may have an abortion and shifting the latest time an abortion may be obtained from the twelfth week to the fourteenth week of pregnancy.[315] This law also clearly establishes that a woman has the right to choose the abortive method, either through medication or surgery.[316] This law is different from an abortion ban per se, as it regulates *IVGs* (voluntary interruption of pregnancy, discussed in more detail below), but abortions for medical reasons (IMG) are still available. These reasons include psycho-sociological distress for the patient, which is discussed in greater detail below. Through this law, midwives are also authorized to practice abortions, even the ones requiring surgical procedures.[317]

The adoption of this law was an efficient answer to the issues raised by the COVID-19 pandemic, when abortion was more difficult to access with lockdowns and curfews.[318] It became more difficult to reach practitioners, which often resulted in missing the twelfth week deadline or created barriers to travel to other countries that allowed abortion later in a pregnancy.[319] This law brought a national answer to a national issue.

Applying the exact same method that was successful in France in the United States may be hard to imagine due to the inherent differences between the two systems: one federal, the other a unitary republic. Therefore, even just drawing inspiration from the French system would be an appropriate approach. Adopting a national, legislative solution would fill the gap left by

313 *Id.*

314 Loi 2022-295 du 2 mars 2022 visant à renforcer le droit à l'avortement [Law No. 2022-295 of March 2, 2022 to Strengthen the Right to Abortion], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 3, 2022, n°0052. (Fr).

315 Code de la Santé Publique [PUBLIC HEALTH CODE] Articles L2211-1 - L2223-2 Livre II (Fr.).

316 *Id.*

317 Jean-Christophe Galloux & Hélène Gaumont-Prat, *Droits et libertés corporels* [Personal Rights And Freedoms], 16 DALLOZ COLLECTION 808 (2022) (Fr.).

318 Maud Gelly, *Le Droit À L'avortement en Temps De Crise Sanitaire* [The Right to Abortion in Times of Health Crisis], 453 LA SANTE EN ACTION 29 (2020) (Fr.).

319 *Id.*

the overturning of *Roe v. Wade*[320] and *Casey v. Planned Parenthood*[321] and ensure consistent protections throughout the entire country.

Furthermore, the legal structure of the European Union ("EU") could be the source of greater inspiration in terms of normative construction for the United States.[322] Indeed, the EU was significantly inspired by federalism.[323] Its States remain autonomous and sovereign in their decisions but have to abide to the greater authority of the EU institutions.[324] However, this comparison has its limits since European States remain sovereign countries, as opposed to the fifty United States of America, but the EU has adopted federal-like features.[325]

The EU instrument that is most similar to the federalist system of the United States is that of directives.[326] A directive is an executive agenda setting forth objectives that the States must meet but leaving open the possibility for States to go further in their implementation. This method could fill the legal void left by the Supreme Court following its *Dobbs* decision.[327] Indeed, by creating a common standard that every single state of the United States must meet, it would ensure homogenous and consistent protection of abortion. Such obligation must be the absolute legalization of abortion up to viability, at 24 weeks and must leave open other ways to receive an abortion after the 24 weeks threshold. States could then use their own autonomy in order to decide whether or not to go further in the implementation of these obligations up to viability.

Following the French example, decriminalizing abortion even after viability would be a significant victory for human rights. Preventing states from bringing criminal charges for abortions conducted post-viability and preventing them from banning the procedure is a pressing issue across the United States today,[328] and the United States could easily look to France's example in prohibiting such criminal charges.

Furthermore, in French law, once the timeframe under which a patient can seek an abortion has passed, they can still receive abortion procedures if they are deemed to be in psycho-sociological distress or for

320 Roe v. Wade, 410 U.S. 113 (1973).

321 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

322 Julien Barroche, *Théories fédéralistes et Union européenne* [Federalist Theories and European Union], 38 CIVITAS EUROPA 337 (2017) (Fr.).

323 *Id.*

324 *Id*.

325 *Id*.

326 *Qu'est-ce qu'une directive?* [What is a directive?], TOUTE LE EUROPE (Jan. 7, 2021), https://www.touteleurope.eu/fonctionnement-de-l-ue/qu-est-ce-qu-une-directive/ (Fr.).

327 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

328 *Criminalizing Abortion Care is Wrong, and We're Fighting Back*, ACLU (Feb. 28, 2023), https://www.aclu.org/news/reproductive-freedom/fighting-against-criminalization-abortion-rights-acdi.

health reasons.[329] French law differentiates abortions depending on their timeline within two categories: *interruption volontaire de grossesse* ("IVG") (i.e., voluntary termination of pregnancy) up until the fourteenth week of pregnancy, and *interruption médicale de grossesse* ("IMG") (i.e., medical termination of pregnancy).[330] This provision opens myriad options for pregnant people to seek abortions post-viability. Psycho-sociological distress can be understood to include domestic violence, rape, poverty, mental health issues etc.[331] Federal legislation would meet not only the dire need for the protection of women's rights and their health, but also the strict requirements dictated by federalism.

C. The Need for Multiple Layers of Protection.

Although this article's central focus is a comparison between France and the United States' approaches to abortion rights, it is important to discuss how other countries, such as Argentina, South Africa and Ireland (historically was one of the main detractors of abortion in Europe), have expanded their abortion laws.[332] However, at the same time, some countries have drastically restricted abortion access, such as Poland and Hungary.[333]

There is no protection for abortion at international law, even though it has been generally recognized by the international community on several occasions that unsafe abortions—due to the criminalization of the procedure—present significant public health concerns.[334] Protections can be understood in a two-fold manner: positive rights and negative rights. Positive rights are a claim to something, wherein the State is obligated to affirmatively provide a right or protect an action; negative rights are rights against State interference, a right protected against obstruction.[335] A negative right regarding abortions would be the easiest to achieve, in our opinion, as it simply entails the obligation not to interfere with a woman's access to

329 Code de la Santé Publique [PUBLIC HEALTH CODE] L2213-1 (Fr.).

330 *Id.*

331 *Que faire en cas de dépassement du délai légal d'IVG* [What to do if the legal abortion period is exceeded?], SOUTENIR LE PLANNING, https://www.planning-familial.org/fr/que-faire-en-cas-de-depassement-du-delai-legal-divg-1676 (Fr.) (last visited Feb. 14, 2023).

332 *International Human Rights and Abortion: Spotlight on Dobbs v. Jackson Women's Health*, CTR. REPROD. RTS. (Nov. 24, 2021) https://reproductiverights.org/supreme-court-case-mississippi-abortion-ban-international-human-rights/.

333 Isabel Marques da Silva, *Débat au Parlement Européen sur le droit à l'avortement en Pologne* [Debate in the European Parliament on the right to abortion in Poland], EURONEWS (Nov. 17, 2022) https://fr.euronews.com/my-europe/2022/11/17/debat-au-parlement-europeen-sur-le-droit-a-lavortement-en-pologne (Fr.).

334 *Information Series: Sexual and Reproductive Health and Rights*, UN OFF. COMM'R HUM. RTS. https://www.ohchr.org/en/women/information-series-sexual-and-reproductive-health-and-rights (last visited Apr. 17, 2023).

335 CHARLES FRIED, RIGHT AND WRONG, (Harvard University Press, 1978).

abortion. However, to ensure safe abortions, positive rights are the goal to achieve at the international level. Positive rights secure help and resources to achieve the positive obligation.[336] A positive obligation for governments to allow women to seek abortions is the most complete form of protection.

Prohibiting abortion necessarily entails discriminatory considerations and effects: on gender for starters in terms of bodily autonomy, but also in terms of welfare, education, health.[337] Several international law bodies, such as the Committee for the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee have stressed the importance of creating an actionable right to abortion.[338] If an international instrument legalizing abortion throughout the world does sound utopic, a multilateral treaty would add another layer of protection within domestic legal systems of the States who sign on.

International law may seem an unlikely and untenable method of decriminalizing abortion. However, new regulatory regimes such as regulations or laws on women's rights could be a good way to address this problem and for States to find common grounds in terms of abortion laws. An instrument protecting a larger set of bodily rights that did not focus on abortion, as it would be a struggle to meet general political approbation, could be constructed to ensure the right to abortion. Nonetheless, this does not detract from the reality that an instrument that clearly and unambiguously legalizes abortion, with little room for interpretation on its creation of an actionable legal right, is the ideal.

Nowadays, domestic courts within an individual State's jurisdiction may incorporate international law treaties and agreements to rule on abortion cases. As previously mentioned, the European Court of Human Rights has recognized that the right to privacy could extend to and protect the right to abortion.[339] However, the absence of a clear ruling from the European Convention on Human Rights that specifically protects abortion leaves much room for future interpretation. If the Court declared that prohibiting abortion aligned with the essence of the European Convention on Human Rights, States obligated to this treaty would not have a legal obligation to

336 CÉCILE FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE* (2000).

337 Ana Langer, *The Negative Health Implications of Restricting Abortion Access*, HARV. INST. OF PUB. HEALTH (Dec. 13, 2021), https://www.hsph.harvard.edu/news/features/abortion-restrictions-health-implications/.

338 *Access to Safe And Legal Abortion: Urgent Call For United States to Adhere to Women's Rights Convention*, UN OFF. COMM'R HUM. RTS. (July 1, 2022), https://www.ohchr.org/en/statements/2022/07/access-safe-and-legal-abortion-urgent-call-united-states-adhere-womens-rights.

339 *See* Boso v. Italy, 2002-VII Eur. Ct. H.R. appl. no. 50490/99 (Sept. 5, 2002).

decriminalize abortion.[340] This lack of international consensus—and even European consensus—creates legal gaps and inconsistencies that threaten abortion rights.[341]

An ideal solution at the international level could look like a regulation that is broad enough to allow international consensus on abortion. Indeed, even if a multilateral treaty necessarily entails a weaker protection due to the need for global consensus, it could be a significant first step in the protection of women throughout the world. For example, while CEDAW implies a right to abortion in Article 16, it does not clearly enumerate this right—it only mentions the right for women to choose freely the number of their children and the frequency of their pregnancies.[342] The right to abortion should be consecrated unambiguously in a multilateral agreement.

The act of ratifying such a multilateral agreement would send a strong political message to the international community about how that State perceives and treats women's rights. Similarly, refusing to sign and ratify would send a different message of its own, such as when the United States refused to ratify CEDAW, and the world read into the statement that the refusal made.[343] To prohibit abortion procedures in a State's own territory is one matter but implicitly declaring to the international stage that women's rights are not important is another matter entirely.

While a multilateral convention often means broad protection, which realistically could leave room for States to still restrict its enumerated rights, that convention will still add another layer of protection that ratifying States would be required to incorporate into their own domestic legal structure. Recalling earlier discussions of normativity, States are necessarily bound by the instruments they ratify.[344]

An international convention that protects the right to abortion may not lead to miracles, and there is little reason to hope that States will reach a universal consensus on this issue. However, the existence of such a convention could be an important step towards furthering the protection of reproductive rights throughout the world, and ensure that individuals, such as citizens of the United States, are not deprived from the right to make decisions about their bodies for themselves.

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340 *A, B and C v. Ireland*, 2010, Eur. Ct. H.R. appl. no. 25579/05 (Dec. 10, 2010).

341 Amélie Dionisi-Peyrusse, *Actualité de la bioéthique* [News of bioethics], 12 ACTUALITE JURIDIQUE, FAMILLE 352 (2022) (Fr.)

342 *Convention on the Elimination of All Forms of Discrimination against Women New York*, UN OFF. COMM'R HUM. RTS (Dec. 18, 1979), https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women.

343 *Access to Safe and Legal Abortion: Urgent Call For United States to Adhere to Women's Rights Convention*, UN OFF. COMM'R HUM. RTS (July 1, 2022), https://www.ohchr.org/en/statements/2022/07/access-safe-and-legal-abortion-urgent-call-united-states-adhere-womens-rights.

344 1155 U.N.T.S. 331.

CONCLUSION

History has shown that countries learn from one another, and by remaining open to the ideas of their neighbors, flourish. No single nation can answer every question and solve every problem. The long and rich history of European civil law nations—from Ancient Rome to modern France—has much to offer the United States in terms of not only law, but also of a broader cultural approach to reproductive rights and bodily autonomy. The great historian Will Durant once asked and answered his own question: "Why do we still study Rome today? *De nobis fabula narratur*; of ourselves is this Roman story told."[345]

Today, in the post-*Dobbs* world, the relationship between the United States and civil law countries is more crucial than ever.[346] The United States has suffered a grievous blow. Perhaps France, with her experiences in these matters operating from a civil law perspective, can help guide the United States back to a time when it focused on protecting that most precious of individual rights, the right to control our own bodies, and the most important right, the right of a woman to access legal and safe abortions.

[345] WILL DURANT, CAESAR AND CHRIST 8 (Vol. VIII, Simon & Schuster, 1944).

[346] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).