The Mexican Supreme Court's (Sexual) Revolution?

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Everybody shake it
Time to be free amongst yourselves,
Your mama told you to be discreet
And keep your freak to yourself.
But your mama lied to you all this time,
She knows as well as you and I
You've got to express what is taboo in you
And share your freak with the rest of us,
'Cause it's a beautiful thang . . .
This is my sexual revolution.
—Macy Gray[1]

This Article analyzes a recent string of cases decided by the Mexican supreme court regarding sexual and reproductive rights and involving issues such as abortion, gay marriage, adoption by same-sex couples, and transgender identity. The purpose of this inquiry is twofold. At one level, it seeks to sort out what the court has in fact said and refrained from saying about the fundamental rights involved—sexual liberty and reproductive liberty—and to contrast the disparate articulation of the court's constitutional doctrine regarding each of them. At a second level, it seeks to illustrate, through the analysis of a family of cases, how the court is struggling to define its newfound role as the entity in charge of substantively interpreting the constitution and, specifically, the fundamental rights contained therein. It proposes that the disparate articulation of the rights of sexual liberty and reproductive liberty reflects a deeper tension within the court: whether to continue in a formalistic tradition that understands the constitution as a set of rules to be applied or instead to assume a new role as the ultimate interpreter of the constitution.

I. Introduction: A New (Role for the) Supreme Court

It is commonplace to state that over the last decade or so, Mexico's supreme court has emerged as a key institution not only in Mexican law, but also in politics, government, and controversial social debates and

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1. MACY GRAY, *Sexual Revolution*, *on* THE ID (Epic Records 2001).

transformations.[2] The court has decided groundbreaking cases on key national issues that range from governance and government (including cases dealing with issues such as financial privacy, limits to executive supplements to legislative bills, antitrust law, access to information, free speech, telecommunications regulation, and due process) to contested social issues (such as abortion, emergency contraception, gay marriage, and HIV/AIDS).[3] In doing so, it has become the focus of media, political, and social attention and controversy. It has also emerged as the key institution in shaping or reshaping law and legal culture in Mexico. This was not always so.

Up until 1994, the Mexican supreme court was a rather obscure institution to which the media, politicians, citizenry, and legal scholars paid little attention. The role it played in the development of constitutional law was not substantively different from that of any lower court. It decided cases, but its decisions had little or no impact beyond the parties to the litigation: even when a law was deemed unconstitutional by the court, it was not stricken from the records but was simply held inapplicable to the successful challenger.[4]

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2. *See, e.g.*, KARINA ANSOLABEHERE, LA POLÍTICA DESDE DE JUSTICIA: CORTES SUPREMAS, GOBIERNO Y DEMOCRACIA EN ARGENTINA Y MÉXICO [FROM POLITICS TO JUSTICE: SUPREME COURTS, GOVERNMENT AND DEMOCRACY IN ARGENTINA AND MEXICO] 197 (2007) (noting the Mexican supreme court's willingness to assume political functions in addition to its judicial functions); Estefanía Vela & José Reynoso, *Estudio Preliminar: La consolidación de la democracia y los Tribunales Constitucionales* [*Preliminary Study: The Consolidation of Democracy and Constitutional Tribunals*], *in* TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA [CONSTITUTIONAL TRIBUNALS AND DEMOCRACY] XIII, XIII–XVI (2008) (discussing the important role of Mexico's supreme court in the process of effectively implementing democracy in Mexico).

3. *See* Alejandro Madrazo, *The Evolution of Mexico City's Abortion Laws: From Public Morality to Women's Autonomy*, 106 INT'L J. GYNECOLOGY & OBSTETRICS 266, 267–69 (2009) (Neth.) (describing the supreme court's decisions upholding reforms to Mexico City's abortion laws); David Agren, *Court Says All Mexican States Must Honor Gay Marriages*, N.Y. TIMES, Aug. 11, 2010, at A6 (summarizing a supreme court decision guaranteeing state recognition of same-sex marriages that are registered in Mexico City); Elisabeth Malkin, *Mexico's Court Limits Reach of Big Media*, N.Y. TIMES, June 8, 2007, at C2 (introducing the new authority of Mexican antitrust enforcers to combat market dominance and a Mexican supreme court decision involving dominance issues in the media markets); *Mexican Supreme Court Rules on HIV in Military*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 25, 2007, at 3A (reporting the supreme court's ruling that the dismissal of HIV-positive soldiers from the military was unconstitutional); Hector Tobar, *In a Supremely Unusual Trend, Mexico's Bench Taking a Stand*, L.A. TIMES, June 22, 2007, at A3 (discussing a media licensing law, which the court found to be "both a violation of the right to free speech and a hindrance to the operation of the free market").

4. This had to do with the fact that the only procedural mechanism for constitutional challenges by individuals was, until then, the writ of *amparo*, a complex, highly technical (and thus expensive) procedure originally designed in the mid-nineteenth century to petition federal courts to protect fundamental rights. The key limitations of the writ of *amparo* include very stringent requirements for having standing before the courts, the impossibility of questioning the constitutionality of the authority of the government whose laws or acts are being challenged, and a ban on third-party effects of the courts' decisions, even the supreme court's. *See* Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 107, frac. II, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Última reforma publicada 29 de Julio de 2010) (Mex.) (regarding the effects of the writ of *amparo*); Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [LA] [Legal Protection Law, Procedural Rules of Articles

A 1994 constitutional amendment overhauled the supreme court and, to a somewhat lesser extent, reformed the rest of the judiciary. It reduced the number of justices from twenty-one to eleven, removed the sitting justices and appointed new ones, expanded its constitutional jurisdiction by incorporating two new procedures allowing access to judicial review—the *acciones de inconstitucionalidad* (actions of unconstitutionality) and *controversias constitucionales* (constitutional controversies)—and generally restructured the administration of the judiciary.[5] Thus began what is officially the Ninth Era of the supreme court.[6]

The thrust of the 1994 reform sought to establish the court as a constitutional arbiter in conflicts between branches and levels of

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103 and 107 of the Constitution of the United States of Mexico], arts. 73, 74, DO, 17 de Junio de 2009 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/20.pdf (regarding standing for the writ of *amparo*); Héctor Fix-Zamudio, *Ignacio Luis Vallarta: La incompetencia del origen y los derechos políticos* [*Ignacio Luis Vallarta: The Incompetence of the Origin and Political Rights*], *in* A CIEN AÑOS DE LA MUERTE DE VALLARTA [A HUNDRED YEARS FROM THE DEATH OF VALLARTA] 19, 23–24 (Instituto de Investigaciones Jurídicas eds., 1994), *available at* http://biblio.juridicas.unam.mx/libros/3/1042/4.pdf (regarding the challenge to the constitutionality of the elected authority); Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, 49 LATIN AM. POL. & SOC'Y 31, 35, 37 (2007) (noting that the court's decisions lacked effect on third parties and that the court lacked the ability to interpret the constitution until 1994).

5. Órgano del Gobierno Constitucional de los Estados Unidos Mexicanos [Constitutional Government Organ of the United States of Mexico], arts. 94, 105, DO, 31 de Diciembre de 1994 (Mex.), *available at* http://www2.scjn.gob.mx/Leyes/ArchivosLeyes/00130133.pdf. The *acción de inconstitucionalidad* granted legislative minorities of 33% as well as the Attorney General standing to challenge the constitutionality of a bill approved by a legislative majority directly before the supreme court. *Id.* art. 105. The *controversia constitucional* gave standing to all branches (executive, legislative, and state judiciaries) and levels of government (federal, state, and municipal) to challenge another branch or level of government or laws or actions that it felt impinged upon its constitutional jurisdiction. *Id.*

Technically speaking, the *controversia constitucional* already existed in Mexico; it was mentioned in the constitution but had not been regulated in a secondary norm, and historically it had been very sparsely used. Fabiola Martínez Ramírez, *Las controversias constitucionales como medio de control constitucional* [*Constitutional Disputes as a Means of Constitutional Control*], *in* 8 LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL: ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO [THE SCIENCE OF CONSTITUTIONAL LITIGATION: STUDIES IN HONOR OF HECTOR FIX-ZAMUDIO IN FIFTY YEARS AS RIGHTS INVESTIGATOR] 567, 569–70 (Eduardo Ferrer Mac-Gregor & Arturo Zaldívar Lelo de Larrea eds., 2008), *available at* http://biblio.juridicas.unam.mx/libros/6/2553/24.pdf. In 1995, the constitutional text was amended, but, more importantly, a law regulating both the *acción de inconstitucionalidad* and *controversia constitucional* procedures was enacted. Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos [Procedural Rules of Sections I and II of Article 105 of the Constitution of the United States of Mexico], DO, 11 de Mayo de 1995 (Mex.), *available at* http://www2.scjn.gob.mx/Leyes/ArchivosLeyes/8654_ TEXTO%20ORIGINAL.doc.

6. Each time a legal reform changes the structure and jurisdiction of the federal judiciary, a new *época*, or era, begins. *See ¿Qué es una época*? [*What is an Era*?], SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, available at: http://www.scjn.gob.mx/CONOCE/QUEHACE/LAJURISPRUDENCIA/Paginas/queesepoca.aspx (listing the various épocas, and the events creating them, after 1917 constitution).

government.[7] The new procedures that were set up to channel political conflicts allowed the court, for the first time in Mexican history, to strike down laws it deemed unconstitutional. The amendment did not, however, modify the writ of *amparo*, a long-standing and very limited procedure that gives ordinary citizens access to the federal judiciary when their fundamental rights are impinged upon, but does not allow striking down a law—at most, a law is simply not applied to those, and only those, who sought and won the *amparo*.[8] In other words, the court was refurbished to take on a new role as

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7. Mexico is a federal republic with three levels of government set up directly in the constitution: federal, state, and municipal (the functional equivalent of county government). C.P. arts. 49, 115, 122 (Mex.).

Traditionally, conflicts between levels or branches of government found political solutions through brokering conducted by the federal executive branch. *See, e.g.*, Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 180, 181 (Tom Ginsburg & Tamir Moustafa eds., 2008) ("[T]he ruling elite submitted to the autocratic political order based on presidential arbitration instead of fighting because the system was self-enforcing *as long as the PRI retained a monopoly on political office* and could guarantee members of the ruling elite a share of power over the long run."). Though barred from reelection, the cornerstone of the political system was the president, who was also the effective head of the party that dominated Mexican politics from 1929 until the 1990s: the Revolutionary Institutional Party (PRI). *Id.*

A series of electoral reforms, beginning in the 1960s but deepening and accelerating in the late 1970s through the late 1980s, opened up the possibility for opposition parties to gain access to a limited number of seats in both state and federal legislatures. *See* Pamela K. Starr, *Neither Populism nor the Rule of Law: The Future of Market Reform in Mexico*, 15 LAW & BUS. REV. AMERICAS 127, 129–30 (2009) (providing a historical overview of electoral reforms in Mexico). An unprecedented electoral competition in the highly questioned presidential race of 1988 resulted in the unification of a constellation of small, left-wing parties and the loss of the supermajority in congress required to reform the constitution. *See* Carol Wise, *Mexico's Democratic Transition: The Search for New Reform Coalitions*, 9 LAW & BUS. REV. AMERICAS 283, 289–90 (2003) (describing the results of the 1988 elections and mentioning the PRI's loss of the two-thirds majority required to amend the constitution). The Salinas Administration (1988–1994) saw an unprecedented growth of opposition in electoral politics, including the ascendance of right-wing party governors—specifically, from the National Action Party (PAN)—both through elections and negotiations with the PRI. *See id.* at 302 (describing the results of the 1997 elections).

The early 1990s saw unprecedented political diversification in elected offices. As opposition parties won (or negotiated) municipal and state government seats and won spaces in the legislatures, the president's capacity to arbitrate conflicts between branches and levels of governments was reduced. *See* Magaloni, *supra*, at 181–82 ("With multiparty competition emerging in the 1990s, the political order began to unravel because the president's leadership was challenged, first by opposition politicians and then by his co-partisans."). In December 1994, as Ernesto Zedillo assumed the presidency after a competitive but unchallenged election, his first act of government was to propose the constitutional amendment restructuring the federal judiciary. *See* Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U. J. INT'L L. & POL'Y 295, 295–96 (1996) (describing how, only one month after taking office, Zedillo initiated a constitutional amendment to "transform[] the composition, structure, and function of Mexico's Supreme Court of Justice").

8. Ríos-Figueroa, *supra* note 4, at 35–36. The writ of *amparo* was modified through an amendment in 1999, which strengthened the supreme court by making the decisions of the administrative head of the federal judiciary, the *Consejo de la Judicatura*, subject to the court's interpretations. *Cf.* C.P. art. 94 (Mex.) (specifying that the Federal Judicial Council has no jurisdiction over the supreme court and that the Council's decisions are limited by the constitution). It also allowed the court to select cases that it considered relevant to establishing "important" and

referee when political classes came into conflict, but the tools it was equipped with to address the protection of citizens' rights remained the old and rusty ones.

The court, however, has gone beyond its role as constitutional arbiter of political conflicts and has flexed its new muscles. It has increasingly taken on cases that concern the citizenry directly. Questions that demand the articulation of fundamental rights have been brought before it, either through political actors who intentionally or unintentionally voice citizens' concerns, or through the reinvigoration of the rusty writ of *amparo* stemming from the court's newfound notoriety. The court initially focused on the concerns of government officials (be they legislative minorities or elected officeholders), some very relevant to the functioning of government,[9] some less so.[10] But its new role as constitutional referee made the court the focus of public attention to an unprecedented degree.[11] In turn, citizens increasingly sought to reach this privileged forum to voice their demands for the articulation of fundamental rights, and politicians acquiesced to using their standing in *acciones* and *controversias* to take up causes dear to their constituencies.[12]

"transcendental" criteria. *Id.* art. 107, frac. IX. This language can be interpreted to allow the court to strike down laws, though it has chosen not to exercise that power.

9. *See* Acción de inconstitucionalidad 61/2008 y sus acumuladas 62/2008, 63/2008, 64/2008 y 65/2008, Pleno de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Novena Época, 8 de Julio de 2008, slip op., *available at* http://www.scjn.gob.mx/2010/transparencia/Documents/Transparencia/Pleno/Novena%20época/2008/7_AI_61_08.pdf (ruling on provisions of federal election law); Controversia constitucional 22/2001, Pleno de la SCJN, Novena Época, 25 de Abril de 2002, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2001/Controversia%20constitucional%2022-2001%20de%20Pleno.pdf (deciding a case brought by congress against the president over a regulation interpreting the constitution).

10. *See* Controversia constitucional 5/2001, Pleno de la SCJN, Novena Época, 4 de Septiembre de 2001, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2001/Controversia%20constitucional%205-2001%20de%20Pleno.pdf (deciding a challenge brought by the head of the Mexico City government regarding time zones).

11. *See* Jeffrey K. Staton, The Impact of Judicial Public Relations on Newspaper Coverage 11–14, 18 (Aug. 23, 2004) (conference paper), *available at* http://mailer.fsu.edu/~jstaton/coverage.pdf (analyzing whether the Mexican supreme court's public relations campaign had a positive effect on media coverage of the court by discussing news coverage of the court between 1997 and 2002, and indicating that "the Mexican Supreme Court was extremely effective in calling media attention to [its] resolutions").

12. For instance, President Calderón, whose constituency is mostly a conservative middle class, has used the attorney general's standing to challenge both the decriminalization of abortion and the legalization of gay marriage and adoption. Women's rights advocates have formed alliances with both county governments and state human rights commissions to challenge state constitutional amendments that established the fetus's right to life. For more information on the abortion cases that have recently been decided or are currently pending decisions, see Estefanía Vela, *Current Abortion Regulation in Mexico* 2–3, 5–9 (CIDE División de Estudios Jurídicos, Working Paper No. 50, 2010), *available at* http://www.cide.edu/publicaciones/status/dts/DTEJ%2050.pdf (discussing the supreme court's precedents that led to further reform of abortion regulation in Mexico); Alejandro Madrazo, The Debate Over Reproductive Rights in Mexico: The Right to Choose vs. the Right to Procreation 6–20 (June 11–14, 2009) (conference paper), *available at*

The court's public notoriety has also had the (presumably unintended) consequence of transforming the role of the writ of *amparo*. Historically an obscure procedure, the *amparo* received little attention and seldom spoke to the substance of fundamental rights.[13] In recent years, however, a few high-profile *amparos* have triggered intense public debate and, more importantly, have been the occasion for the court to speak of and flesh out fundamental rights with unprecedented frequency and depth.[14]

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http://www.law.yale.edu/documents/pdf/sela/Madrazo_Eng_ConferenceVersion.pdf (analyzing both the majority and dissenting opinions in recent abortion cases).

13. This does not mean that the court has never spoken of fundamental rights through *amparos*. The court and the circuit courts (the equivalent to the federal circuit courts in the United States) have ruled *in relation* to fundamental rights when deciding an *amparo*. However, *amparos* before the supreme court and lower courts historically have been (and mostly still are) decided without taking on the substantive interpretation of fundamental rights. Although empirical studies on Mexico's courts have only recently been attempted, there are a few empirical studies that reflect this phenomenon. For instance, one study showed that the vast majority of cases before district courts were thrown out without addressing the substantive question posed to the court, in what has been labeled a policy of "deciding without solving." Ana Laura Magaloni & Layda Negrete, *El Poder Judicial y su política de decidir sin resolver* [*The Judicial Power and the Policy of Deciding Without Resolving*] 7 (CIDE División de Estudios Jurídicos, Working Paper No. 1, 2001), *available at* http://academica.mx/aleph/Documentos%20de%20Trabajo/DOCT2064372.pdf. Another study, which surveyed the court's published interpretations of due process rights during the Ninth Era, concluded that the court's interpretations regarding fundamental rights show a strong tendency toward a formalistic, not substantive, approach to constitutional norms. Ana Laura Magaloni Kerpel & Ana María Ibarra Olguín, *La configuración jurisprudencial de los derechos fundamentales: El caso del derecho constitucional a una defensa adecuada* [*The Jurisprudential Configuration of Fundamental Rights: The Case of the Constitutional Right to Adequate Counsel*], CUESTIONES CONSTITUCIONALES [CONST. QUESTIONS] (Mex.), July–Dec. 2008, at 107, 142. A broader historical (rather than empirical) survey of the court's criteria concluded that no particular constitutional theory existed informing Mexico's constitutional adjudication until at least 2002, and that the tendency of the court from 1940 until the 1994 amendment was minimalist, reducing the substantive content and the scope of the court's decisions to a minimum. JOSÉ RAMÓN COSSÍO, LA TEORÍA CONSTITUCIONAL DE LA SUPREMA CORTE DE JUSTICIA [THE CONSTITUTIONAL THEORY OF THE SUPREME COURT OF JUSTICE] 77–78 (2002). These studies indicate that, historically, the court seldom spoke substantively on fundamental rights, and when it did, it addressed only certain rights and generally did so in a superficial manner, refraining from fleshing out the meaning and scope of the rights.

14. For instance, the constitutional interpretation of due process rights was deeply transformed by the case popularly known as *Acteal*, resolved in August 2009. Juicio de amparo directo penal 9/2008, relacionado con la facultad de atracción 13/2008-PS, Primera Sala de la SCJN, Novena Época, 12 de Agosto de 2009, slip op., *available at* http://www.cursosamij.org.mx/material%20de%20apoyo/Javier%20Cruz%20Angulo/ACTEAL.pdf. It concerned an armed group of indigenous people, charged with the brutal massacre of more than forty-five Tzotzil Indians in 1997 in Chiapas. Héctor Aguilar Camín, *Regreso a Acteal III: El día señalado (Tercera y última parte, Diciembre 2007)* [*Return to Acteal III: On the Appointed Day (Third and Last Part, December 2007)*], NEXOS EN LÍNEA [LINKS ONLINE], (Aug. 8, 2009), http://www.nexos.com.mx/?P=leerarticulo&Article=748. It took nearly a decade for the perpetrators to be convicted, but the supreme court later found that most of the proof used to convict them had been either illicitly obtained (under torture) or fabricated (including the prosecution's key witness who, despite not knowing how to read or write and speaking only Tzotzil, had rendered his testimony in writing and in Spanish) and therefore void. Juicio de amparo directo penal 9/2008, relacionado con la facultad de atracción 13/2008-PS, SCJN, slip op. at 437–42, 468–85. As a result, about a third of the prisoners were released (although the rest were not because they did not argue the same defense). *Id.* at 10.

In this context, Mexico's supreme court has ruled on landmark cases that have gained international attention for putting the country at the head of the advancement of sexual and reproductive rights. Since 2007, Mexico's supreme court has sanctioned the decriminalization of first-trimester abortion and the legalization of gay marriage and adoption, and it has established the fundamental right of transgender individuals to change their officially recognized sex without public registry of their previous sex.[15] These advancements in sexual and reproductive rights are all the more notable if one takes into consideration the law regarding sexual and reproductive rights before these decisions came down. Before this wave of noteworthy cases, the court considered rape perpetrated within a marriage to be the exercise of a right (admittedly, an undue exercise, but a right nonetheless)[16] and that the possibility of terminating a pregnancy for medical reasons could be allowed insofar as the termination of the pregnancy formally remained a crime.[17] The contrast between the two extremes of this evolution in the law of sexual and reproductive rights is astounding, and one is not surprised by the recently acquired notoriety of the court. It certainly looks like a revolution in sexual and reproductive law in Mexico.

The matter, however, is less clear if one looks at the arguments that sustain the court's decisions rather than at their results. In deciding some of these cases, the court has been reluctant to articulate or even recognize the existence of certain fundamental rights. By contrast, in deciding other cases, the court has been proactive and creative in both articulating rights and fleshing them out. The result has been a disparate acknowledgement and development of the rights involved. The contrast between the different ways in which these rights have been developed through the court's decisions illustrates the tension that the court faces when it is required, or has the opportunity, to reflect upon the span and meaning of constitutional rights in

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This is arguably the most important case regarding due process, because it fleshed out, for the first time, the standards of proof for conviction in a criminal prosecution. *Id.* at 132–45. This case has already served as precedent in other high-profile cases that were recently decided by the supreme court, in what seems to be the beginning of a string of due process cases. *E.g.*, Recurso de apelación 2/2010, Primera Sala de la SCJN, Novena Época, 28 de Abril de 2010, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/10000020.044.doc (popularly known as *Teresa y Alberta*); Dictamen que valora la investigación constitucional realizada por la comisión designada en el expediente 3/2006, Pleno de la SCJN, Novena Época, 12 de Febrero de 2009, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/06000030.223.doc (popularly known as *Atenco*).

15. All of these decisions are particularly noteworthy, considering that Mexico is a Latin American transitioning democracy composed primarily of Catholics. *See Principales religiones: Volumen de la población católica* [*Principle Religions: Volume of the Catholic Population*], INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA [NAT'L INST. STAT. & GEOGRAPHY], http://www.inegi.org.mx/Sistemas/temasV2/contenido/sociedad/rel03.asp?s=est&c=22438 (last modified Mar. 3, 2011) (noting that in the 2010 census, 84.2% of Mexicans self-identified as Catholic).

16. *See infra* subpart II(B).

17. *See infra* subpart II(A).

general. In its recent transition, the court has gone far, but it is still struggling to come to terms with its emerging role as a constitutional court while holding on to a long-standing tradition in which it understood itself as a court of justice within the continental tradition, ever respectful of and deferential to the text of the law.

This Article takes an initial look at the substantive interpretations of the constitution in the supreme court's decisions in an attempt to understand the struggles it is grappling with while undergoing a deep transformation. To do so, we will trace the recent evolution of two fundamental rights that have only recently become central to the court's discussions: sexual liberty and reproductive liberty. We will then reflect on what this tells us about the broader transformation that the supreme court is undergoing. The Article is divided accordingly. In Part II, we will briefly describe the cases and the opinions the court has produced regarding these rights so that the raw material is laid out for the reader to follow. Part III analyzes these opinions to identify what the court has said and what it has implied about the rights it refers to most often as "sexual liberty" and "reproductive liberty." Finally, in Part IV, we reflect by way of conclusion upon what this revolution in sexual- and reproductive-rights law tells us about the court's own evolution from a common court of law to a budding constitutional court.

II. The Cases

There are seven important cases regarding sexual- and reproductive-freedom rights in recent court history. They were selected for what they *say* regarding these rights or for what they *could have said* but did not. In this Part, all seven of these cases will be described briefly, including how they came to be heard by the supreme court and what the supreme court decided on the matter. They are presented in chronological order by date of decision, from the oldest (January 30, 2002) to the newest (August 16, 2010).

A. Ley Robles *Case*[18]

In 2000, Mexico City's legislative assembly reformed its criminal code, altering the regulation of abortion.[19] One of the reform's main points was to

18. Acción de inconstitucionalidad 10/2000, Pleno de la SCJN, Novena Época, 29 y 30 de Enero de 2002, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2000/Acción%20de%20inconstitucionalidad%2010-%202000%20de%20Pleno.pdf. Cases in Mexico are identified by reference to the type of procedure, the specific court deciding it, and the corresponding file number. This is, to say the least, a cumbersome way of identifying cases (resulting from the historic lack of importance of case law in Mexico's legal system). We have chosen to name the cases, so that reading the Article is more comfortable and clearer. Where popular names are widely adopted—as in this case, where the reform was named after the Mexico City mayor who promoted it—we have kept them. On other occasions we have altered the popular name—such as in the *Sexual Identity* case that is popularly known as the *Transsexuals* case—because we felt it to be misleading.

broaden the number of exceptions under which abortion was not to be punished. To rape and imprudence (i.e., accident), they added three new instances in which sanctions were not to be applied:

> [W]hen a woman is artificially inseminated without her consent, when there is a threat to the woman's health, and when there are adverse genetic and congenital conditions affecting the fetus which may result in physical or mental damage, to the extent that they put the product of conception's survival at risk.[20]

A qualified minority (at least 33%) of Mexico City's assembly challenged the reform through an *acción de inconstitucionalidad*. Specifically, they challenged the congenital-malformation exception to punishment, arguing, basically, that it violated the fetus's right to life.[21] The court upheld the reform, but for very peculiar reasons.

The court framed the question as follows: does the amendment violate the right to life of the fetus?[22] The court found the right to life to be protected from the moment of conception, based on constitutional clauses that deal with labor rights regarding maternity (for example, the right to maternity leave or a prohibition on employers requiring risky activities from pregnant women).[23] Having found that the fetus has a right to life, the court then went on to consider the criminal code. It focused on the fact that the law under scrutiny held abortion to be a criminal act even in the instances where it mandated that punishment should be withheld.[24] For the court, the fact that the conduct was not technically "decriminalized" was key.[25] The bottom line is this: the state is still sending the message that *abortion is wrong* (it is illegal); but it chooses not to punish under certain conditions as long as, the court affirmed once again, all the requisites established by the law are fulfilled.[26] The constitutionality of the reform lies in the fact that under its terms, abortion remains a crime.

Notably, the court is completely silent regarding reproductive freedom or any other fundamental right, with the exception of the right to life for the fetus.

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19. Deborah L. Billings et al., *Constructing Access to Legal Abortion Services in Mexico City*, 10 REPROD. HEALTH MATTERS 86, 87 (2002); Madrazo, *supra* note 3, at 267.

20. Vela, *supra* note 12, at 2 (internal quotation marks omitted).

21. Acción de inconstitucionalidad 10/2000, SCJN, slip op. at 15–16.

22. *Id.* at 84–85.

23. *Id.* at 100–01.

24. *Id.* at 70–71.

25. *Id.* at 71.

26. These conditions are (1) that two doctors conclude that the product of conception presents genetic or congenital conditions that (a) may result in physical or mental damage and (b) may result in risk of death *for the product*; (2) that the woman consent to the abortion; (3) that her consent was the result of a free, informed, and responsible decision; (4) that it was based, in part, on the doctors' diagnoses and objective, truthful, sufficient, and opportune information; and (5) that she have information regarding the procedures, risks, consequences, effects, and alternatives to abortion, as well as the support available to her. *Id.* at 72–74.

B. Conjugal Rape Case[27]

In 2005, the court's first chamber[28] decided a prickly question: whether or not forced intercourse between spouses was rape. It was not the first time the chamber resolved this issue: in 1994, it had ruled that if the sexual intercourse imposed was potentially procreative, it should be prosecuted as the crime of "undue exercise of a right," but not as rape.[29] Eleven years later, the chamber was asked to reverse its criteria, and it did.

The first time it was confronted with the matter, neither sexual nor reproductive freedom was taken to be part of the problem. In 2005, however, it was the constitutional clause stating that every person has a right to choose the number and timing of one's children (Right to Choose Clause)[30] that reversed the chamber's decision. After citing article 4, paragraph 2 of the constitution, the chamber held that even if procreation is to be considered the end of marriage,

> that cannot be interpreted as to allow one of the spouses to force the other to the carnal act . . . since [trumping marriage's purpose] is the right of every person to decide not just regarding her sexual freedom and the free disposition of her body, but to determine when the perpetuation of the species shall be attempted.[31]

With this, the chamber reversed its previous ruling and affirmed categorically that, conjugal debt or not, when one spouse imposes sex on the other, the action should be considered rape.[32]

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27. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, Primera Sala de la SCJN, Novena Época, 16 de Noviembre de 2005, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/46/0500009P.S39.doc.

28. The supreme court can function in chambers (*Sala*) or en banc (*Pleno*). Ley Orgánica del Poder Judicial de la Federación [LOPJF] [Enabling Law for the Federal Judiciary], *as amended*, art. 2, DO, 26 de Mayo de 1995 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/172.pdf. There are two chambers, each constituted of five justices. *Id.* Although the arrangement is more flexible in practice, the first chamber is responsible for hearing civil and criminal cases, while the second chamber is designated for labor and administrative cases. *Id.* arts. 10, 21. The chief justice only sits when the court decides cases en banc. *Id.* arts. 2, 10. All *acciones* and *controversias* must be decided en banc. *Id.* art. 10.

29. Contradicción de tesis 5/92, Primera Sala de la SCJN, Octava Época, 28 de Febrero de 1994, slip op., *available at* http://www2.scjn.gob.mx/ius2006/UnaEj.asp?nEjecutoria=187&Tpo=2. The court began its exercise asking what the end of marriage was, not what the constitution says (or what international treaties say, for that matter). *Id.* Since reproduction is understood to be the end of marriage, the court held that the spouses have a right to reproduction ("conjugal debt" or "carnal debt"). *Id.* This right, however, only implies reproductive sex (which it dubbed "normal copulation") and not sex for pleasure ("abnormal copulation"). *Id.* Therefore, if a spouse imposes, for instance, anal sex, it is rape; if the spouse, on the other hand, imposes vaginal sex, it is the undue exercise of a right.

30. C.P. art. 4 (Mex.).

31. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, SCJN, slip op. at 61.

32. *Id.* at 63–64. One thing that has to be mentioned is the fact that the chamber completely ignored the circuit court's arguments to reverse the criteria. This is important because the circuit court—the petitioner in this case—based most of its arguments not just on sexual freedom, but on equality. *Id.* at 26–27. To the circuit court, the problem of conjugal rape was one that must have

C. HIV and the Military Case[33]

A member of the army was discharged after being diagnosed with HIV.[34] Upon discharge, he lost his social security coverage and was left without the means to treat his illness.[35] His discharge, however, had a seemingly solid legal basis: an article of the armed forces' social security law established that, following an HIV diagnosis, he was to be considered "useless" for military purposes and thus could be discharged.[36] The plaintiff filed an *amparo* challenge against the clause on the grounds that it was health-based discrimination.[37] Having HIV, he argued, is not a sufficient reason to consider a soldier useless, since carrying the virus does not automatically mean that one is unable to perform one's duties; if treated correctly, one can lead a regular life for years, even decades.[38]

The matter, as framed by the court, consisted of weighing and balancing two competing interests: the efficiency of the military versus a person's right not to be discriminated against because of his health.[39] For the majority of the justices, the restriction was aimed at pursuing a constitutionally valid interest: having healthy, functional soldiers.[40] In this sense, the problem was not the purpose pursued, but the way it was pursued: was this measure a good means to that end and, more importantly, was the benefit it sought greater than the harm it caused? On both accounts, the court responded negatively.[41] Since HIV does not necessarily imply being unfit for duty, this measure, the court held, cannot be understood as furthering the state's interest—at least if one considers that, along the way, soldiers are deprived of duty and their rights.[42]

Because of the way the issue was framed, it did not become a matter of sexual rights (or sexual health), but rather a case of nondiscrimination. As Ana Amuchástegui and Rodrigo Parrini noticed, the "ghost" of homosexuality did appear at several points during the plenary's discussion,[43] but those

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been resolved by appealing to equality: since there is a disparity between men and women when it comes to sex, permitting conjugal rape ensured women's (sexual) subordination to men. Regarding this, the chamber remained silent.

33. Amparo en revisión 307/2007, Pleno de la SCJN, Novena Época, 24 de Septiembre de 2007, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/07003070.002.doc.

34. *Id.* at 3–4.

35. *Id.* at 3–5.

36. *Id.* at 18, 57.

37. *Id.* at 5, 21. The constitution prohibits discrimination "motivated by . . . health conditions." C.P. art. 1 (Mex.).

38. Amparo en revisión 307/2007, SCJN, slip op. at 23.

39. *Id.* at 55–58.

40. *Id.* at 71.

41. *Id.* at 71, 78.

42. *Id.* at 80.

43. Ana Amuchástegui & Rodrigo Parrini, *Sujeto, sexualidad y biopoder: la defensa de los militares viviendo con VIH y los derechos sexuales en México* [*Subject, Sexuality and Biopower:*

interventions are not part of the opinion.[44] Strictly speaking, the court was silent on the matter of sexuality.

D. Decriminalization Case[45]

Of the six cases the court has decided concerning abortion, the most important deals with the decriminalization of first-trimester abortion in Mexico City.[46] In 2007, Mexico City's assembly once again reformed its criminal code and its health law by redefining the crime of abortion as the interruption of pregnancy after the twelfth week, and establishing that prior to that time, voluntary abortion would be part of the health services granted free of charge by the state.[47] For second- and third-trimester abortions, the reform left untouched the series of exceptions to the rule that abortions constituted criminal conduct.[48] The assembly based the reform on several

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The Defense of the Soldiers Living with HIV and Sexual Rights in Mexico], 27 ESTUDIOS SOCIOLÓGICOS [SOC. STUD.] 861, 874 (2009) (Mex.). In Mexico, the plenary's discussions are public and broadcasted through television (and later transcribed and posted online).

44. In an article analyzing the eleven cases that the supreme court resolved dealing with the discharge of members of the military for being HIV positive, Amuchástegui and Parrini acknowledge that part of the silence had to do with how the defense, and not just the court, framed the matter: it was easier, on behalf of the soldiers, to frame their problem in terms of health, social security, and labor rights than to address the sexual discrimination latent in most of their histories. *Id.*

45. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, Pleno de la SCJN, Novena Época, 28 de Agosto de 2008, slip op., *available at* http://www.unifr.ch/ddp1/derechopenal/temas/t_20090316_03.pdf.

46. *Id.* From 2000 to today, the court has solved six cases dealing with abortion: (1) Acción de inconstitucionalidad 10/2000, Pleno de la SCJN, Novena Época, 29 y 30 de Enero de 2002, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2000/Acción%20de%20inconstitucionalidad%2010-%202000%20de%20Pleno.pdf; (2) Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op.; (3) Controversia constitucional 54/2009, Pleno de la SCJN, Novena Época, 26 de Mayo de 2010, slip op., *available at* http://www.scjn.gob.mx/documents/pr_cc_54_09.pdf; (4) Amparo en revisión 633/2010, Segundo Sala de la SCJN, Novena Época, 22 de Septiembre de 2010, slip op., *available at* http://www.scjn.gob.mx/Micrositios/unidadcronicas/Sinopsis%20de%20Asuntos%20destacados%20de%20las%20Salas/2S-220910-SSAA-633.pdf; (5) Amparo en revisión 644/2010, Segundo Sala de la SCJN, Novena Época, 22 de septiembre de 2010, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/10006440.002.doc; and (6) Amparo en revisión 687/2010, Segundo Sala de la SCJN, Novena Época, 22 de Septiembre de 2010, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/10006870.002.doc. We group *Controversia constitucional* 54/2009 as an abortion case because it was challenged as a "chemical abortion" that violated the right to life (under state constitutional law) of the fetus. *See infra* note 78 and accompanying text.

47. Código Penal para el Distrito Federal [CPDF] [Criminal Code for the Federal District], *as amended*, art. 144, Gaceta Oficial del Distrito Federal [GODF], 16 de Julio de 2002; Ley de Salud para el Distrito Federal [Health Law of the Federal District], *as amended*, art. 16, DO, 15 de Enero de 1987 (Mex.).

48. CPDF art. 148. Again, the exceptions are: when the pregnancy is the result of rape or an artificial insemination that was not consented to; when the fetus has a congenital malformation; when the woman's health is at risk; or when the pregnancy is the result of imprudence (i.e., accident). *See supra* note 20 and accompanying text. This change—from considering abortion a crime *not to be punished* to *not considering it a crime at all*—had been implemented in 2004 and was unchallenged in court. Madrazo, *supra* note 3, at 267–68.

fundamental rights. It was deemed to be a measure that made women's right to health effective, referring to the high numbers of complications resulting from clandestine abortions.[49] The reform was also believed to make women's right to control their sexuality and reproduction effective: the decriminalization of abortion before the twelfth week of pregnancy was thought of as an advancement of reproductive freedom.[50] Women would now be able to choose on their own terms and for their own reasons. Last but not least, the reform was presented as a way to make women's right to equality effective: by making the legal interruption of pregnancy available to all, the reform ensured that there would not be an economic distinction between the women who could and those who could not get safe abortions.[51]

The decriminalization of abortion was challenged before the supreme court by both the federal attorney general's office and the head of the National Commission of Human Rights through two independent *acciones de inconstitucionalidad*.[52] The two main arguments they advanced to strike down the new law were (a) that it violated the fetus's right to life, and (b) that it violated the men's rights to procreation and to equality (because it placed the final decision entirely in the hands of women).[53]

The court decided the case in August 2008. In its plurality opinion,[54] it framed the question before it as follows:

> This case confronts us with a peculiar problem, in which the question to be answered is the opposite of the one responded to by [constitutional courts in most abortion cases elsewhere]: we must ask if the state has the obligation to criminalize a specific type of conduct, and not if the criminalization of a particular type of conduct affects or violates constitutional rights.[55]

This manner of casting the question allowed the plurality to sidestep the fundamental question of abortion cases: the existence of women's right to

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49. Iniciativa de Reforma a los Artículos 145 y 147 del Código Penal para el Distrito Federal, Que Presenta el Diputado Jorge Carlos Díaz Cuervo de la Coalición Parlamentaria Socialdemócrata [Initiative to Reform Articles 145 & 147 of the Criminal Code for the Federal District, Presented by Deputy Jorge Carlos Díaz Cuervo of the Social-Democratic Parliamentary Coalition], Diario de los Debates de la Asamblea Legislativa del Distrito Federal [Journal of the Debates of the Legislative Assembly of the Federal District], 10–11, 28 de Noviembre de 2006, *available at* www.aldf.gob.mx/archivo-8b1bb5ba4d386d700a7516ccf2ede1b4.pdf.

50. *Id.* at 12.

51. *See id.* at 11 (expressing concern at the fact that, prior to the reform, 74% of low-income women were not aware that they could terminate their pregnancies at the government's expense under certain circumstances).

52. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, Pleno de la SCJN, Novena Época, 28 de Agosto de 2008, slip op. at 1–2, *available at* http://www.unifr.ch/ddp1/derechopenal/temas/t_20090316_03.pdf.

53. *Id.* at 185–87.

54. The plurality opinion technically gathered a qualified majority of eight votes. However, seven out of those eight justices wrote concurring opinions (all except Justice Cossío, who drafted the plurality opinion). *Id.* at 207–08. Therefore, the binding force of that plurality is rather weak.

55. *Id.* at 177.

choose. Having framed the question in this manner, the court found the decriminalization of abortion to be constitutional.[56] It did so by focusing on a technical aspect of criminal law—the principle of strict legality—according to which there is no crime unless expressly and clearly stated in a written text.[57] Likewise, if the constitution does not expressly and specifically establish the legislature's obligation to criminalize a behavior, then no such obligation exists. Importantly, the assembly's defense offered that argument in its brief, although it focused mostly on women's rights and the implausibility of considering the fetus a rights holder if it was not technically a "person" according to civil law.[58] The defense explicitly invoked reproductive liberty as established in the Right to Choose Clause.[59] However, the plurality opinion provided no answer to fundamental-rights arguments.[60]

This time around, a plurality opinion held that the right to life of a fetus was not in the constitution.[61] Rather, the plurality found that the state had an obligation to promote and secure the conditions of an already existing life.[62] It found that the question of when life began remained unanswered by the constitution or the international treaties signed by Mexico.[63] With this, the court basically reversed its holding from 2002,[64] which had established that the constitution protected the right to life from the moment of conception.[65] Further—and more importantly—it held that "the mere existence of a constitutional right does not imply an obligation to criminalize a type of conduct that affects it."[66] With this, the court basically determined that enshrining the right to life (even if life begins at conception) does not imply that abortion must be criminalized. Actually, the core of its holding—that there is no constitutional mandate to criminalize abortion and thus that legislative decriminalization is constitutional—was Justice Gudiño Pelayo's concurring opinion in 2002.[67] It is remarkable that in a six-year period a

56. *Id.* at 177–85.

57. *Id.*

58. *Id.* at 55–56.

59. *Id.* at 57.

60. *Id.* at 177–85.

61. *Id.* at 175.

62. *Id.* at 174–75.

63. *Id.* at 127.

64. Acción de inconstitucionalidad 10/2000, Pleno de la SCJN, Novena Época, 29 y 30 de Enero de 2002, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2000/Acción%20de%20inconstitucionalidad%2010-%202000%20de%20Pleno.pdf.

65. *Id.* at 90–97.

66. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 176.

67. Acción de inconstitucionalidad 10/2000, SCJN, slip op. at 181–82 (Gudiño Pelayo, J., concurring).

10-to-1 majority for the constitutional right to life from conception would shift to a 3-to-8 minority.[68]

As stated above, those against the decriminalization of abortion also argued that it violated men's rights to procreation and equality, because it placed the final decision exclusively with women. The court determined that the reform was, contrary to the plaintiffs' argument, reasonable if one were to consider how pregnancy impacts men's and women's lives (women are generally the ones that deal with it) and how hard it is to establish paternity during the first trimester of a pregnancy.[69]

E. Sexual Identity Case[70]

In January of 2008, the court decided an *amparo* regarding transgender identity. The case did not involve the right to change one's name or sex, but rather the possibility of keeping one's name and sex change a private matter.[71] Although it was strictly unnecessary to decide the case on matters regarding sexuality (privacy had been the core argument of the plaintiff), the court framed its decision by distinguishing between *sex* and *gender*, assessing their relevance to a person (and society), and then constructing the rights related to sexual and gender identity and, importantly, sexual liberty and self-determination.[72]

In the end, the court established that every person has a right to a sexual identity, which includes the right to have sexual reassignment surgery (if one so chooses) and a legal sex change.[73] The court also addressed every person's right to privacy, which involves the decision of choosing what in one's life is private and what is not[74]—for instance, the revelation of a legal sex change, which ultimately rests on the person and not on the state (or anyone else).

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68. *Compare id.* at 120–22 (announcing votes in the *Ley Robles* case), *with* Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 207–08 (announcing votes in the *Decriminalization* case).

69. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 188–89.

70. Amparo directo civil 6/2008, relacionado con la facultad de atracción 3/2008-PS, Pleno de la SCJN, Novena Época, 6 de Enero de 2009, slip op., *available at* http://www.equidad.scjn.gob.mx/IMG/pdf/IV-11-_Amparo_Directo_Civil_62008_relacionado_con_la_facultad_de_atraccion_32008-PS_Cambio_de_nombre_en_el_acta_persona_transexual_.pdf.

71. *Id.* at 51.

72. *Id.* at 66–75, 86–90.

73. *Id.* at 90.

74. *Id.* at 87.

F. Emergency Contraception Case[75]

This case concerned the constitutionality of an administrative bylaw regulating the medical attention provided to female victims of sexual, family, or general violence. The bylaw obligated all medical institutions (federal and local, public and private) to give emergency contraception to rape victims and required public health institutions, after being authorized by the corresponding authority, to give medical abortions to rape victims.[76]

The bylaw was challenged by the state government of Jalisco through a *controversia constitucional* on the grounds that providing attention to victims of crime—in this case, rape—was under the jurisdiction of state criminal authorities; thus, the bylaws represented an invasion of the state's criminal jurisdiction by federal health authorities.[77] Jalisco's governor also argued that emergency contraception amounted to "chemical abortion," which was prohibited by the state constitution (which had been reformed, after the 2008 decision on abortion, to state that life was constitutionally protected from the moment of conception).[78]

The court rejected the state government's claim that the "morning-after pill" was chemical abortion on the grounds that a previous, unchallenged bylaw had referred to it as contraception, not abortion.[79] The court then focused its attention on the question of jurisdiction. It found that the state's jurisdiction pertained to treatment of victims from the perspective of criminal law, but that medical attention could be regulated by federal health authorities.[80] Furthermore, it insisted that since state criminal authorities were included in the process of giving victims access to medical abortions (they had to authorize the procedure), the bylaws did not violate Jalisco's jurisdiction.[81]

G. Same-Sex Marriage Case[82]

In December of 2009, Mexico City's assembly reformed its civil code and redefined marriage to allow same-sex marriage (and, simultaneously, though nobody seemed to notice it, same-sex *common law marriage*).[83] This

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75. Controversia constitucional 54/2009, Pleno de la SCJN, Novena Época, 26 de Mayo de 2010, slip op., *available at* http://www.scjn.gob.mx/documents/pr_cc_54_09.pdf.

76. *Id.* at 58–60.

77. *Id.* at 5.

78. *Id.* at 7.

79. *Id.* at 61–62.

80. *Id.* at 65–72.

81. *Id.* at 60–61.

82. Acción de inconstitucionalidad 2/2010, Pleno de la SCJN, Novena Época, 10 de Agosto de 2010, slip op., *available at* http://www.scjn.gob.mx/Documents/AI-2-2010.pdf.

83. In Mexico City, there are now three legal structures for recognizing couples, all accessible to both gay and straight couples: (1) civil unions (*sociedades de convivencia*), which are not just tailored for sexual couples, but for cohabitants who decide to make a contract to regulate their relationship; (2) common law marriage (*concubinato*), which is acquired with the passing of time (2

change allowed gay couples access to adoption *as married couples*.[84] The reform was challenged by the Federal Attorney General's office.[85] It argued that altering the definition of marriage violated the constitutional protection of the family,[86] which protected and promoted only the ideal family that the constituent power had in mind (a sort of originalist argument): man and woman united through marriage for the purpose of having children.[87] It also argued that allowing gay couples to adopt violated the rights of children; specifically, that permitting the adoption would place them in a disadvantaged position relative to other children (namely, those that lived with heterosexual parents).[88]

In a historic and unprecedented decision, with an overwhelming majority (nine of eleven justices), the court upheld the reform: same-sex marriage and adoption are both constitutional.[89] More important, however, were the reasons for upholding the reform. Unlike abortion (to mention one example), the court did not restrict itself to answering a question of jurisdiction (is Mexico City's assembly authorized to change the definition of marriage?), but rather based its holding on the fundamental rights involved in the case.

Regarding marriage, the court's holding rested on two rights: (1) the right to the recognition and protection of one's family, and (2) the right to the free development of one's personality. For the court, article 4, paragraph 1 of the Mexican constitution,[90] which mandates the legal protection of the family, meant that the law has to protect the family as a social reality and not as an ideal model.[91] From this perspective, same-sex marriage is a new form of relationship that demands recognition.[92]

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years of cohabitation) or when there is both cohabitation and a child in common, and which is regulated in a manner similar to marriage; and (3) marriage, in a strict legal sense. *See* Código Civil para el Distrito Federal [CCDF] [Civil Code for the Federal District], *as amended*, art. 146, DO, 26 de Mayo de 1928 (Mex.) (setting out the prerequisites for formal marriage); *id.* art. 291 *bis* (common law marriage); Ley de Sociedad de Convivencia para el Districto Federal [LSCDF] [Law on Civil Union for the Federal District], *as amended*, art. 2, DO, 16 de Noviembre de 2006 (Mex.) (civil unions).

84. In Mexico City's civil code, two types of adoptions are available: adoption by single people and adoption by couples, whether married in common law marriage or in civil unions. *See* CCDF arts. 390–391 (stating the requirements that singles and couples, respectively, must meet in order to adopt). In both cases, prior to the reform there was no specific prohibition that banned gay couples (or gay single people) from adopting.

85. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 1.

86. C.P. art. 4 (Mex.).

87. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 2–7.

88. *Id.* at 22–26, 37–47.

89. *Id.* at 142–44.

90. C.P. art. 4 (Mex.).

91. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 140.

92. The court mentioned migration, women's integration into the work force, and divorce, observing that they all alter the way family bonds are established and have to be dealt with legally. *See id.* at 89–90 (surveying the past century's changes to social reality and asserting that legislators and judges must consider these changes when shaping the law). When dealing with these societal

Recognizing same-sex marriage, the court held, not only satisfies the right to have one's family ties protected, but also can be understood as making effective the right to the free development of one's personality.[93] In this respect, the court cited its own precedent—the *Sexual Identity* case—to establish that the right to the free development of one's personality entails the choices of getting married and of having kids.[94] The court indicated that by making it possible for same-sex couples to get married, the reform enabled them to choose their life's project.[95]

Regarding adoption, the court held that the best interests of the child were to be determined case by case and not through an a priori ban on gay adoption.[96] Furthermore, it held that simply posing the question, with nothing to distinguish one couple from another but their sexual orientation, was discriminatory in itself, and thus the question could not be answered by the court.[97]

III. The Rights

What has the court told us about the rights to sexual and reproductive freedom? For one thing, the court has said that each are fundamental rights. But the depth to which the court has interpreted these rights and established their reach is quite disparate. In this Part we will reconstruct these rights, based on what the court has said about them. We will take up each right separately, although they intersect at key points, examining the intersections from the perspective of each one. We use the terms "sexual liberty" and "reproductive liberty" for brevity's sake, though the court has used several different terms.

A. A Joint Origin?

If we take a step back and look at both rights, we find that they are both initially taken up in the *Conjugal Rape* case, decided in 2005. The two

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shifts, lawmakers should not try to halt change but should give way to what individuals really want out of their lives and facilitate their fulfillment. In this respect, it is important to bear one precedent in mind: *Amparo directo en revisión 917/2009*, in which the court dealt with the reforms to the Mexico City civil code that permitted a no-fault and one-party divorce—that is, it allowed a spouse to end a marriage unilaterally, without the need for mutual agreement or proof of a fault on the part of the other spouse. Amparo directo en revisión 917/2009, Primera Sala de la SCJN, Novena Época, 23 de Septiembre de 2009, slip op. at 2, *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/09009170.010.doc. In this case, the court said that allowing this change in divorce law, more than violating marriage and people's stability, allowed people to pursue what they truly wanted without a violent, long, and generally unnecessary hassle (as most divorce trials were). *Id.* at 45–46.

93. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 145.

94. *Id.* at 146–47.

95. *Id.* at 154.

96. *Id.* at 134.

97. *Id.* at 131–32.

fundamental rights take different paths in later cases, but it is interesting to look in detail at this first case, which substantively addresses them.

On this occasion, sexual liberty is first taken up as the "legal value"[98] protected by the criminalization of rape.[99] In this line, the first chamber specified that, in the past, the crime of rape was understood to protect legal values such as "personal modesty" (*pudicia*) or a woman's "honesty," but "a general consensus" held that the protected legal value today is "sexual liberty, which recognizes in a human being . . . the right to . . . sexual self-determination."[100] In this context, "sexual self-determination" refers to how one uses one's body (whether to have sex). As we shall see, this understanding of the concept of sexual self-determination will prove to be expansive in later cases.

Having set up sexual self-determination as a fundamental right in one corner, the first chamber then turned to balancing this right against its counterpart: the reproductive function of marriage.[101] As we saw, this case's precedent stated that a husband forcing his wife to have (potentially reproductive) intercourse had been deemed not the crime of rape, but an "undue exercise of a right."[102] This right, according to family law doctrine, stems from the "carnal debt" implied in a marriage contract, which in turn derives from the fact that reproduction was deemed to be the ultimate end of marriage.[103] On this occasion, however, when tackling the tension between sexual liberty and carnal debt, the first chamber established that the latter must give way to the former.[104]

The argument goes like this: even though reproduction is an end of marriage, it cannot be imposed by one party on the other because the constitution protects the right of each to "determine the moment in which the perpetuation of the species is to take place."[105] The first chamber, as we reviewed previously, based its decision on the Right to Choose Clause, which states that "every person has the right to choose in a free, responsible and informed manner the number and spacing of their children."[106] After quoting the article that explicitly establishes reproductive liberty, the first chamber stated that the right that stems from "carnal debt" presupposes, and is

98. In the continental tradition, the personal rights or social values legally protected through criminal law are referred to as a "protected legal value" or *bien jurídico protegido*.

99. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, Primera Sala de la SCJN, Novena Época, 16 de Noviembre de 2005, slip op. at 59, *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/46/0500009P.S39.doc.

100. *Id.*

101. *Id.* at 60–61.

102. Contradicción de tesis 5/92, Primera Sala de la SCJN, Octava Época, 28 de Febrero de 1994, slip op. at 6, *available at* http://www2.scjn.gob.mx/ius2006/UnaEj.asp?nEjecutoria=187&Tpo=2.

103. *Id.*

104. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, SCJN, slip op. at 63–64.

105. *Id.* at 61.

106. C.P. art. 4 (Mex.).

trumped by, the freedom "to determine, through mutual agreement and in full exercise of their sexual liberty, when they shall proceed to intercourse so as to procreate."[107]

In closing the door on "carnal debt" by recasting sexual liberty as a fundamental right and recasting reproduction not only as an obligation stemming from marriage but also as a fundamental right, the first chamber linked sexual liberty and reproductive liberty in deeper ways: sexual liberty became a spinoff of reproductive liberty, insofar as reproductive liberty is exercised through sexual liberty. The right to choose when to have children implies the right to choose when to have sex.[108] The textual grounding for the fundamental right to sexual liberty—which is understood here as what one does with one's body—is the fundamental right to reproductive liberty. Sexual liberty is protected because it is a requisite of reproductive liberty. In this sense, the freedom the first chamber constructed is the right to say no to sex (for procreation) or the right to say no to procreation (through abstaining from sex).[109]

To review, let us focus on the key features of sexual and reproductive liberties as understood in this case. First, they are closely linked rights: sexual liberty is a means to secure reproductive liberty; thus, sexual liberty is grounded on the textual reference to reproductive liberty found in article 4 of the constitution.[110] Second, sexual liberty is understood as the liberty to have or not to have intercourse, that is, it relates to what one can do with one's body, in terms of sexual activity. Lastly, however, sexual liberty is deemed to be a right that can be legitimately limited by marriage (the obligation of fidelity, for instance, is one of those limits).

B. Sexual Liberty

Sexual liberty has been considerably more developed by the court than reproductive liberty. In a very short string of cases (two, to be precise), the court has come to construct this fundamental right in a remarkably expansive manner. Let us dive into this rapid evolution.

1. The Sexual Identity Case—Sexual liberty acquired a new dimension in the *Sexual Identity* case. Here, sexual liberty became detached from its grounding in reproductive liberty and acquired a far more complex structure. The cornerstone of the court's construction of sexual liberty in this case was the concept of dignity. From it the court derived a cluster of fundamental

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107. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, SCJN, slip op. at 61–62.

108. It is noteworthy that the court always speaks of *when*, not *whether*, to have children. Here the court seems to assume that one *must* have children at some point if one is married and can have children. After all, it still assumes that reproduction is a valid end of marriage; the problem is in abusing it and committing a crime.

109. Clearly, because of the case brought before it, the chamber only had procreative sex in mind, and not procreation without sex or sex without procreation.

110. C.P. art. 4 (Mex.).

rights woven together in a net of complex and not always clearly discernible, yet mutually reinforcing, relations. Because of space restrictions and the abundance and complexity of the court's reasoning, we will limit ourselves to presenting only those passages that directly flesh out the right to sexual liberty.

The word *dignity* appears in the Mexican constitution. After listing a set of suspect categories—including race, religion, (sexual) preferences, and gender—the constitution includes the catch-all phrase, "and any other that attacks human dignity."[111] From this phrase and from the international treaties subscribed to by Mexico—specifically those regarding human rights—the court identifies the right that is the "basis and condition of all others: the right to always be acknowledged as a human person. Thus, from human dignity all other rights stem, insofar as they are necessary for man to integrally develop his personality."[112] Dignity means that individuals have "the right to choose, in a free and autonomous manner, their life project. . . . Hence, the recognition of the right to the free development of one's personality."[113]

The court, having moved from dignity to the free development of personality, proceeded to flesh out this last right. The right covers (at least) the freedom to marry or not; the freedom to have children or not, and if one chooses to have children, the freedom to decide when;[114] and the freedom to choose one's appearance, profession, and "sexual option."[115] It is the freedom, in other words, to be who one is (literally).

The court then stated that "human dignity [also] encompasses, among others, the rights to intimacy and one's own image . . . as well as 'the right to personal identity . . . [, that is,] the manner in which one sees oneself and projects it in society.'"[116] This last right, the court noted,

> [also implies] the right to a sexual identity, since every person sees herself and projects herself unto society also from a sexual perspective. Not just regarding her sexual orientation, that is, her sexual preferences, but, primarily, the way she perceives herself, according to her psyche, emotions, feelings, etcetera. Such an identity is composed, not just of a person's morphological aspect, but,

111. C.P. art. 1 (Mex.).

112. Amparo directo civil 6/2008, relacionado con la facultad de atracción 3/2008-PS, Pleno de la SCJN, Novena Época, 6 de Enero de 2009, slip op. at 85, *available at* http://www.equidad.scjn.gob.mx/IMG/pdf/IV-11-_Amparo_Directo_Civil_62008_relacionado_con_la_facultad_de_atraccion_32008-PS_Cambio_de_nombre_en_el_acta_persona_transexual_.pdf.

113. *Id.* at 85–86.

114. This mention of reproductive liberty in passing is actually quite relevant. It is the first shift from understanding reproductive liberty as the liberty to choose *when* to have children—as in the *Conjugal Rape* case—to understanding it as the liberty to choose *whether* to have children.

115. Amparo directo civil 6/2008, relacionado con la facultad de atracción 3/2008-PS, SCJN, slip op. at 86–87.

116. *Id.* at 87–89.

> primordially, of a person's most profound feelings and convictions regarding her belonging to the sex she was legally assigned to at birth. According to this very personal adjustment, the individual shall live her life, not just for herself, but also for and with others. All this because, eminently, sexuality is an essential component of a person's life and her psyche; it forms part of the most personal and intimate sphere of human life. That is why sexual self-determination is transcendental to the recognition of human dignity and its full development; and that is why the constitutional protection includes a free decision regarding sexuality.[117]

The court concluded by saying that "the fundamental right to the free development of one's personality implies necessarily the recognition of the right to sexual identity and to gender identity . . . ."[118]

Thus, sexual liberty is (at least) three-pronged. It encompasses (1) sexual orientation—one's sexual preferences; (2) sexual identity—how one lives, in private and in public, and one's gender; and (3) sexual self-determination—how one models one's body. Rooted in the notion of human dignity and derived from the fundamental right to the free development of one's personality, the right to sexual liberty has now become fully fledged: it is no longer just a right that empowers people to do what they choose with their body, it also empowers them to make what they choose of their body. How one expresses one's sexuality to others is also encompassed, but that right is more robustly articulated in the *Same-Sex Marriage* case of 2010.[119]

Importantly, sexual liberty has at this point cut its mooring in reproductive liberty and now has a less textual, but far broader, base: dignity. Also, what is important is that there is an explicit recognition of the different aspects in which freedom and sexuality intersect; because of this ruling, every person has a right to choose who they want to be in terms of sex (male/female), gender (masculine/feminine), preference (attracted to males/attracted to females), relationships (married/not married), and parenting (having children/not having children; how many and when).

2. The Same-Sex Marriage Case—Sexual liberty, understood as a right derived from the right to free development of one's personality, was further construed in the 2010 *Same-Sex Marriage* decision.[120] Explicitly building on the *Sexual Identity* case, at first sight the court seemed to take its statements from precedent. But this time, the court enhanced the expressive dimension of the right.[121] The court stated that the right consists of "freely choosing

117. *Id.* at 89–90.

118. *Id.* at 97.

119. *See* discussion *infra* section III(B)(2).

120. Acción de inconstitucionalidad 2/2010, Pleno de la SCJN, Novena Época, 10 de Agosto de 2010, slip op., *available at* http://www.scjn.gob.mx/Documents/AI-2-2010.pdf.

121. Regarding decisions concerning gay rights in the United States, Laurence Tribe wrote,

how to live one's life, which includes, among other expressions, the freedom to marry or not; to have children and how many, or to not have them; to choose one's personal appearance; as well as one's free sexual option."[122]

Later in the opinion, the court took the expressive dimension of the right to a new level:

> If one of the aspects that leads the way a person projects her life and her relationships is her sexual orientation, it is a fact that, bearing the respect to human dignity, one can demand the State's recognition not only of a person's sexual orientation towards people of her same sex, but of their unions too.[123]

One is not only free to determine one's (three-pronged) sexuality and openly express it, but the state is obligated to acknowledge it. Sexual liberty has quickly evolved from the freedom not to engage in sex (i.e., the freedom to control what one does with one's body in terms of sexual activity—a freedom that admitted limitations, such as fidelity and "carnal debt") to a seemingly limitless freedom to deploy one's body as one wishes, and also to alter it and understand it freely (or as freely as can materially be done), as well as to present the body, its uses, and its meanings to the world while demanding official sanction by the state. All of this was constructed from a comparatively feeble mooring in the text of the constitution.

C. Reproductive Liberty

If a mention of dignity allowed the court to construct such a formidable edifice regarding sexual liberty, one would expect at least something similar regarding reproductive liberty, given that the text of the constitution

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> In the end, what anchors all of these decisions—from *Meyer* and *Pierce* to *Griswold* and *Lawrence*—most firmly in the Constitution's explicit text and not solely in the premise of self-rule implicit in the entire constitutional edifice is probably the First Amendment's ban on government abridgements of "speech" and "peacabl[e] . . . assembl[y]," taking those terms in their most capacious sense. For what are speech and the peaceful commingling of separate selves but facets of the eternal quest for such boundary-crossing—for exchanging emotions, values, and ideas both expressible in words and wordless in the search for something larger than, and different from, the merely additive, utility-aggregating collection of separate selves? And what is government doing but abridging that communication and communion when it insists on dictating the kinds of consensual relationships adults may enter and on channeling all such relationships, to the degree they become inwardly physically intimate or outwardly expressive, into some gender-specified or anatomically correct form? What is government doing but abridging the freedoms of speech and peaceable assembly when it insists that the language of love remain platonic or be reserved for making babies (or when that is impossible, at least going through the standard baby-making motions)?

Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1939–40 (2004) (alterations in original) (footnote omitted).

122. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 153.

123. *Id.* at 156.

explicitly speaks of the right to choose whether to have children and when.[124] However, this has not been the case. The court has been notorious in avoiding a direct interpretation of article 4's Right to Choose Clause when it comes to cases dealing with reproduction. As we have seen in the first case dealing with abortion law, the court completely omitted any reference to the Right to Choose Clause and did the same when deciding the *Emergency Contraception* case.

The court explicitly invoked the Right to Choose Clause in the *Conjugal Rape* case, but the language it used consistently assumed that procreation is going to happen during marriage—the only question is when.[125] Moreover, in that case the court explicitly referred to the right to choose the number and timing of children as a right to be exercised jointly by man and wife.[126] In the *Sexual Identity* and *Same-Sex Marriage* cases, reproductive liberty is mentioned. It was even, to a limited degree, further developed, insofar as the court explicitly acknowledged that reproductive liberty includes the right *not* to have children.[127] But it does not cease to surprise that in those cases reproductive liberty was presented as rooted in the (inferred) right to the free development of one's personality and not in the explicit constitutional text.

The resistance of the court to develop a substantive interpretation of reproductive liberty and to address the meaning of the Right to Choose Clause was illustrated by the *Decriminalization* case, handed down in 2008.[128] References to the right to reproductive liberty are few and far

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124. *See supra* note 30 and accompanying text. It must be kept in mind that Mexico is rooted in a highly formalist and textualist legal culture, where judges were (until recently) considered to be the enforcers of rules, not the interpreters of principles, rights, and values. *See* Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After* Presidencialismo, 4 INT'L J. CONST. L. 411, 423 (2006) ("Traditional Mexican legal philosophy rejects the role of the judge as an expansive interpreter of the law (or of the Constitution) in keeping with modern-day policy considerations."). Such a creative deployment of interpretation is not surprising to a person trained in the common law, but it is certainly exceptional in the civil law tradition, especially in Latin America. *See generally* Alejandro Madrazo, *El formalismo: desde el derecho privado* [*Formalism: From Private Law*], *in* FUNDAMENTOS DEL DERECHO PATRIMONIAL [FUNDAMENTALS OF ESTATE LAW] 1–2 (Martín Hevia ed., forthcoming 2011) [hereinafter Madrazo, *El formalismo*] (describing the formalism associated with the civil law tradition and distinguishing it from the formalism associated with common law); Alejandro Madrazo, *From Revelation to Creation: The Origins of Text and Doctrine in the Civil Law Tradition*, MEX. L. REV., May–Dec. 2008, at 33, 65–66 [hereinafter Madrazo, *From Revelation to Creation*], http://info8.juridicas.unam.mx/pdf/mlawrns/cont/1/arc/arc3.pdf (explaining the "historical roots" of legal theories present in the civil law tradition).

125. *See supra* note 108 and accompanying text.

126. *See supra* note 107 and accompanying text.

127. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 153; Amparo directo civil 6/2008, Relacionado con la facultad de atracción 3/2008-PS, Pleno de la SCJN, Novena Época, 6 de Enero de 2009, slip op. at 86, *available at* http://www.equidad.scjn.gob.mx/IMG/pdf/IV-11-_Amparo_Directo_Civil_62008_relacionado_con_la_facultad_de_atraccion_32008-PS_Cambio_de_nombre_en_el_acta_persona_transexual_.pdf.

128. *See supra* subpart II(D). This is not to say that the court was unanimous on the matter. As we shall see, several justices pressed for the further development of the right. *See infra* notes 138–50 and accompanying text.

between in the 1,313-page opinion. Even though all litigants invoked or proposed an interpretation of the Right to Choose Clause in the core of their arguments,[129] the court did not ground its decision on the fundamental right to reproductive liberty or shed much light on it.

There is scarce mention of women's rights in the plurality's opinion, written by Justice Cossío, which states that decriminalization of abortion by Mexico City's legislature was deemed an adequate policy to safeguard those rights.[130] The rights mentioned, however, are freedom over one's own body, the right to health, and the right to life. There was no explicit mention of reproductive liberty. Ironically, the Right to Choose Clause was taken up by the plurality opinion, but only when addressing the issue of a *man's* right to choose the number and spacing of his children.[131]

In their challenges to the law, the Human Rights Commission and the Attorney General argued that even if the decriminalization of abortion was deemed constitutional in the abstract, the regulation at hand impermissibly imposed upon the (putative) father's right to be a father, insofar as the woman could decide to terminate the pregnancy without his consent.[132] For the plaintiffs, the right to procreation, when it comes to women, implies exclusively the freedom to choose whether or not to engage in sexual conduct. Once coitus has taken place, whatever happens after it (e.g., pregnancy), the "right to procreation" means only the right to protect the pregnancy from third parties, for women.[133] For men, obviously, that is precisely when the right comes in with force: pregnancy is also protected from the pregnant woman, for she cannot have an abortion because a man's procreative freedom would be trumped unless he participated in the decision-making process.

It is only in responding to this interpretation by the plaintiffs that the court took up the Right to Choose Clause. The plurality began its response by recasting the issue as a question of reasonableness, rather than a direct impingement upon the man's reproductive rights: "The core of these arguments is to make evident the lack of reasonableness of the decriminalization, and not a direct challenge to its inequality."[134] After this, the court made three affirmations that matter for our purposes.

The court first separated sexual freedom from reproductive freedom. The plaintiff's vision, it held, reduces sex to procreation (sexual freedom to reproductive freedom), ignoring the fact that there are many dimensions of

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129. For a detailed account of the interpretations of the Right to Choose Clause put forth by the litigants, *see* Madrazo, *supra* note 12, at 6–20.

130. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, Pleno de la SCJN, Novena Época, 28 de Agosto de 2008, slip op. at 76, *available at* http://www.unifr.ch/ddp1/derechopenal/temas/t_20090316_03.pdf.

131. *Id.* at 187–90.

132. *Id.* at 185–86.

133. *Id.* at 7.

134. *Id.* at 185.

sexuality that have little or nothing to do with procreation.[135] Second, the court affirmed that "the right to be a father or mother" is not a right to be exercised jointly, but individually.[136] Third, by referencing individual adoption as a way to exercise reproductive freedom, it recognized that reproduction is not only biological, but legal as well: one can become a parent (and exercise one's reproductive right) through sex or through adoption.[137] Other than these three ideas, the plurality's opinion remains silent on reproductive liberty.

The absence of direct engagement with reproductive liberty is criticized in several of the concurring opinions. It is there, where a precedent cannot be formed, that we find strong statements regarding reproductive liberty.

Justice Góngora, for instance, let us know that he was "in favor of incorporating issues related to the human and fundamental rights of women regarding sexual and reproductive rights, for they are the doorway to the recognition of true equality and the full exercise of citizenship."[138] Also, he complained that the plurality opinion did not take seriously the motives for decriminalization expressed by Mexico City's congress.[139] He stated that "the right to procreation is an exercise in liberty that should not be interfered with, much less imposed through criminal law."[140]

Justice Valls (in charge of drafting both the *Sexual Identity* and *Same-Sex Marriage* opinions) linked reproductive liberty with both the right to health and the right to free development of one's personality and then stated that "the right to reproductive self-determination implies the minimum intervention regarding the State in a woman's decisions over her body and her reproductive capacity, since it's a very personal decision for a woman to terminate a pregnancy . . . ."[141] Furthermore, he stated: "sexual and reproductive rights are . . . the foundation of the rights to equality and gender equity . . . ."[142]

Justice Franco held that articles 1 and 4 of the constitution recognize "a right exclusive to women, which is the right to self-determination in matters of maternity. It is a right exclusive to women for, in my opinion, it is one

135. *Id.* at 187–90.

136. *Id.* at 187–88.

137. *Id.*

138. Voto concurrente que formula el Ministro Genaro David Góngora Pimentel [Concurring Opinion of Góngora, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 10.

139. *Id.* at 11.

140. *Id.* at 23.

141. Voto concurrente que formula el Ministro Sergio A. Valls Hernández [Concurring Opinion of Valls, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 1, 10.

142. *Id.* at 10.

with their personal liberty . . . ."[143] He then went on to speak of the state's responsibility for making sure that a woman's decision about whether to be a mother is an informed one.[144]

Justice Sánchez Cordero held that "in matters of gestation men are not equal to women, and it is through the subjection to control through the criminal law that [the latter] are devalued as persons and reduced to instruments of procreation, which makes discrimination evident, when it is only they that are criminally punished."[145]

Finally, Justice Silva Meza was most vociferous in reproaching the silence in the plurality's opinion regarding women's rights in general and reproductive liberty in particular. He explicitly stated that the majority of the justices emphasized women's rights in their interventions, yet this was not taken up in the final ruling.[146] He held it "indispensable" to identify the rights involved in order to determine the constitutionality of decriminalization, which he proceeded to do: "The fundamental rights of women involved in the conflict in question are life, health, equality, nondiscrimination, sexual and reproductive liberty, self-determination and intimacy."[147] He referred to the Right to Choose Clause, emphasizing the state's obligation to provide education and birth control methods.[148] He asserted that "the State, although it has undertaken family planning policies, has not yet done so sufficiently and efficaciously enough so that couples can decide in a free and responsible manner the number and spacing of their children."[149] In direct reference to the clause, he stated:

> Hence, if the State has not fulfilled its constitutional obligation (article 4) to educate in sexual and reproductive matters, and has been lacking in guaranteeing full access to birth control methods . . . it cannot reproach an irresponsible exercise of reproductive freedom, through the absolute criminalization [of abortion].[150]

The result from the *Decriminalization* case is baffling. The plurality opinion spoke as little as it could about reproductive liberty and did so only to address the question of men's reproductive rights. In doing so, it advanced (minimally) the articulation of the right to reproductive liberty, clearly stating

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143. Voto concurrente que formula el Ministro José Fernando Franco González Salas [Concurring Opinion of Franco, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 8.

144. *Id.* at 16.

145. Voto concurrente que formula la Ministra Olga Sánchez Cordera de García Villegas [Concurring Opinion of Cordera, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 16.

146. Voto concurrente que formula el Ministro Juan N. Silva Meza [Concurring Opinion of Meza, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 1–2, 5.

147. *Id.* at 9–10.

148. *Id.* at 19.

149. *Id.*

150. *Id.*

that it need not be exercised jointly. However, when one takes into account the 8–3 majority by which the decriminalization of abortion was declared constitutional and, furthermore, looks at the strong pronouncements of the concurring justices, one is disconcerted. Moreover, if one takes into consideration that not one but three cases (the *Ley Robles*, *Decriminalization*, and *Emergency Contraception* cases) have been decided specifically based on reproductive-rights and reproductive-health policy with solid majorities, and what is more, that reproductive liberty has explicit, textual anchorage in the constitution, disconcertment turns into amazement. But if we contrast the creativity with which the court has consistently articulated sexual liberty with the stinginess with which it has spoken of reproductive liberty, one begins to wonder if the court suffers from a collective multiple personality disorder.

IV. The Court

Going beyond the analysis of these two specific fundamental rights, what does this tell us about the court in general? In this Article, we have traced a series of cases that speak to interrelated issues—the body, sexuality, reproduction, family, intimacy, autonomy, and dignity—and analyzed the construction of two related fundamental rights that stem from them. What we have seen is two very different attitudes taken by the court to address similar and interrelated matters regarding similar and interrelated rights—three if we include the minority of the *Decriminalization* and *Same-Sex Marriage* cases.

On one hand, we find a creative and activist court conjuring up the right to sexual liberty from little more than a word or two. The court has constructed a right from feeble textual grounding in the constitution. Originally derived from the Right to Choose Clause, sexual liberty has come to be grounded in a very abstract and highly undetermined value: dignity. Dignity is mentioned almost in passing in the text of the constitution, but it is read into the constitution as the overarching constitutional value from which all rights stem, as noted in the *Sexual Identity* case. From dignity, the court derives intimacy and free development of one's personality; from the latter the right to one's identity, and specifically the right to one's sexual identity. This in turn is fleshed out in different and fertile directions: it means one is free to do what one wishes with one's body, but also to make what one wishes *of* one's body; it empowers one to choose sexual preference and gender identity. The free development of one's personality also entails choosing marriage (or not) and having children (or not). It even entails the right to demand that the state recognize and sanction all of these choices.

It is a robust, creative, expansive interpretation of the constitutional text. It is also an interpretation of the constitution that builds upon its precedents, adding layers of depth and articulating details at each turn. We can discuss and disagree as to whether the court's argumentation is well structured or solid, or correctly accounts for the text and its history. But what is relevant is

that the court is approaching the constitution as a set of values—changeable, but meaningful—that are to be interpreted and constructed to expand fundamental rights.

Importantly, the cases involving reproductive liberty are not linked together by the court: the court does not use its own precedents, following in a long historic tradition in which the reasoning that set precedents is irrelevant for future cases. In contrast, the cases involving sexual liberty build heavily on each other: here the court extensively refers to and quotes its own precedents, and elaborates upon them.[151]

On the other hand, we find an evasive, minimalist court that avoids speaking of the right to reproductive liberty whenever possible. Instead of a right derived indirectly from vague and abstract passages of the constitution, we are dealing with a right that is clearly and expressly stated: the right to choose the number and spacing of one's children. Nonetheless, the court systematically ignores it (*Ley Robles* case), or it sidesteps the matter by recasting the question before it in terms of a technical legislative issue (*Decriminalization* case) or as a question of federalism and tacit acceptance (*Emergency Contraception* case). Even where the court speaks of the right directly, it does so to address the fringes, not the core, of the situations that the right to reproductive liberty would normally be seen to protect: a man's right to veto a woman's abortion (*Decriminalization* case), or a woman's right to sexual liberty (i.e., not to be raped) within marriage (*Conjugal Rape* case). When it does speak of the core, it does so incoherently: the *Decriminalization* case involves seven different concurring opinions and spans over 1,300 pages. This does not seem like a court concerned with speaking to the citizenry—women in particular—about their rights.

There are many potential explanations for this disparity in addressing such similar rights. From the perspectives of political science or gender studies, there is much to say here. But independent of what explains the court's split-personality disorder, we are concerned with the type of court that is in front of us.

If we go back to the political and historical juncture at which the court finds itself, one hypothesis that must be considered is that we are observing a court in the midst of a complex transition. The court is in tension with its old court-of-law self—a court charged with deciding cases, rather than solving social or political problems, through the application of all-or-nothing rules. Whether these are jurisdictional rules, technical rules of how the criminal law can be enacted, or rules stating that one cannot be forced to reproduce, matters little. The key aspect of this court is that it sees rules, not principles

151. For more on the importance of the court's use of precedents and how they influence its work, see generally Magaloni Kerpel & Ibarra Olguín, *supra* note 13.

or values that can be deployed multidirectionally in creative, nuanced, and changing ways.[152]

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152. We have in mind something roughly akin to Ronald Dworkin's classic contrast between rules and principles. *See* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25–26 (1967) (distinguishing *rules*, which apply in an "all-or-nothing" fashion, from *principles*, which "state[] . . . reason[s] that argue[] in one direction, but do[] not necessitate a particular decision"). In the reproduction cases, the court has looked for rules: all-or-nothing solutions to the cases. It has articulated the legal issues through basic yes-or-no questions—"Must the assembly criminalize abortion?" or "Can the federal authorities regulate emergency contraception for rape victims?"—that call for rules to be solved. *See supra* subpart III(C). The sexuality cases, on the other hand, have been generally solved through principles. This can be seen from the way that the court frames the matters and from the answers it provides (i.e., reasons to constantly go in one direction, instead of another). *See supra* subpart III(B).

Yet, there is a third modality of legal reasoning that needs to be considered in order to give a full account of the way the supreme court works through its normative inquiries. James Gordley has described and labeled the teleological–conceptual method: core concepts and institutions of private law were built using a method of reasoning originally deployed by Aquinas and then perfected by the late scholastics of the sixteenth and seventeenth centuries, who acheived a synthesis between Roman law and Thomistic or Aristotelian philosophy. *See* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 70–71 (1991) (noting that late scholastics in the sixteenth century attempted to apply Thomistic and Aristotelian principles to issues of property, contract, and tort law, and stating that "[i]n the seventeenth century, the doctrines of the late scholastics were taken over intact and popularized by the founder of the northern natural law school, Hugo Grotius"). The method proceeds by conceiving legal concepts and institutions as being substances—that is, as entities that can be natural (like an animal or man) or artificial (like a chair)—with a determined and fixed *essence*. *See id.* at 16–19 (describing the Thomistic method of understanding a thing or action by describing its "substantial form" or "essence," which allows one to formulate a definition that states both the general class to which it belongs and the specific differences that makes it a distinct kind within that class). In order to discover the essence of a legal institution, they built concepts following Aristotle's theory of the four causes, according to which the essence of a thing is known when its causes (final, formal, efficient, and material) are identified. *See id.* at 23 (describing the Thomistic position that "essences are linked to ends"—specifically to Aristotle's final cause—and outlining the late scholastic application of this doctrine to legal institutions such as contracts). The method, according to Gordley, has been grossly disarticulated as its explicit grounding in Aristotelian–Thomistic philosophy has come to be suppressed. *See* JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 14 (2006) (noting that the philosophical foundations of the legal system developed by the late scholastics were forgotten during the seventeenth and eighteenth centuries, but that rather than developing new systems, jurists of this period continued to employ "concepts . . . which had a meaning in the older philosophical synthesis but were now becoming incoherent"). This model of normative inquiry, though markedly altered, is still visible in much of legal doctrine in the continental tradition today. *See generally* Madrazo, *From Revelation to Creation*, *supra* note 124 (referring to the distinction between two historical modes of normative inquiry: the "model of revelation," which was concerned with the interpretation of texts and which roughly corresponded to the model of rules, and the "model of creation," which drew from the teleological–conceptual model and the Aristotelian theory of causes in addition to texts).

Though we consider the teleological–conceptual model key to understanding legal thought in Mexico in general and at the supreme court in particular, we have not included this mode of normative inquiry as a tool for explaining the court's decisions in this Article. In the family of cases we are concerned with, the teleological–conceptual mode of normative inquiry did not prevail in the court's opinions, but it informs a substantial part of the minority opinions in both the *Decriminalization* and *Same-Sex Marriage* cases. In the *Decriminalization* case, the dissenting justices argued that the proper end of the "right to reproduction" (i.e., the Right to Choose Clause) was for reproduction to take place (final cause), and that reproduction required both men and women to participate (efficient cause). The dissent developed its interpretation accordingly, arguing that (a) abortion could not be protected under the clause, for it betrayed its end, and (b) if abortion

Now, the court deploys the right to the free development of one's personality in different directions, integrating it with other rights and deriving from it not only freedoms for the citizenry but also demands of state recognition. It hardly understands itself as a court of law, but rather as a constitutional tribunal. It sees not rules but values and principles to be creatively used in building, not just applying, the law.

The quote from Macy Gray's song, *Sexual Revolution*, at the start of this Article aims to evoke this tension. The court is caught between the taboos inherited from its court-of-law past—a court told by its tradition to be discreet and not to flesh out a right if it can apply a rule—and a court that shows intense impulses to share its creative freak with the rest of us, and construct rights from values in complex and intermingled ways; a court that yearns to come out of the closet of formalism[153] and engage in the revolution of rights that it itself has already begun. If the court decides to come out of the closet and unquestionably and openly continues to be anything like the court that in an almost unanimous voice decided the *Same-Sex Marriage* case, then it is likely to be a beautiful thang to listen to.

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were allowed, it would be a decision to be taken jointly by man and woman. Voto de minoría que formulan los ministros Sergio Salvador Aguirre Anguiano, Mariano Azuela Güitrón y Guillermo I. Ortiz Mayagoitia [Dissenting Opinion of Aguirre, Azuela, and Ortiz, JJ.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, Pleno de la SCJN, Novena Época, 28 de Agosto de 2008, slip op. at 16, *available at* http://www.unifr.ch/ddp1/derechopenal/temas/t_20090316_03.pdf. For more on the teleological–conceptual method used by the dissent, see Madrazo, *supra* note 12, at 13–16, 20–25. In the *Same-Sex Marriage* case, justices in the minority argued that the proper end of marriage was reproduction (final cause); thus, allowing for marriage that could not lead to (natural) reproduction would destroy its essence. *Cf. id.* at 24 (describing natural reproduction as protected by fundamental rights). The minority in this last case was composed of Justice Sergio Aguirre Anguiano and then-Chief Justice Guillermo Ortiz Mayagoitia, whose interventions can be found online. *See* Sesión Pública Ordinaria del Pleno de la SCJN [Ordinary Public Session of the Supreme Court], sobre acción de inconstitucionalidad 2/2010, Novena Época, 3 de Agosto de 2010, slip op. at 20–32, 57–61, *available at* http://www.scjn.gob.mx/2010/pleno/Documents/2010/ago2.pdf (comments of Justice Aguirre Anguiano and Chief Justice Ortiz Mayagoitia). This line of reasoning was the core of the original *Conjugal Rape* case in 1994—not a part of this research—in which the court found that whether imposed sex was rape or undue exercise of a right depended on whether the act pursued the proper end of marriage—namely reproduction. *See supra* note 29 and accompanying text. For an example of teleological–conceptual reasoning in the context of marriage in the U.S., see Sherif Girgis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 246 (2010).

153. We understand formalism, in Mexico and the continental tradition at least, not so much as a coherent theory of law, but rather as a set of practices and attitudes toward the law that have been in motion for several centuries. For us, these practices and attitudes include at least three aspects: (1) a tendency to "decide without solving" matters, as coined by Magaloni & Negrete, *supra* note 13; (2) an understanding of legal decisions as the application of rules rather than the deployment of principles; and (3) the reification of institutions and concepts corresponding to a teleological–conceptual model of normative reasoning that has, as one of its effects, the trumping of people's desires and needs in favor of privileging the essence of "institutions" and "legal concepts." For more on understanding formalism in order to better overcome it, see generally Madrazo, *El formalismo*, *supra* note 124.