

(DIS)UNIFORMITY OF RIGHTS IN
FEDERATIONS AND UNIONS

DISCUSSION LEADERS

JUDITH RESNIK AND REVA SIEGEL

III. (DIS)UNIFORMITY OF RIGHTS IN FEDERATIONS AND UNIONS

DISCUSSION LEADERS:
JUDITH RESNIK AND REVA SIEGEL

Uniformity, Disuniformity, Sovereignty, and the Import of Rights

Andreas Auer, *The Constitutional Scheme of Federalism* (2005) ... III-5
Robert Cover, *The Uses of Jurisdictional Redundancy: Interest,
Ideology, and Innovation* (1981) III-7

“Unreasonably” Wrong? Codifying Doctrines of Deference III-10

Democratic Sovereignty and Individual Rights: The Examples of Enfranchisement and Reproduction

Disenfranchisement

Hirst v. United Kingdom (European Court of
Human Rights) (2005) III-13
Joint Committee on Human Rights, *Enhancing Parliament's
Role in Relation to Human Rights Judgments* (2009)..... III-24
Lord Irvine of Lairg, *A British Interpretation of
Convention Rights* (2011) III-27
Sejdić v. Bosnia and Herzegovina (European Court of
Human Rights) (2009) III-32

Counting, Consensus, and Categorizing

Roderick M. Hills, Jr., *Counting States* (2009)..... III-35
John L. Murray, *Consensus: Concordance, or Hegemony of the
Majority?* (2008)..... III-38
Judith Resnik, *Categorical Federalism: Jurisdiction,
Gender, and the Globe* (2001) III-40

Health and Life

A, B and C v. Ireland (European Court of Human Rights) (2010) III-43
Reva B. Siegel, *The Constitutionalization of Abortion* (2012)..... III-54
Siobhán Mullally, *Debating Reproduction Rights in
Ireland* (2005) III-56

These materials explore legal systems that embrace, simultaneously, two commitments. The first is to subunits—“member states,” “states,” “länder,” “provinces,” and the like—which are recognized as having self-constituted identities and degrees of autonomy. That form of authority is sometimes described as “sovereignty,” albeit often partial or delineated because of a subunit’s participation in a larger legal system. The second commitment is to individuals, who are understood to possess certain foundational rights (sometimes called constitutional or human rights) that are protected wherever they live within the larger jurisdiction. Our focus is on how courts deal with the conflicts generated by the intersection of these two commitments.

When and why do jurisdictions that deem some rights to be fundamental nonetheless permit subunits to provide less than full protection or recognition of those rights? What political utilities are served by rights vindicated (or not) through multi-layered systems? What are the harms? How do judges assess the relative importance of state sovereignty claims and of individuals’ assertions of foundational rights?

Some analyses celebrate variation in norms, explained as reflecting the potential for development of rights over time, the utility of building consensus and of exploring differences, and the desirability of renegotiating over time the meaning of membership in a federation or union. Other analyses criticize variation either for undervaluing the importance of stated and foundational rights (such as individual liberty, dignity, and equality) or for producing unduly diffuse legal regimes of unnecessary complexity.

Examples of legal multiplicity expanded during the twentieth century through the creation of federations, unions, and supra-national institutions. When reasoning about when a rule sourced at the subunit or the larger unit ought to prevail, courts have cited terms such as “subsidiarity,” “competency,” “comity,” “doctrines of deference,” “federalism,” “independent and adequate state grounds,” and “the margin of appreciation.”

When conflicts emerge about foundational commitments, courts regularly turn to foundational texts to supply direction but, as is familiar, provisions are often indeterminate. Complexities arise about characterizing and categorizing relevant powers and rights. Courts are thus constantly making interpretive judgments and seek to structure their deliberations.

For example, judges look to variances in practices within and outside their jurisdictions. That method requires a series of choices about how to characterize rights and the relevant legal rules and jurisdictions. What “counts”—

constitutional provisions, or statutory rules and practices as well? Which jurisdictions matter—other internal subunits, or jurisdictions across the globe? What is the import of a state being an “outlier”? Might tolerance for difference vary across systems, such that either the United States or Europe might be more open (or closed) to difference with respect to particular kinds of rights?

Below, we explore the explicit and implicit concerns that inform judicial determination of rights in multi-level jurisdictions. We have provided materials laden with concerns about democracy and about rights. We seek to understand how determinations of rights can generate a shared identity and create occasions for the assertion of distinctive identities of subunits. We are especially interested in the dynamic logic of rights and sovereignty claims and judgments. On one view, courts that can identify the “right answer” or “balance” can settle the issue. On another, sometimes referred to as “pluralism,” “experimentalism,” or “democratic constitutionalism,” settlements may be temporary or illusive. Debate (characterized as “conflict” or “dialogue”) continues, and the ongoing conversation may promote, rather than undermine, the authority of “law.”*

To ground the inquiries, we look at two arenas—suffrage, and the regulation of abortion—chosen because of their changing contours and political saliency. Each is the locus of rights and sovereignty claims that have evolved through conflict over time. At the founding of both the United States and of the nation-states that today compose Europe, voting was not the entitlement it is today; exclusion of large classes—such as women—was routine. Identitarian claims are similarly dynamic. When the Human Rights Act became effective in the United Kingdom in 2000, few would have predicted that Britain would stake its sovereign authority on a decision about whether prisoners could vote. Likewise, a half century ago, the regulation of abortion was not imagined as the site of constitutional rights nor as constitutive of sovereign identity. The cases and commentary make plain that the stakes—including the stakes for voting and abortion—are not foreordained, essential, or inevitable, but rather are generated through social and political movements that mark certain rights as central to the identity of individuals or nation-states at particular historical moments.

One final note by way of introduction. We well appreciate the differences in governing law, in the underlying constitutional documents and the distinctive historical experiences of jurisdictions (beyond those referenced here), in the kinds of remedies available for noncompliance, and in the forms of implementation and oversight provided by constitutional or supra-national courts. Variation exists not

*See e.g. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

only in the enforcement powers of courts but also in the mechanisms for overriding judicial decisions. But our view is that puzzles and challenges across legal systems are recurring; by using the specific examples, we aim not to delve into the particulars of doctrines on voting, reproduction, or the “margin of appreciation,” but rather to explore the function of conflict over rights within federations and unions.

UNIFORMITY, DISUNIFORMITY, SOVEREIGNTY, AND THE IMPORT OF RIGHTS

Andreas Auer

*The Constitutional Scheme of Federalism**

How can one explain the difficulties in defining federalism? Mainly because there are as many federalisms as there are federal states, each one considering its own specificities as being absolutely essential to the very concept of federalism. . . . [Yet, three] basic principles or guidelines can be distinguished and must be combined in order to reveal the existence of a federal state experience: autonomy, superposition and participation.

Autonomy means that the constituent units of a federal state structure enjoy more than just some delegated competences. They are autonomous in many ways: they have their own institutions and organs; they have their own laws and regulations; they have a constitution; they have legislators, governments and judges; they have at least some financial autonomy, meaning that they may raise taxes and decide freely upon their affectation. Constituent units thus have their own legal order. Being autonomous, they are just like sovereign states, without being sovereign states . . . because their sovereignty is limited by the second principle, the principle of superposition.

Superposition means that the powers of constituent units and the way they make use of these powers are subordinate to the requirements of a superior legal order, i.e. the one formed by the federal unit. Laws and decisions of the federal unit are, and must be, binding for the constituent units. Federalism is not a supermarket where one may buy whatever one wants to. American and Swiss constitutional history shows that theories of ‘nullification’ or ‘interposition,’ allowing constituent units to oppose their sovereignty to the application of a federal measure they dislike, amount to the very negation of federalism. Nothing

*Excerpted from Andreas Auer, *The Constitutional Scheme of Federalism*, 12 J. EUR. PUB. POL’Y 419 (2005).

prevails, in law, over the simple rule that federal regulations must be, in case of conflict, superior to state regulations. Another question is, of course, who is entitled to have the final word about questions where competences are contested between constituent and central units.

Participation basically means that the legal orders of the central unit and the legal orders of the constituent units are not strangers to each other. They are, on the contrary, so closely intertwined and connected as to appear to form but one legal order. Participation between two superposed legal levels is probably the most decisive feature of federal government (interlocking federalism). But it is essential to recognize that participation must go both ways, bottom-up and top-down.

On the one hand, the constituent units have the possibility and, indeed, the obligation to participate in the process of defining, of enacting, and of implementing federal rules and policies: the existence of a second chamber representing directly the constituent units, the power to initiate legislation, the right to be consulted before the enactment of a federal regulation or the conclusion of an international treaty, the possibility to apply to the constitutional court, and, most important, the obligation to implement and to enforce federal rules. By these means, and many more, the constituent units become directly involved in the process of defining and implementing the will and the policy of the federal unit.

On the other hand, the federal unit has also to contribute in some way to the adoption or the implementation of the laws and regulations of the constituent units. It cannot remain completely indifferent to the exercise of state autonomy. The central unit must not only recognize the existence and the autonomy of the constituent units. It also has to guarantee, on the international as well as on the national level of government, full respect and enforcement of the regular exercise, by the constituent units, of their powers and regulations. In other words, the federal unit has to somehow become involved in the process of formulating and implementing the will of the constituent units.

[W]ithout the constituent units, the federal unit cannot exist. Without the latter, the former cannot be autonomous. Both have to work together, through a set of specific procedures, in order to accomplish their respective goals.

Robert Cover

The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation^{*}

While both the state and federal courts are subject to the appellate jurisdiction of the Supreme Court of the United States on matters of federal law, the independence of each of the state systems from one another and of all from the federal system has remained real and significant. The possibilities of concurrency are thus both “vertical” (state-federal) and “horizontal” (state-state).

Two different emphases are possible in understanding this jurisdictional array. The first treats the complex patterns of concurrency as both an accident of history and an unavoidable, perhaps unfortunate incident of the formal logic of our system of states. . . . [But instead] of viewing the persistence of concurrency as a dysfunctional relic, one may hypothesize that it is a product of an institutional evolution. The persistence of the anomaly over time requires a search for a strong functional explanation. . . .

The jurisdictional array that I have identified as the traditional and constant American structure of courts is a form of redundancy that I shall call complex concurrency. This structure exemplifies at least one of three important characteristics: strategic choice [i.e., forum shopping], synchronic redundancy [i.e., simultaneous adjudication in multiple forums], and diachronic or sequential redundancy [i.e., recourse to the courts of another system after one system has adjudicated and reached a result]. . . .

The uses of jurisdictional redundancy [can] be sought by examining the kinds of problems associated with systematic political authority. . . . I have singled out [three areas] for discussion here: Interest, Ideology, and Innovation. These terms are a shorthand for three general problems: (a) the self-interest of incumbent elites in a regime; (b) the more or less unconsciously held values and ways of seeing the world, reflected in the governing elites, which tend to serve and justify in general and long run terms the social order which the elites dominate; and (c) the consciously determined policies of the authoritative elites, especially insofar as they depart from traditional, common cultural norms and expectations.

^{*}Excerpted from Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). See also Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

The proposition that I begin with is that different polities with differing constituencies, peopled by distinct governing elites, indeed will differ from one another in some measure with respect to all three areas. . . .

[T]o the extent that the jurisdictional alternatives differ with respect to the supposed salient social determinants of ideology, complex concurrency constitutes a strategy for coping with ideological impasse. If outcomes are confirmed by the courts of two or more different systems which vary with respect to supposed social determinants of knowledge and mind, this result would suggest some common epistemological ground with respect to the issue presented and with respect to its resolution. For a series of jurisdictional alternatives to present a plausible network of redundancy sufficient to “correct” ideological bias requires that those alternative forums arise out of widely varied political bases with attendant variations in the constituencies to which they speak. In terms of the American judicial systems . . . [m]ost state court trial judges are drawn from local, provincial elites, while federal district court judges are more likely to be drawn from a national elite. Levels of education, bonds of loyalty, status, and even economic class may differ radically from one group to the other. . . .

I have mentioned that the adjudicatory process entails both dispute resolution and norm articulation elements. Ideological distrust entails related challenges to both dimensions of adjudication. It implies skepticism about the reliability of a range of adjudicatory acts and orientations: ethical and practical judgment, capacity for critical or empathetic orientation to parties and witnesses, and appreciation for consequences. Thus, in its most blatant form, a system may be challenged because its judges cannot be expected to understand—to empathize with—“our” kind of people. They will literally not comprehend “us” without an act of translation, will not believe even when they understand what is foreign to them in the experience of “our” people, and will not appreciate the consequences to “us” of “their” standards.

[There is a value] to the display of nonconfirming results in different tribunals. . . . If there is a chasm rendering the social reality of one group in our nation problematic to another, and if that problem of perception and apprehension is to arise in the work of adjudication, there is much to be said for making it explicit. . . . [W]hen we see the alternative forums reaching nonconfirming, inconsistent results, we are watching the impasse between the toned-down versions of social reality and right conduct held by at least locally significant groups in the society. . . .

If there were a unitary source for norm articulation over a given domain, the costs of error or lack of wisdom in any norm articulation would be suffered

throughout the domain. . . . The multiplicity of centers means an innovation is more likely to be tried and correspondingly less likely to be wholly embraced. The two effects dampen both momentum and inertia. Assuming a general readiness to take risks, the array of multiple norm articulation sources, some of which will not go so far in innovation, will then mitigate the damages suffered through risky experiments. . . . It justifies, at least in some areas, the existence of a system of polycentric norm articulation. Such a system is a prerequisite for, but does not itself justify, jurisdictional redundancy. . . .

If the several legislative authorities articulate the same norm, the norm is, if anything, clarified and intensified. . . . There are several ways in which the iteration of a norm operates to reinforce it. It first removes what might be called jurisdictional doubt. If the norm is found almost everywhere, then it is a safer inference that the norm will be applied even when it is unclear what norm articulation source operates over a given domain. Second, the fact that a variety of norm articulators have independently arrived at a given conclusion about some conduct reduces the likelihood that the conclusion is a product of local error or prejudice, ideology, or interest. If a large number of jurisdictions arrive *independently* at the conclusion that a certain kind of conduct is wrong or detrimental, then the conclusion is more apt to reflect the problematic character of the conduct than the problematic character of the norm articulation process. Finally, the meaning of the norm will be clarified by reiterating independently the “central core” conduct, which all jurisdictions include within the prohibition, while leaving less clear signals for the penumbral areas with respect to which controversy exists. It will be clearer that there is in fact an unproblematic core area of conduct to which the norm will be applied. . . . A unitary system may, over time, clarify by repetition as well. Density of contemporaneous utterances of equal authority then is simply a horizontal array performing a function similar to that of a body of precedent over time. . . .

[I]f there is disagreement as to what the Constitution requires, federal courts may [differ]. . . . In all such transition cases, civil or criminal, it is important to see the nature of the plight of the litigant. She appeals to “law” against law. It may be an appeal to law which one of several alternative forums calls no law. But so long as such a forum is only one of several, there is room, for awhile at least, for recognition of the truly open, tentative, and transitional status of norms which do not yet command common acquiescence among all relevant authoritative courts. Openness about such transitional norms might be useful in many ways. It might lead, for example, to compromise either upon the underlying claim or upon a third “neutral” forum. . . .

[Many challenges exist.] First, since the substantive battlefields upon which conflicts of interest, ideology, and innovation are fought change over time, it is not to be expected that effective coordination rules will be substance-neutral emanations of formal structure alone. Rather, the areas of relatively unrestrained redundancy will change with the salient social conflicts. . . .

Second, the political pressure for open avenues of redundancy comes about when effects are not random. Thus, to the extent that the redundant forum simply provides an avenue for forum shopping with no systematic differences arising from interest, ideology, or innovation, there will not be an identifiable and cohesive group prejudiced by the presence or absence of the alternative forum. When the forum becomes an issue to an identifiable group, it is because that group thinks that there is more than mere randomly distributed error at stake. This means that the very fact that significant groups have conflicting systematic preferences for a forum or type of forum as to some issue is a strong argument for relatively unrestrained redundancy.

[F]or some time the jurisdictional structure of “our federalism” has struck me as comprehensible only as a blueprint for conflict and confrontation, not for cooperation and deference. It seems unfashionable to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict. Unquestionably, my perverse perspective may be carried too far. I, ultimately, do not want to deny that there is value in repose and order. But the inner logic of “our federalism” seems to me to point more insistently to the social value of institutions in conflict with one another. It is a daring system that permits the tensions and conflicts of the social order to be displayed in the very jurisdictional structure of its courts. It is that view of federalism that we ought to embrace.

“Unreasonably” Wrong? Codifying Doctrines of Deference

To sharpen the questions of what kinds of deference are due by which institutions of government to certain decisions of states or member states, we offer a few examples of rules, codified by the U.S. Congress, to allocate authority between state and federal courts. An “anti-injunction” act instructs federal courts not to enjoin state court proceedings except under specified circumstances. Another statute directs federal courts not to interfere with state taxation processes when a “plain, speedy and efficient remedy” is available in state courts. A sequence of cases establish principles about deference (comity) to ongoing state

criminal proceedings, yet instruct federal judges generally not to defer or “abstain” from making decisions when state courts have parallel civil cases pending.

Some of these standards facilitate the kind of open airing of conflicts over legal norms that Robert Cover celebrates and, in 1977, termed “dialectical federalism.” Not all share Cover’s views of the virtues of dialectical federalism. In 1997, Congress formulated new rules for post-conviction remedies that directed federal judges, when ruling on petitions from state prisoners for habeas corpus relief, to silence their own adjudication by according state court judgments substantial deference. Specifically, 28 U.S.C. § 2254 authorizes persons in custody “in violation of the Constitution or laws or treaties of the United States” to bring claims to federal courts. Yet federal judges are told that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

These provisions have prompted many decisions debating when a constitutional right was “clearly established” and what interpretations of its scope are “unreasonable.” Writing for the majority in *Harrington v. Richter* (2011), Justice Kennedy interpreted these provisions to mean that:

[Section 2254(d)] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with this Court’s precedents. It goes no farther. [It] reflects the view that habeas corpus is a “guard against extreme malfunctions in the state criminal justice systems,” not a substitute for ordinary error correction through appeal. . . . [A] state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in

justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

The reasons for this approach are familiar. “Federal habeas review of state convictions frustrates both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.” It “disturbs the State’s significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.”

The Supreme Court has held that even when state courts issue summary dispositions without reasons for denials of petitions, federal judges must accord the form of deference outlined in the statute—that “precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Id.* Some commentators see this approach as permitting prisoners to remain in prison for life or be executed despite the underenforcement or nonenforcement of federal constitutional rights, such as to effective assistance of counsel and disclosure by prosecutors of exculpatory material evidence.

Under what circumstances should interests in the finality of criminal judgments override state court judgments that fail to protect individual federal constitutional rights? From what standpoint would one know that federal rights have been overridden? Does the idea of “fairmindedness” (the Court’s term) suggest that, in federations, different judges can reach opposite conclusions—yet both be fairminded? Should dispute about the content of a right counsel deference and if so, should the degree of deference vary depending on whether a contested judgment is made by a legislature, a prosecutor, or another court?

Below, we turn to another formulation of a doctrine of deference, the European “margin of appreciation.” At first glance, the U.S. test of “unreasonable” applications could be read as radically different, in that it entails a judgment that a state court has not been completely compliant with federal constitutional law, and then another judgment that the departure was or was not also “unreasonable.” Yet could the U.S. approach be interpreted as giving a “margin” to state court interpretation and thereby tolerating deviance unless outside the pale of plausible understandings of individual rights? Given the differences between the U.S. federation and the European Union and the Council of Europe, ought subunits be given different degrees of deference?

DEMOCRATIC SOVEREIGNTY AND INDIVIDUAL RIGHTS: THE EXAMPLES OF ENFRANCHISEMENT AND REPRODUCTION

Disenfranchisement

One way to underscore the intensity that the clashes between sovereignty and transnational individual rights have produced is to rehearse what transpired after the European Court of Human Rights (ECtHR) decided the 2005 *Hirst* case, excerpted below, on prisoner disenfranchisement. *Hirst* held that a blanket ban on voting by prisoners was impermissible under the European Convention. How does the Court determine that the United Kingdom violated Convention rights? What sources of law does the Court consider, and from where? Does the Court rely on a standard when counting and comparing? Should it, or should the Court's approach vary with the right in question?

Hirst v. United Kingdom

European Court of Human Rights (Grand Chamber)

App. No. 74025/01 (2005)

12. On 11 February 1980 the applicant pleaded guilty to manslaughter on the ground of diminished responsibility. His guilty plea was accepted on the basis of medical evidence that he was a man with a severe personality disorder to such a degree that he was amoral. He was sentenced to a term of discretionary life imprisonment.

13. The applicant's tariff (that part of the sentence relating to retribution and deterrence) expired on 25 June 1994. His continued detention was based on . . . the Parole Board considering that he continued to present a risk of serious harm to the public.

14. The applicant, who is barred by section 3 of the Representation of the People Act 1983 from voting in parliamentary or local elections, issued proceedings in the High Court under section 4 of the Human Rights Act 1998, seeking a declaration that this provision was incompatible with the European Convention on Human Rights. . . .

16. In the Divisional Court judgment dated 4 April 2001, Lord Justice Kennedy . . . cited the Secretary of State's reasons, given in the proceedings, for maintaining the current policy:

“By committing offences which by themselves or taken with any aggravating circumstances including the offender's character and previous criminal record require a custodial sentence, such prisoners have forfeited the right to have a say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative.”

[L]ord Justice Kennedy concluded:

“[W]hat Article 3 of the First Protocol is really concerned with is the wider question of universal franchise, and ‘the free expression of the opinion of the people in the choice of the legislature.’ If an individual is to be disenfranchised that must be in the pursuit of a legitimate aim. . . .

The European Court also requires that the means employed to restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this Court to defer to the legislature. . . .”

21. [S]ection 3 of the Representation of the People Act 1983 (“the 1983 Act”) provides:

“(1) A convicted person during the time that he is detained in a penal institution in pursuance of his sentence . . . is legally incapable of voting at any parliamentary or local election.”

22. [T]he substance of [this provision] dated back to the Forfeiture Act 1870 . . . which in turn reflected earlier rules of law relating to the forfeiture of certain rights by a convicted “felon” (the so-called “civic death” of the times of King Edward III). . . .

33. According to the Government's survey based on information obtained from its diplomatic representation, eighteen countries allowed prisoners to vote without restriction (Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, “the former Yugoslav Republic of Macedonia,” Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden,

Switzerland and Ukraine), in thirteen countries all prisoners were barred from voting or unable to vote (Armenia, Belgium, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia, Turkey and the United Kingdom), while in twelve countries prisoners' right to vote could be limited in some other way (Austria, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Romania and Spain).

34. [I]n Romania prisoners may be debarred from voting if the principal sentence exceeds two years, while in Latvia prisoners serving a sentence in penitentiaries are not entitled to vote; nor are prisoners in Liechtenstein. . . .

35. In 1992 the Canadian Supreme Court unanimously struck down a legislative provision barring all prisoners from voting [*Sauvé v. Canada (no. 1)*]. Amendments were introduced limiting the ban to prisoners serving a sentence of two years or more. The Federal Court of Appeal upheld the provision. However, following the decision of the Divisional Court in the present case, the Supreme Court on 31 October 2002 in *Sauvé v. the Attorney General of Canada (no. 2)* held by five votes to four that section 51(e) of the Canada Elections Act 1985, which denied the right to vote to every person imprisoned in a correctional institution serving a sentence of two years or more, was unconstitutional as it infringed Articles 1 and 3 of the Canadian Charter of Rights and Freedoms, which provides:

“1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. . . .

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”

36. The majority opinion . . . found that the Government had failed to identify the particular problems that required denying the right to vote and that the measure did not satisfy the proportionality test, in particular as the Government had failed to establish a rational connection between the denial of the right to vote and its stated objectives. . . .

38. On 1 April 1999, in *August and Another v. Electoral Commission and Others*, the Constitutional Court of South Africa considered the application of prisoners for a declaration and orders that the Electoral Commission take measures enabling them and other prisoners to register and vote while in prison. .

. . . [T]he South African Constitution [sets out] the right of every adult citizen to vote in elections for legislative bodies . . . in unqualified terms . . . :

“The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts.”

40. [T]he applicant [in the present case] . . . relied on Article 3 of Protocol No. 1 which provides:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

41. The Chamber found that the exclusion from voting imposed on convicted prisoners in detention was disproportionate. It had regard to the fact that it stripped a large group of people of the vote; that it applied automatically irrespective of the length of the sentence or the gravity of the offence; and that the results were arbitrary and anomalous, depending on the timing of elections. It further noted that, in so far as the disqualification from voting was to be seen as part of a prisoner’s punishment, there was no logical justification for the disqualification to continue in the case of the present applicant, who had completed that part of his sentence relating to punishment and deterrence. . . . :

“The Court accepts that this is an area in which a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on prisoners’ right to vote can still be justified in modern times and if so how a fair balance is to be struck. In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing court should be left with an overriding discretion to deprive a convicted person of his right to vote. The Court would observe that there is no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners. It cannot accept however that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation. . . .”

55. [T]he Latvian Government were concerned that the Chamber's judgment would have a horizontal effect on other countries which imposed a blanket ban on convicted prisoners voting in elections. They submitted that . . . States should be afforded a wide margin of appreciation, in particular taking into account the historical and political evolution of the country and that the Court was not competent to replace the view of a democratic country with its own view as to what was in the best interests of democracy. In their view, the Chamber had failed to pay enough attention to . . . the general sense of combating criminality and in avoiding the situation whereby those who had committed serious offences could participate in decision-making that might result in bringing to power individuals or groups that were in some way related to criminal structures. . . .

56. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom.

57. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium* (1987)). Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference. . . .

59. [I]n the twenty-first century, the presumption in a democratic State must be in favour of inclusion Universal suffrage has become the basic principle.

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. . . . [The] Contracting States must be allowed a margin of appreciation in this sphere.

61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into their own democratic vision.

62. [F]or example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned. . . .

69. [T]he Court . . . begin[s] by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. . . .

70. There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.

71. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1 . . . does not therefore exclude . . . restrictions on electoral rights . . . for example, [on individuals who have] seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations (see . . . *Glimmerveen and Hagenbeek v. the Netherlands* (1979)[, in which] the [European] Commission [of Human Rights] declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic traits, to stand for election). The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. The Court notes in this regard the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by express judicial decision. As in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness. . . .

74. [T]he Court notes that, at the time of the passage of the latest legislation, the Government stated that the aim of the bar on convicted prisoners was to confer an additional punishment. . . . The measure is meant to act as an incentive for citizen-like conduct.

75. [T]he Court finds no reason in the circumstances of this application to exclude these aims as untenable or incompatible *per se* with the right guaranteed under Article 3 of Protocol No. 1.

76. The Court notes that the Chamber found that the measure lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff (that period representing retribution and deterrence) had expired.

77. The Government have argued that the measure was proportionate, pointing out, *inter alia*, that it only affected some 48,000 prisoners (not the 70,000 . . . in the Chamber judgment which omitted . . . that prisoners on remand were no longer under any ban) and submitting that the ban was in fact restricted in its application as it affected only those convicted of crimes serious enough to warrant a custodial sentence and did not apply to those detained on remand, for contempt of court or for default in payment of fines. . . . [W]hile it is true that there are categories of detained persons unaffected by the bar, it nonetheless concerns a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. . . .

79. As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended that a convicted prisoner should not be entitled to vote. . . .

82. Therefore, while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. . . . Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1. . . .

84. In a case such as the present one, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable

margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1. . . .

CONCURRING OPINION OF JUDGE CAFLISCH

2. [T]here must . . . be limits to [restrictions on the right to vote, to elect and to stand for election]; and it is up to this Court, rather than the Contracting Parties, to determine whether a given restriction is compatible with the individual right to vote, to elect and to stand for election. To make this determination, the Court will rely on the legitimate aim pursued by the measure of exclusion and on the proportionality of the latter. . . .

3. [The respondent State and the Latvian government] criticised the Chamber for having drawn its own conclusions instead of relying on national traditions or the views of the national courts. [However, although c]ontracting States' margin of appreciation in matters relating to Article 3 may indeed, as has been contended, be relatively wide . . . the determination of its limits cannot be virtually abandoned to the State concerned and must be subject to "European control."

7. [I]t might have been useful if the Court, in addition to finding a violation of Article 3 of Protocol No. 1, had indicated some of the parameters to be respected by democratic States when limiting the right to participate in votes or elections. These parameters should, in my view, include the following elements.

(a) The measures of disenfranchisement that may be taken must be prescribed by law.

(b) The latter cannot be a blanket law: it may not, simply, disenfranchise the author of every offence punished by a prison term. It must, in other words, be restricted to major crimes, as rightly pointed out by the Venice Commission in its Code of Good Practice in Electoral Matters.* It cannot simply be assumed that whoever serves a sentence has breached the social contract.

* [Editors' Note: The Venice Commission's Guidelines on Elections state, "The five principles underlying Europe's electoral heritage are *universal, equal, free, secret and direct suffrage*." While deprivations of voting and electoral rights are permissible according to the Commission, "[t]he proportionality principle must be observed," such that "conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them." Furthermore, any deprivations must be "based on mental incapacity or a criminal conviction for a serious offence." Eur. Comm'n for Democracy Through Law (Venice Commission), *Code of Good Practice in Electoral Matters*, 51st Sess., Op. No. 190/2002, available at [http://www.venice.coe.int/docs/2002/CDL\(2002\)139-e.pdf](http://www.venice.coe.int/docs/2002/CDL(2002)139-e.pdf).]

(c) The legislation in question must provide that disenfranchisement, as a complementary punishment, is a matter to be decided by the judge, not the executive. This element, too, will be found in the Code of Good Practice adopted by the Venice Commission.

(d) Finally—and this may be the essential point for the present case—in those Contracting States where the sentence may comprise a punitive part (retribution and deterrence) and a period of detention based on the risk inherent in the prisoner's release, the disenfranchisement must remain confined to the punitive part and not be extended to the remainder of the sentence. . . .

8. Two out of the above four elements are contained in the Code of Good Practice of the Venice Commission: I say this not because I consider that Code to be binding but because, in the subject matter considered here, these elements make eminent sense.

JOINT CONCURRING OPINION OF JUDGES TULKENS AND
ZAGREBELSKY

[T]he same criminal offence and the same criminal character can lead to a prison sentence or to a suspended sentence. In our view this, in addition to the failure to take into consideration the nature and gravity of the offence, demonstrates that the real reason for the ban is the fact that the person is in prison.

This is not an acceptable reason. There are no practical grounds for denying prisoners the right to vote (remand prisoners do vote) and prisoners in general continue to enjoy the fundamental rights guaranteed by the Convention, except for the right to liberty. As to the right to vote, there is no room in the Convention for the old idea of “civic death” that lies behind the ban on convicted prisoners' voting.

We would conclude, therefore, that the failure of the United Kingdom legal system to take into consideration the gravity and nature of the offence of which the prisoner has been convicted is only one of the aspects to be taken into account. . . . The lack of a rational basis . . . is a sufficient reason for finding a violation of the Convention, without there being any need to conduct a detailed examination of the question of proportionality.

[W]e note that the discussion about proportionality has led the Court to evaluate not only the law and its consequences, but also the parliamentary debate. This is an area in which two sources of legitimacy meet, the Court on the one hand and the national parliament on the other. This is a difficult and slippery

terrain for the Court in view of the nature of its role, especially when it itself accepts that a wide margin of appreciation must be allowed to the Contracting States.

JOINT DISSENTING OPINION OF JUDGES WILDHABER, COSTA,
LORENZEN, KOVLER AND JEBENS

2. [L]ike the majority, we will limit our examination to [two conditions for restriction on the individual rights granted by Article 3 of Protocol 1: that any such conditions must pursue a legitimate aim, and that the means employed must not be disproportionate. Thus, we implicitly accept] that the United Kingdom legislation does not in itself impair the very essence of the right to vote and deprive it of its effectiveness, as was found in *Aziz v. Cyprus* (2004), where an ethnic minority of the Cypriot population was barred from voting. . . .

6. We do not dispute that it is an important task for the Court to ensure that the rights guaranteed by the Convention system comply with “present-day conditions,” and that accordingly a “dynamic and evolutive” approach may in certain situations be justified. However, it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions. An “evolutive” or “dynamic” interpretation should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case. . . .

According to the information available to the Court, some eighteen countries out of the forty-five Contracting States have no restrictions on prisoners’ right to vote. On the other hand, in some thirteen States prisoners are not able to vote either because of a ban in their legislation or *de facto* because appropriate arrangements have not been made. It is essential to note that in at least four of those States the disenfranchisement has its basis in a recently adopted Constitution (Russia, Armenia, Hungary and Georgia). In at least thirteen other countries more or less far-reaching restrictions on prisoners’ right to vote are prescribed in domestic legislation, and in four of those States the restrictions have a constitutional basis (Luxembourg, Austria, Turkey and Malta). The finding of the majority will create legislative problems not only for States with a general ban such as exists in the United Kingdom. As the majority have considered that it is not the role of the Court to indicate what, if any, restrictions on the right of serving prisoners to vote would be compatible with the Convention, the judgment in the present case implies that all States with such restrictions will face difficult assessments as to whether their legislation complies with the requirements of the Convention.

[L]egislation in Europe shows that there is little consensus about whether or not prisoners should have the right to vote. In fact, the majority of member States know such restrictions, although some have blanket and some limited restrictions. Thus, the legislation in the United Kingdom cannot be claimed to be in disharmony with a common European standard. . . .

8. [W]e do not rule out the possibility that restrictions may be disproportionate in respect of minor offences and/or very short sentences. . . .

DISSENTING OPINION OF JUDGE COSTA

5. [O]nce I had . . . accepted that the States have a wide margin of appreciation to decide on the aims of any restriction, limitation or even outright ban on the right to vote (and/or the right to stand for election), how could I, without being inconsistent, reduce that margin when it came to assessing the proportionality of the measure restricting universal suffrage (a concept which, of course, remains the democratic ideal)?

6. How would I be able to approve of the *Py v. France* judgment of 11 January 2005 (which I am all the more at liberty to cite in that I did not sit in the case)? In that judgment, the Court unanimously . . . held that the minimum ten-year-residence qualifying period for being eligible to vote in elections to Congress in New Caledonia did not impair the very essence of the applicant's right to vote, as guaranteed by Article 3 of Protocol No. 1, and that there had been no violation of that provision. How, then, could I approve of that judgment and at the same time agree with the judgment in the present case when it states in paragraph 82: "while . . . the margin of appreciation is wide, it is not all-embracing," which in practice means that a prisoner sentenced to a discretionary life sentence would have the right to vote under Article 3 of Protocol No. 1 (but when would the right become effective?). Are there not two "standards"?

7. It might perhaps be objected that the *Py* judgment took into account "local requirements," within the meaning of Article 56 § 3 of the Convention. That is true. But what of the decision in *Hilbe v. Lichtenstein* (1999)? In holding that a Lichtenstein national who was resident in Switzerland did not have the right to vote in Liechtenstein parliamentary elections . . . the Court noted: "the Contracting States have a wide margin of appreciation to make the right to vote subject to conditions."

9. [T]he point is that one must avoid confusing *the ideal* to be attained and which I support—which is to make every effort to bring the isolation of convicted prisoners to an end, even when they have been convicted of the most serious

crimes, and to prepare for their reintegration into society and citizenship—and the reality of *Hirst (no. 2)*, which on the one hand theoretically asserts a wide margin of appreciation for the States as to the conditions in which a subjective right (derived from judicial interpretation!) may be exercised, but goes on to hold that there has been a violation of that right, thereby depriving the State of all margin and all means of appreciation.

Joint Committee on Human Rights
Enhancing Parliament's Role in Relation to Human Rights
Judgments^{*}

116. It is now almost 5 years since the judgment of the Grand Chamber in *Hirst v UK* (2005). The Government consultation was finally completed in September 2009. Since then, despite the imminent general election, the Government has not brought forward proposals for consideration by Parliament. We reiterate our view, often repeated, that the delay in this case has been unacceptable.

118. [T]he Government, in its recent correspondence with us and the Committee of Ministers has been keen to emphasise that the ongoing breach of the Convention cannot affect the legality of the forthcoming election. In his recent letter, the Human Rights Minister said:

Whilst the Government is bound under Article 46 of the ECHR to implement decisions of the European Court of Human Rights, such decisions do not have the effect of striking down the national law to which they relate. The UK is a dualist legal system in which international law obligations must be translated into domestic law via Parliament. Therefore, whilst the Government accepts that the Court in *Hirst v UK (No 2)* found that section 3 of the Representation of the People Act 1983 is not compliant with its international law obligations under the Convention, the domestic law continues in force. Similarly, this decision does not have any impact on the continuing validity of our current body of domestic election law.

^{*}Excerpted from JOINT COMMITTEE ON HUMAN RIGHTS, ENHANCING PARLIAMENT'S ROLE IN RELATION TO HUMAN RIGHTS JUDGMENTS, 2009-10, HC 455, at 35-37 (March 26, 2010) (U.K.).

119. The Government's analysis is legally accurate. The continuing breach of international law identified in *Hirst* will not affect the legality of the forthcoming election for the purposes of domestic law. However, without reform the election will happen in a way which will inevitably breach the Convention rights of at least part of the prison population. This is in breach of the Government's international obligation to secure for everyone within its jurisdiction the full enjoyment of those rights. We consider that the Government's determination to draw clear distinctions between domestic legality and the ongoing breach of Convention rights shows a disappointing disregard for our international law obligations.

As is likely familiar, the United Kingdom did not thereafter amend its legislation, and other applicants returned to the ECtHR to seek relief. In November of 2010, the ECtHR issued its judgment in *Greens and M.T.*, responding to applicants who:

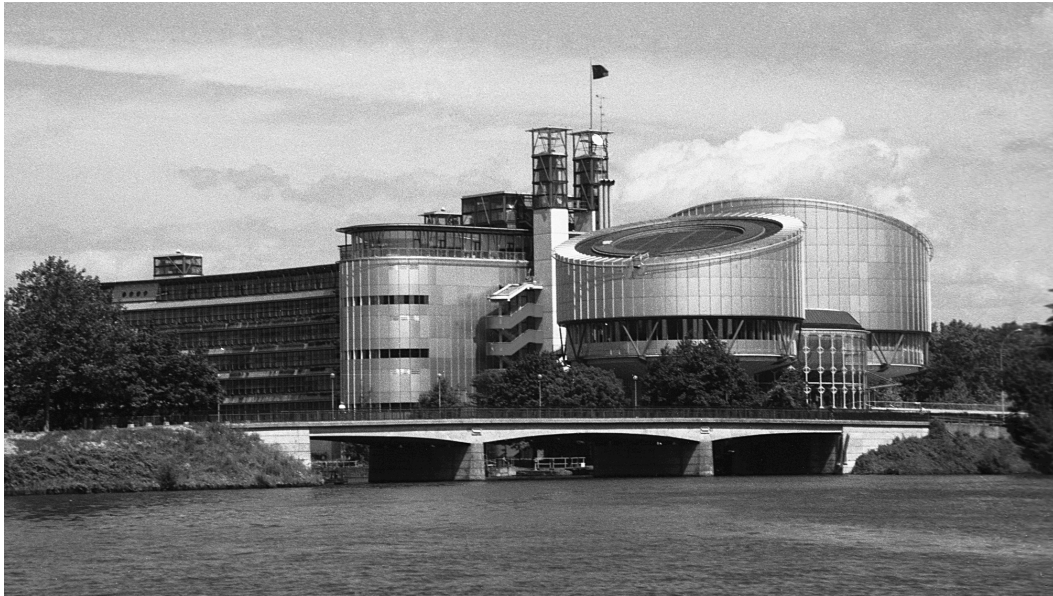
complained that as convicted prisoners in detention they had been subject to a blanket ban on voting in elections and had accordingly been prevented from voting in elections to the European Parliament in June 2009 and in the general election of May 2010 and would potentially be banned from voting in the elections to the Scottish Parliament of May 2011.

The Court held that, "notwithstanding the wide margin of appreciation afforded to the respondent State by its judgment in *Hirst*," the United Kingdom was in violation of voting rights guaranteed by Article 3 of Protocol No. 1 to the Convention and that, under Article 46 of the Convention, the contracting parties had obligations "to abide by the final judgment of the Court in any case to which they are parties." The Court directed further that "in light of the lengthy delay in implementing that decision and the significant number of repetitive applications," the United Kingdom had to:

(a) bring forward, within six months of the date upon which the present judgment becomes final, legislative proposals intended to amend [its felon disenfranchisement laws] in a manner which is Convention-compliant; and (b) enact the required legislation within any such period as may be determined by the Committee of Ministers.

As part of the remedy, the applicants in *Greens* were each awarded 5,000 Euros (£4,350) in costs and expenses for their loss.

Greens was met with considerable outcries. As the *Telegraph* reported in April of 2011, one MP stated that, “Britain must stand firm against this growing abuse of power by unaccountable judges.” The Prime Minister was quoted as saying that it made him “physically ill to contemplate giving the vote to prisoners. They should lose some rights including the right to vote.” Further, “Lord Neuberger, the Master of the Rolls and the country’s second most senior judge, said the domestic courts would not interfere if Parliament chose to reject the controversial decision. He said any outcome was a ‘political decision’ and if the Government chose to ignore a Strasbourg ruling there would be ‘nothing objectionable’ in British law.” Tom Whitehead, *European Court Gives Cameron Ultimatum on Prisoner Votes*, TELEGRAPH (London), Apr. 13, 2011.



European Court of Human Rights, Strasbourg, France, 1984.

Architect: Richard Rogers and Claude Bucher.

Photograph by Sandro Weltin. Reproduced courtesy of the Council of Europe.

Lord Irvine of Lairg
*A British Interpretation of Convention Rights**

The hostility towards human rights and the Human Rights Act 1998 (“the HRA”) within some sections of the press, and their very mixed record of reporting on these issues, impels me, for the avoidance of any possible misunderstanding, to reaffirm my unswerving support both for the international system of human rights protection that the European Convention on Human Rights (“the ECHR”) provides and for the provisions of the HRA under which our own Judges protect those rights in domestic law.

This Lecture will invite our Supreme Court to re-assess all its previous statements about the stance it should adopt in relation to the jurisprudence of the ECHR. My objectives are:

(a) to ensure that the Supreme Court develops the jurisdiction under the HRA that Parliament intended;

(b) that, in so doing, it should have considered and respectful regard for decisions of the ECHR, but neither be bound nor hamstrung by that case-law in determining Convention rights domestically;

(c) that, ultimately, it should decide the cases before it for itself;

(d) that if, in so doing, it departs from a decision or body of jurisprudence of the ECHR it should do so on the basis that the resolution of the resultant conflict must take effect at State, not judicial, level; and

(e) by so proceeding, enhance public respect for our British HRA and the development and protection of human rights by our own Courts in Britain.

Section 2(1) of the HRA directs the domestic Courts how they are to treat decisions of the Strasbourg Court when interpreting and giving effect to the ‘Convention rights’ domestically . . . [and] provides:

*Excerpted from Lord Irvine of Lairg, *A British Interpretation of Convention Rights* (Dec. 14, 2011), *available at* http://www.ucl.ac.uk/laws/judicial-institute/docs/Lord_Irvine_Convention_Rights_dec_2012.pdf. [Editor’s note: This speech, given on December 14, 2011 at the Bingham Centre and hosted by the Judicial Institute at University College London was the “first time” that Lord Irvine, “architect of the Human Rights Act,” had “publically commented on his intent behind section 2 and its subsequent interpretation.”]

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any . . . judgment . . . of the European Court of Human Rights

[W]hat precisely is it that our domestic Courts are doing when adjudicating under the HRA? Are they merely seeking to predict and mimic what the decision of the Strasbourg Court would be if presented with the facts of the case before them—in effect, are they simply agents or delegates of the ECHR? Or are they doing something quite different (and more profound)—interpreting and explaining the content and meaning of the Convention rights within the sovereign legal systems of the United Kingdom?

[T]he starting point is the language. ‘Take account of’ is not the same as ‘follow,’ ‘give effect to’ or ‘be bound by.’ Parliament, if it had wished, could have used any of these formulations.

It did not. The meaning of the provision is clear. The Judges are not bound to follow the Strasbourg Court: they must decide the case for themselves. . . .

[P]arliament, if it deems it necessary, can legislate in a manner which is inconsistent with the Courts’ view of what the Convention rights require. If Parliament expresses its will in clear terms then the domestic Courts remain bound to give effect to its intention. . . .

[P]arliament’s endorsement of [section 2] means that it is simply untenable to suggest that the Judges are *entitled* to treat themselves as bound by decisions of the Strasbourg Court. It is Parliament, and not the Strasbourg Court, which is supreme. . . .

[S]ection 2 of the HRA means that the domestic Court *always has a choice*. Further, not only is the domestic Court *entitled* to make the choice, its statutory duty under s[ection] 2 *obliges* it to confront the question whether or not the relevant decision of the ECHR is sound in principle and should be given effect domestically. Simply put, the domestic Court must decide the case for itself.

A more nuanced approach, which allows for some possibility of the domestic Court declining to follow Strasbourg in certain (relatively narrowly defined) circumstances, is provided in the judgment of Lord Neuberger (on behalf of a unanimous nine Justice Supreme Court) in *Pinnock v Manchester City Council*:

This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would

sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law . . . Of course, *we should usually follow* a clear and constant line of decisions by the European court: . . . But we are not actually bound to do so *or (in theory, at least)* to follow a decision of the Grand Chamber. . . .

There is no magic in the mantra ‘clear and constant line of jurisprudence.’ The phrase has no statutory warrant in the HRA and is not a term of art. . . . [The] obligation is ‘to take into account.’ This does not change, irrespective of how many times the Strasbourg Court may repeat itself. . . .

[The need to comply with international law is not to the contrary.] A Judge’s concern for the UK’s foreign policy and its standing in international relations can never justify disregarding the clear statutory direction which s.2 of the HRA provides. . . .

Parliament contemplated that the domestic Courts would not follow Strasbourg in all cases. In doing so it implicitly approved the domestic Courts reaching an outcome which might result in non-compliance with the UK’s Treaty obligations. The Judges should not abstain from deciding the case for themselves simply because it *may* cause difficulties for the UK on the international law plane.

[T]reaty obligations only bind the State as an actor in public international law. They are not directly incorporated in, or enforceable under, our domestic legal system. Absent the HRA, no claim could be brought in our Courts because an individual alleges that his Convention rights have been breached. Treaty obligations bind the UK only because the UK *qua* State has consented to it. If the UK does not comply with its obligations then the consequences which *may* follow are a matter of international relations, and inter-State diplomacy. . . .

[I]t is not the Courts’ function under the HRA to determine cases of high Constitutional importance, with far-reaching consequences for our democracy and the citizens of the UK, on the basis of their view of the importance of the UK’s standing as a good global citizen. That is an issue far better left to the Foreign and Commonwealth Office and Parliament. . . .

[T]he ECHR may (or may not) hold that UK domestic law is not compliant with the requirements of the Convention. At this stage, the UK *qua* State may either determine what steps are necessary to remedy the identified breach of its Treaty obligations or, in what would probably be a very rare case,

decide that the UK's pressing national interest means that the judgment of the ECHR should not be implemented. . . .

[M]any of our Judges have all too easily slipped into the mind-set that the domestic Courts, even the Supreme Court, are effectively subordinate (in a vertical relationship) to the ECHR. . . .

Moreover, there are major advantages in our domestic Courts' adopting a more critical approach to the Strasbourg jurisprudence.

It is our own Judges who are embedded in our culture and society and so are best placed to strike the types of balance between the often competing rights and interests which adjudication under the HRA requires. Put shortly, more often than not we should trust our own judges to reach a 'better' answer.

In terms of fostering a 'dialogue' with Strasbourg about the development of its own case-law, the standing of our Courts is likely to be enhanced if their position is more rather than less assertive. A Court which subordinates itself to follow another's rulings cannot enter into a dialogue with its superior in any meaningful sense. Importantly, this will influence Strasbourg's approach to decisions of our Supreme Court. If Strasbourg always proceeds secure in the knowledge that our Judges will inevitably "roll-over," we should not be at all surprised if we find ourselves being "rolled over" with increasing regularity. An appropriately critical, but respectful, approach on the part of our own Courts will have positive influence in encouraging Strasbourg to observe the appropriate limitations inherent in its own role, and to respect the State's margin of appreciation.

This approach would enhance our Courts' own institutional prestige and credibility domestically, both with the man in the street and Parliament. The domestic Court must act, and be seen to act, as an autonomous institution which determines cases of high Constitutional import according to *its* interpretation of our fundamental values and national interest. It would be damaging for our Courts' own legitimacy and credibility if they are perceived as merely agents or delegates of the ECHR and Council of Europe ("CoE"). A perception that our Judges regard it as their primary duty to give effect to the policy preferences of the Strasbourg Court should not be allowed to take root, since this would gravely undermine, not enhance, respect for domestic and international human rights principles in the UK. This risk can be obviated by holding fast to the obvious intention of s. 2(1). . . .

[I] now turn to the . . . different question: where there is no Strasbourg decision in point may our Courts “leap beyond” the existing Strasbourg jurisprudence and decide the case for themselves? . . .

First, there is no legislative warrant for our Courts abdicating their Constitutional role in determining the content of the relevant Convention right under domestic law. A policy of ‘wait and see’ what Strasbourg may or may not do, if and when an appropriate case comes before it, simply will not do. Under s. 2 it is the *duty* of the domestic Court to decide the matter for itself.

Second, the realities of life and litigation mean that our domestic Courts are inevitably called upon to consider issues in circumstances and contexts where the Strasbourg case-law will not provide any definitive answer or assistance. Sitting on our hands in such a case is most certainly not what Parliament intended.

Third, it is this type of case—where the Strasbourg case-law does not offer any clear answer—that gives our Courts the greatest scope to enter into a productive dialogue with the ECHR, and thus shape its jurisprudence. It is through our own Judges grappling with the difficult issues which human rights adjudication poses and cogently stating their reasoning that there is the most potential to influence the approach which the Strasbourg Court ultimately adopts. . . .

[T]he UK Courts have no power to bind any other CoE member state, and the Strasbourg Court is of course not bound by their decisions. The domestic Courts do not interpret the content of the ECHR as an international Treaty; they interpret the Convention rights under domestic law. . . .

[S]ection 2 of the HRA means that it is our Judges’ duty to decide the cases for themselves and explain clearly to the litigants, Parliament and the wider public why they are doing so. This, no more and certainly no less, is their Constitutional duty.

Might the Court in *Hirst* have anticipated the resistance that its judgment would provoke? If so, should that have factored into its decision in any respect? When, if ever, should judges, as part of their role, take into account predictions about the impact of their decisions? In the service of what concerns? Building or preserving the court’s legitimacy? Deferring to arguments about political

stability or national claims of identity? When, if ever, would such concerns support the view that either *Sejdić*, excerpted below, or *Hirst* should come out differently?

Sejdić v. Bosnia and Herzegovina
European Court of Human Rights (Grand Chamber)
App. No. 27996/06 (2009)

6. The Constitution of Bosnia and Herzegovina is an annex to the General Framework Agreement for Peace in Bosnia and Herzegovina (“the Dayton Peace Agreement”), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. Since it was part of a peace treaty, the Constitution was drafted and adopted without the application of procedures which could have provided democratic legitimacy. . . .

7. In the Preamble to the Constitution, Bosniacs, Croats and Serbs are described as “constituent peoples.”

9. [T]he applicants [Mr Dervo Sejdić and Mr Jakob Finci] describe themselves to be of Roma and Jewish origin respectively. Since they do not declare affiliation with any of the “constituent peoples,” they are ineligible to stand for election to the House of Peoples (the second chamber of the State parliament) and the Presidency. . . .

26. [T]hey relied on Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12[.] [Article 14 provides]:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” . . .

44. [W]here a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible. . . .

45. [T]his exclusion rule pursued at least one aim . . . broadly compatible with the general objectives of the Convention, . . . namely the restoration of peace. . . . The nature of the conflict was such that the approval of the “constituent peoples” (namely, the Bosniacs, Croats and Serbs) was necessary to ensure peace.

This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations

47. [T]he Court observes significant positive developments in Bosnia and Herzegovina since the Dayton Peace Agreement. . . .

48. [T]here exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. . . .

49. Thus, the Court concludes that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1. . . .

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF
JUDGE MIJOVIĆ, JOINED BY JUDGE HAJIYEV

[I]s it up to the European Court of Human Rights to determine when the time for change has arrived? I would hesitate to give a firm and definite answer to these questions. "Identity through citizenship" would be a desirable change, but ethnic distinction, in the Court's case-law, is considered unnecessary and therefore discriminatory where the same result (legitimate aim) could be achieved through a measure that does not rely on a racial or ethnic differentiation, or on the application of criteria other than those based on birth. . . .

[T]he law of most, if not all, member States of the Council of Europe provides for certain distinctions based on nationality with regard to certain rights and the Court's case-law allows a certain margin of appreciation to national authorities in assessing whether and to what extent differences justify a different treatment in law. . . . For the sake of the Court's case-law, it would have been very interesting to see how far the Court would have interpreted the margin of appreciation left to the State in this case.

DISSENTING OPINION OF JUDGE BONELLO

[I] believe the present judgment . . . has divorced Bosnia and Herzegovina from the realities of its own recent past. . . .

I also question the Court's finding that the situation in Bosnia and Herzegovina has now changed and that the previous delicate tri-partite

equilibrium need no longer prevail. . . . [A] judicial institution so remote from the focus of dissent can hardly be the best judge of this. . . .

Strasbourg has, over the years, approved quite effortlessly the restriction of electoral rights (to vote in or stand for elections) based on the widest imaginable spectrum of justifications: from absence of language proficiency to being in detention or having previously been convicted of a serious crime; from a lack of “four years’ continuous residence” to nationality and citizenship requirements; from being a member of parliament in another State to having double nationality; from age requirements to being below 40 years old in senate elections; from posing a threat to the stability of the democratic order to taking the oath of office in a particular language; from being a public officer to being a local civil servant; from the requirement that would-be candidates cannot stand for election unless endorsed by a certain number of voters’ signatures to the condition of taking an oath of allegiance to the monarch.

All these circumstances have been considered sufficiently compelling by Strasbourg to justify the withdrawal of the right to vote or to stand for election. But a clear and present danger of destabilising the national equilibrium has not. The Court has not found a hazard of civil war, the avoidance of carnage or the safeguard of territorial cohesion to have sufficient social value to justify some limitation on the rights of the two applicants.

I do not identify with this. I cannot endorse a Court that sows ideals and harvests massacre.

Counting, Consensus, and Categorizing

In determining the scope of Convention rights, the *Hirst* decision surveyed jurisdictions and counted and characterized national laws, as does the *A, B and C* decision, excerpted below. The practice of counting, found in both European and American judgments, may seem straightforward, yet it entails a sequence of decisions.

First, what is the point of counting? Does it reflect a court’s effort to understand the state of the law? Might counting establish the content of an evolutive norm, reflected in many subunits’ law? Or is counting in the service of other system goods, such as deference to decision makers within subunits (be they majoritarian or judicial), or respect for value pluralism? Or does counting justify

and legitimate potentially controversial decisions and so serve to preserve court authority? In practice, does counting insulate courts from criticism and backlash?

Does counting determine whether to intervene, or when? Does the answer vary depending on the supra-national entity's own understanding of whether it is seeking a progressive integration and homogenization, or providing an umbrella for divergent norms that valorize experimentation? How might answers to these questions guide a court, once it decides that a rule is shared or is an outlier?

Second, how do courts decide *what* to count? Courts have to determine how to characterize a particular right, and then decide what categories of legal rules relating to the claim are relevant. In *Hirst*, for example, which limits on voting were seen as illuminating? Which irrelevant? Or, in the context of restrictions on abortion, should judges survey laws providing health related exceptions from abortion bans, or survey laws recognizing abortion rights? Or should the focus instead be on privacy, equality, or citizenship? What kinds of individual interests come to be characterized as relevant, and how are they weighted? What kinds of legal rules—constitutions, statutes, administrative regulations, applied practices—are to be tallied?

Third, what jurisdictions are subject to the count? Should judges survey subunits within the larger federation or union only, or those outside itself as well? And need all rules be discussed? Should the *Hirst* Court, which considered the Canadian rule, also have discussed the United States, which has approved prisoner disenfranchisement?

How would answers to these questions identify whether a rule is shared or an outlier? And then guide judges about what to do?

Roderick M. Hills
*Counting States**

[S]tate counting involves two common elements: judicial use of state law to inform the content of federal constitutional doctrine, and judicial evaluation of states' laws collectively rather than singly to determine a state "consensus." When counting states, the Court treats the States as one large decision-making body whose members reach a single consensus. . . .

*Excerpted from Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17 (2009).

[F]irst, the Court could be using the state legislatures' consensus as a source of national law. Alternatively, the Court could be using the state legislatures' consensus as a limit on national law. In the first case, the Court would count the States' laws to determine the States' consensus position on an issue and then enforce that position against outlier states. In the second case, the Court would determine the States' consensus to place an outside limit on the judiciary's enforcement of its own view of the constitutional norm. In effect, the second version of state counting uses the States' consensus as a sort of collective veto over judicial review, not as an independent source of federal constitutional norms. . . .

[S]uppressing outlying states as an end in itself is not a coherent constitutional goal in a federal regime. The whole point of federalism is based on the premise that there is no harm in legal diversity as such. If a single state passed a statute, for instance, punishing a certain crime by ordering the offender to undergo intensive therapy and perform community service, it would not be sensible to strike down the law as "cruel and unusual" just because no other state had enacted such a reform. In a federal regime, merely being unusual (absent cruelty) is a virtue, not a vice.

It is more helpful and coherent to think of state laws as forming a *limit* on the Court's interpretation. . . . [Thus, c]ounting states . . . is intended to function as a constraint on the judiciary, not on outlier states.

This judiciary-limiting character of state law explains why the Court does not require a more robust showing of state consensus. If the only purpose of the state counting exercise is to demonstrate the negative point that no clear consensus exists among the States that is inconsistent with the Court's point of view, then it is sufficient for the Court to show that its holding has not been rejected by a majority of the States. The Court need not show that the judicial position has actually been endorsed by a majority of the States because the States' consensus is not intended to supply the content of the federal norm. State counting merely provides assurance against a national popular backlash against the Court. Put differently, where there is no consensus one way or the other, the Court uses the indecision of the States as an opening for the Court to impose its own values on the nation.

Likewise, once one understands that state counting functions in practice as a purely negative, judiciary-limiting device, the Court's notorious casualness in how it tallies states becomes less mystifying. If the only point of the tally is to ensure that the Court's position has not been rejected by a majority of states, it is unnecessary to determine why the States have not rejected the judicial position. It

suffices that, for whatever reason, most states have not adopted a position inconsistent with the Court's view. That these state legislatures might not perceive themselves as fixing a national standard of decency is immaterial, because the Court is not relying on them to define such a constitutional standard—it is relying on them only to demonstrate that it is not trampling on any well-defined majority opinion. . . .

There are certain parallels between this Court-restraining function of state counting in due process cases and what Professor Larry Sager calls “cool federalism.”³¹ Professor Sager describes cool federalism as the practice of allowing “maverick” states to “invent” new governmental norms that are then gradually “propagated” to other states and are eventually “consolidated” as federal norms by Congress or the federal courts once they have won sufficiently widespread support among the States. The period of state experimentation, according to Professor Sager, provides information to national decision makers about how the “maverick” norms will operate on the ground, allowing them to decide whether to nationalize the norms after they have proven themselves to be sound policies.

To the extent that the Court tallies states to assure itself that its decision will not offend a national majority, . . . the States become the Court's pollsters. Counting states helps the Court ensure that it will not experience *de novo* the widespread popular backlash it has incurred in the past for getting ahead of public opinion. But it is important to note the thinness of the information the Court obtains from state counting: The Court simply assures itself that the public is sufficiently divided on a controversial issue that the Court can weigh in without risking a popular backlash so great that it would have to reverse itself later. Such state counting, in other words, yields very little information about the actual merits of the position that the Court decides to endorse. Moreover, state counting as a device for restraining courts does very little to foster maverick states' experiments because a bare majority of state legislatures has the power to stop the Court from imposing a uniform constitutional rule on the nation. Novel state policies that arguably impinge on the federal judiciary's theories of liberty or equality—like covenant marriage—would need an additional and more robust restraint on judicial review. . . .

[I]f one assumes that the only function of federalism is to protect outlying states' experiments, then state counting will not seem to be consistent with the spirit of federalism. But American federalism has more justification than

³¹ Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1386 (2005).

protection of regulatory diversity. Since the Anti-Federalists' attack on the proposed U.S. Constitution as a device for serving the interests of mercantile elites, supporters of state power have argued that state governments—whose officials are generally elected from small electoral districts—are more responsive to voters, more egalitarian, and less dominated by cultural and financial elites than the federal government. Uniting the States as a single force to counterbalance the federal government, therefore, is a venerable theme in American federalism. The Court's device of counting states is essentially a judicially crafted version of this populist idea.

John L. Murray

*Consensus: Concordance, or Hegemony of the Majority?**

The role of consensus within the system of the European Convention on Human Rights is a doctrine which has been described as “one of the Court's favourite, as well as controversial, interpretive tools.” [T]he very application of a doctrine of consensus by a court required to adjudicate on fundamental rights begs important questions of legitimacy.

How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights? Is resort to consensus consistent with respect for diversity among the democratic and sovereign States which are Contracting Parties to the Convention? Or an undesirable *renvoi* to national systems whose mechanisms for the protection of human rights may be seen as lacking? Alternatively, is it the only valid reference point in the evaluation of the societies of those States? . . .

United States death penalty case-law may be characterised as an ongoing tug-of-war between two competing theories of adjudication that have a resonance for the Convention system. The theory espoused by one camp accords a high level of deference to State legislatures, strongly favours judicial restraint, and requires an overwhelming degree of convergence, based on domestic indicia, in order to determine a consensus, and that such consensus is well-established rather than of recent origin. According to this theory, overwhelming consensus regarding

*Excerpted from John L. Murray, *Consensus: Concordance, or Hegemony of the Majority*, in *DIALOGUE BETWEEN JUDGES, EUROPEAN COURT OF HUMAN RIGHTS, COUNCIL OF EUROPE* (2008), available at http://www.echr.coe.int/NR/ronlyres/D6DA05DA-8B1D-41C6-BC38-36CA6F864E6A/0/DIALOGUE_2008_EN.pdf.

imposition of the death penalty in a given circumstance, when discerned, will not only inform but *dictate* the court's decision.

The other theory, in according the court a role as a moral arbiter using its own independent judgment, tempers its deference to State legislatures and also takes a more relaxed approach to consensus, not only with the possibility of a more moderate consensus being utilised to buttress a principled judgment and a more flexible approach to the determination of consensus, with recent international developments of relevance, but also permitting the court to deviate from national consensus when its independent judgment warrants such departure.

[C]onvention jurisprudence has been characterised as containing a persistent tension between what are perceived as its two major interpretative poles: consensus and "moral truth." This pull between the two poles is, however, to some extent masked by the seemingly inconsistent application of the consensus doctrine. . . .

Indeed, in *Hirst*, . . . the sources used to determine consensus attracted considerable disagreement. In that case, Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in a joint dissenting opinion took issue with a majority decision which referred extensively to two recent judgments of the Supreme Court of Canada and the Constitutional Court of South Africa but which, they noted, "unfortunately contains only summary information concerning the legislation on prisoners' right to vote in the Contracting States." Was this simply a case, in Justice Scalia's words, of the Court looking over the crowd and picking out its friends?

Hirst also provides an example of the Court's differing approaches to cases where no consensus may be discerned. In that case, the Court held that "even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue," ultimately finding that the ban constituted a disproportionate infringement

This may be compared with the case of *Vo v. France* (2004), decided the previous year, in which the Grand Chamber held that, as "there is no European consensus on the scientific and legal definition of the beginning of life," "the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere."

However, in *Christine Goodwin v. the United Kingdom* in 2002 regarding transsexuals' right to marry, the Court found that such a right existed despite the absence of a European consensus on the issue, given the existence of a

“continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.”

[F]irstly, is the Court relying on consensus as a determinative factor in many of its decisions or is consensus simply a mask for engaging in the process of a substantive analysis of the matter in issue?

Secondly, if the latter is the case, why is the doctrine of consensus invoked at all? [Professor Letsas has] said that Convention case-law “shows that the Court is primarily interested in evolution towards the moral truth of the ECHR rights, not in the evolution towards some commonly accepted standard, regardless of its content.”

Judith Resnik

Categorical Federalism: Jurisdiction, Gender, and the Globe^{*}

“The Constitution requires a distinction between what is truly national and what is truly local.” These words were used by the Chief Justice of the United States Supreme Court in 2000 to explain why a statute described by Congress as providing a “civil rights remedy” for victims of gender-biased assaults unconstitutionally trenched on lawmaking arenas belonging to the states. Neither the phrase “truly local” nor “truly national” appears in the United States Constitution. Indeed, the Court’s reliance on the modifier “truly” suggested that calling something local or national did not suffice to capture the constitutional distinction claimed—that the Violence Against Women Act (VAWA) impermissibly addressed activities definitional of and reserved to state governance.

This Essay considers the mode of analysis for which the phrases “truly national” and “truly local” are touchstones. Categorical federalism is the term I offer for this form of reasoning. Categorical federalism’s method first assumes that a particular rule of law regulates a single aspect of human action: Laws are described as about “the family,” “crime,” or “civil rights” as if laws were univocal and human interaction similarly one-dimensional. Second, categorical federalism relies on such identification to locate authority in state or national governments

^{*}Excerpted from Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

and then uses the identification as if to explain why power to regulate resides within one or another governmental structure. Third, categorical federalism has a presumption of exclusive control—to wit, if it is family law, it belongs only to the states. Categories are thus constructed around two sets of human activities, the subject matter of regulation and the locus of governance, with each assumed to have intelligible boundaries and autonomous spheres.

Categorical federalism has appeal, particularly in a world as full of vivid changes as the one we inhabit. Proponents of categorical federalism argue that its virtue lies in its democracy-enhancing features. The Court's interventions, in the name of federalism, are supposed to engender responsibility on the part of government officials by promoting transparent lines of accountability. Categorical federalism posits and promises clearly delineated allocations of power by suggesting, comfortingly, that these delineations flow “naturally” through the United States's history from a topic to a geographically located government. . . . [Federal judges cast] their project as empirical rather than interpretive, a historical exercise aimed at describing and implementing agreements forged in 1789. . . .

But the search for meaning from 1789 cannot work because “the federal” had yet to be made. The issue then, and now, is what meaning and purposes to give to federal and state governments. In a world increasingly conscious that “the local” and “the national” are ideas as well as places, the quaint tidiness of categorical federalism ought to prompt skepticism. . . .

Given this context, categorical federalism ought to be understood as a political claim, advancing an argument that certain forms of human interactions should be governed by a particular locality, be it a nation-state or its subdivisions. Return then to the Chief Justice's locution—“truly national,” “truly local”—and reread it to betray anxiety as well as insistence, as an effort to make meaningful a division that is not only elusive but increasingly inaccurate. Categorical federalism's attempt to buffer the states from the nation, and this nation from the globe, is faulty as a method and wrong as an aspiration.

Below, I sketch the empirical case against categorical federalism by showing that the very areas characterized in the VAWA litigation as “local”—family life and criminal law—have long been subjected to federal lawmaking. Decades of federal constitutional family law create substantive rights anchored in the Fourteenth Amendment for parents and children, just as decades of federal legislation—addressing welfare, pension, tax, bankruptcy, and immigration—have defined membership in and relationships within groupings denominated “families” by the national government.

The normative critique of categorical federalism stems from the political injuries caused by equating family life with state law. Categorical federalism is not only fictive but harmful, for it deflects attention from the many political and legal judgments made by the nation's judiciary, executive, and Congress as they regulate the lives of current and former householders. Federal actors ought not to be sheltered from accounting for their work in shaping the meaning of gendered family roles. And just as it cloaks the exercise of national powers from view, categorical federalism also provides a false sense of security from transnational lawmaking. . . .

[C]ategories are endemic, in law as elsewhere, but what fills categories and their contours varies with context. Return to the issue of violence against women: If a man raped a woman and proclaims he did so because he likes to inflict such pain on women, what should law call that action? Should the description vary if the man and woman have been (or are) married instead of strangers? If they were employer and employee? Opponents in a war? Should the legal import vary if the man assaults the woman as she is about to leave the house on her way to school, work, or another shelter? . . . [D]ecisions to categorize are purposeful, consequentialist, and situational. . . .

[L]aws may be about both family and equality, about both economic capacity and violence [and] governance cannot accurately be described as residing at a single site. State, federal, and transnational laws are all likely to be relevant. And . . . any assignment of dominion can be transitory. One level of government may preside over a given set of problems for a given period rather than forever. Were one to use this lens, the assignment of regulatory authority would become a self-conscious act of power, exercised with an awareness that a sequence of interpretive judgments, made in real time and revisable in the future, undergirds any current designation of where power to regulate what activities rests. . . .

[E]xploration is needed of the rich veins of federalism beyond the boundaries of contemporary legal discourse, fixated on a bipolar vision of states acting singularly and of a predatory federal government. The contemporary debate about whether to prefer, a priori, the states or the federal government for certain forms of lawmaking misses dynamic interaction across levels of governance. In practice, federalism is a web of connections formed by transborder responses (such as interstate agreements and compacts) and through shared efforts by national organizations of state officials, localities, and private interests. . . .

Health and Life

Recall in *Hirst* the interpretive practices on which the Court relied to determine that disenfranchisement of prisoners violated Convention rights. Should the same approaches determine the scope of rights that the Convention protects in cases arising from laws criminalizing abortion? How might the various rights at stake be categorized? Given the facts detailed below, is *A, B and C* about life, health, liberty, autonomy and/or respect for private and family life?

Voting rules directly implicate sovereignty and democracy. Should the importance of those concerns have counselled the Court to afford more deference to suffrage legislation than to abortion legislation? Note that, in *A, B and C*, the Court observes that “there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law.” Yet the Court permitted the Irish law to stand, albeit with additional procedural safeguards as applied to some women. Why is the Court in *A, B and C* more deferential than it was in *Hirst*?

A, B and C v. Ireland

European Court of Human Rights (Grand Chamber)

App. No. 25579/05 (2010)

[Applicants A, B and C are women over 18 years of age who reside in Ireland. A and B, both Irish nationals, complained under Article 8 about the Irish Government’s prohibition of abortion for health and well-being reasons. C, a Lithuanian national, complained under Article 8 that the Government had failed to implement the constitutional right to an abortion in Ireland in the case of a risk to the woman’s life.]

13. [O]n 28 February 2005 the first applicant [A] traveled to England for an abortion as she believed that she was not entitled to an abortion in Ireland. She was 9½ weeks pregnant.

14. She had become pregnant unintentionally, believing her partner to be infertile. At the time she was unmarried, unemployed and living in poverty. She had four young children [of whom she did not have custody]. . . . She considered that a further child at that moment of her life (with its attendant risk of post-natal

depression and to her sobriety) would jeopardise her health and the successful reunification of her family. She decided to travel to England to have an abortion.

15. [She borrowed funds at a high interest rate and travelled] in secrecy, without alerting the social workers and without missing a contact visit with her children. . . .

18. [O]n 17 January 2005 the second applicant [B] travelled to England for an abortion believing that she was not entitled to an abortion in Ireland. She was 7 weeks pregnant.

19. The second applicant became pregnant unintentionally. She had taken the “morning-after pill” and was advised by two different doctors that there was a substantial risk of an ectopic pregnancy (a condition which cannot be diagnosed until 6-10 weeks of pregnancy)

21. [O]n her return to Ireland she started passing blood clots and two weeks later, being unsure of the legality of having travelled for an abortion, sought follow-up care in a clinic in Dublin affiliated to the English clinic. . . .

22. On 3 March 2005 the third applicant [C] had an abortion in England believing that she could not establish her right to an abortion in Ireland. She was in her first trimester of pregnancy at the time.

23. Prior to that, she had been treated for 3 years with chemotherapy for a rare form of cancer. . . . [Her doctors advised] that, if she did become pregnant, it would be dangerous for the foetus if she were to have chemotherapy during the first trimester.

24. The cancer went into remission and the applicant unintentionally became pregnant. She was unaware of this fact when she underwent a series of tests for cancer, contraindicated during pregnancy. . . . She alleged that, as a result of the chilling effect of the Irish legal framework, she received insufficient information as to the impact of the pregnancy on her health and life and of her prior tests for cancer on the foetus.

25. Given the uncertainty about the risks involved, the third applicant travelled to England for an abortion. . . .

26. On returning to Ireland after the abortion, the third applicant suffered complications of an incomplete abortion, including prolonged bleeding and infection. She alleges that doctors provided inadequate medical care. . . .

[Section 58 of the Offences Against the Person Act 1861 makes having or administering an abortion punishable by life in prison.]

36. [A] referendum was held in 1983, resulting in the adoption of a provision which became Article 40.3.3 of the Irish Constitution, the Eighth Amendment (53.67% of the electorate voted with 841,233 votes in favour and 416,136 against). . . .

55. [F]ollowing [two] amendments [adopted by popular referendum in November 1992], Article 40.3[.3] of the Constitution reads as follows:

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

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.” . . .

212. [T]he Court recalls that the notion of “private life” within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to personal autonomy and personal development. It concerns subjects such as gender identification, sexual orientation and sexual life, a person’s physical and psychological integrity as well as decisions both to have and not to have a child or to become genetic parents.

213. The Court has also previously found . . . that legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman, the Court emphasising that Article 8 cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman’s private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman’s right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child.

214. While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second

applicants complained, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8. . . .

217. To determine whether this interference entailed a violation of Article 8, the Court must examine . . . whether the interference was "in accordance with the law" and "necessary in a democratic society" for one of the "legitimate aims" specified in Article 8 of the Convention. . . .

221. [With respect to whether the interference was "prescribed by law"] [t]he Court considers that the domestic legal provisions . . . were clearly accessible [and] that it was clearly foreseeable that the first and second applicants were not entitled to an abortion in Ireland for health and/or well-being reasons.

222. [With respect to whether the interference pursued a legitimate aim] [t]he Court recalls that, in the *Open Door* (1992) case, it found that the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum. The impugned restriction in that case was found to pursue the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect. . . .

223. However, the first and second applicants maintained that the will of the Irish people had changed since the 1983 referendum so that the legitimate aim accepted by the Court in its *Open Door* judgment was no longer a valid one. The Court recalls that it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals including on the question of when life begins. By reason of their "direct and continuous contact with the vital forces of their countries," State authorities are in principle in a better position than the international judge to give an opinion on the "exact content of the requirements of morals" in their country, as well as on the necessity of a restriction intended to meet them.

224. [I]t is true that, since [1983], the population of Ireland has not been requested to vote in a referendum proposing any broader abortion rights in Ireland. In fact, in 1992 and 2002 the Irish people refused in referenda to restrict the existing grounds for lawful abortion in Ireland, on the one hand, and accorded in those referenda the right to travel abroad for an abortion and to have information about that option, on the other.

225. [T]he rejection by a further referendum of the Lisbon Treaty in 2008 is also important in this context. While it could not be said that this rejection was entirely due to concerns about maintaining Irish abortion laws, the Report commissioned by the Government found that the rejection was “heavily influenced by low levels of knowledge and specific misperceptions” as to the impact of the Treaty on Irish abortion laws. As with the Maastricht Treaty in 1992, a special Protocol to the Lisbon Treaty was granted confirming that nothing in the Treaty would affect, *inter alia*, the constitutional protection of the right to life of the unborn and a further referendum in 2009 allowed the ratification of the Lisbon Treaty.

226. [T]he Court does not consider that the limited opinion polls on which the first and second applicants relied are sufficiently indicative of a change in the views of the Irish people Accordingly, the Court finds that the impugned restrictions in the present case, albeit different from those at issue in the *Open Door* case, were based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have relevantly changed since then. . . .

229. [With respect to whether the interference was “necessary in a democratic society”] the Court must examine whether there existed a pressing social need for the measure in question and, in particular, whether the interference was proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation. . . .

232. [T]he Court recalls that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when determining any case under Article 8 of the Convention. Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. . . .

233. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection

accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.

234. However, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus.

The existence of a consensus has long played a role in the development and evolution of Convention protections . . . , the Convention being considered a “living instrument” to be interpreted in the light of present-day conditions. . . .

235. In the present case, and contrary to the Government’s submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. In particular, the Court notes that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than in Ireland namely, a prohibition on abortion regardless of the risk to the woman’s life. Certain States have in recent years extended the grounds on which abortion can be obtained. Ireland is the only State which allows abortion solely where there is a risk to the life (including self-destruction) of the expectant mother. Given this consensus amongst a substantial majority of the Contracting States, it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leant in favour of broader access to abortion.

236. However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.

237. Of central importance is the finding in [*Vo v. France* (2004)] that the question of when the right to life begins came within the States’ margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State’s protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that,

even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention.

238. It is indeed the case that this margin of appreciation is not unlimited. . . . A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature. Nor is the regulation of abortion rights solely a matter for the Contracting States, as the Government maintained relying on certain international declarations. However, and as explained above, the Court must decide on the compatibility with Article 8 of the Convention of the Irish State's prohibition of abortion on health and well-being grounds on the basis of the above-described fair balance test to which a broad margin of appreciation is applicable.

239. From the lengthy, complex and sensitive debate in Ireland as regards the content of its abortion laws, a choice has emerged. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an abortion for those reasons, the option of lawfully travelling to another State to do so. . . .

241. Accordingly, having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn. . . .

243. [T]he third applicant's complaint concerns the failure by the Irish State to implement Article 40.3.3 of the Constitution by legislation and, notably, to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life of her pregnancy. . . .

253. [T]he ground upon which a woman can seek a lawful abortion in Ireland is expressed in broad terms . . . [N]o criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case law or otherwise, by which that risk is to be measured or determined, leading to uncertainty as to its precise application. . . .

[The absence of medical guidelines and of a framework to resolve differences of opinion among doctors or between the woman and her doctor constituted a further cause of uncertainty.]

254. Against this background of substantial uncertainty, the Court considers it evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act. . . .

258. [T]he Court does not consider that the constitutional courts are the appropriate fora for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State. In particular, this process would amount to requiring the constitutional courts to set down on a case by case basis the legal criteria by which the relevant risk to a woman's life would be measured and, further, to resolve through evidence, largely of a medical nature, whether a woman had established that qualifying risk. However, the constitutional courts themselves have underlined that this should not be their role. . . .

259. In addition, it would be equally inappropriate to require women to take on such complex constitutional proceedings when their underlying constitutional right to an abortion in the case of a qualifying risk to life was not disputable. . . .

263. [C]onsequently, the Court considers that neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which allowed the third applicant to establish her right to a lawful abortion in Ireland. . . .

FOR THESE REASONS, THE COURT

4. *Holds* by eleven votes to six that there has been no violation of Article 8 of the Convention . . . as regards the first and second applicants;

5. *Holds* unanimously that there has been a violation of Article 8 of the Convention . . . as regards the third applicant [for failing to provide] an accessible

and effective procedure by which [she could have] established whether she qualified for a lawful abortion in Ireland [under its constitution].

CONCURRING OPINION OF JUDGE LÓPEZ GUERRA, JOINED BY
JUDGE CASADEVALL

5. [I]t cannot be excluded that in other cases, in which there are grave dangers to the health or the well-being of the woman wishing to have an abortion, the State's prohibition of abortion could be considered disproportionate and beyond its margin of appreciation. In such cases, this would result in a violation of Article 8 of the Convention, since the latter protects the right to personal autonomy as well as to physical and psychological integrity.

CONCURRING OPINION OF JUDGE FINLAY GEOGHEGAN

9. [T]he Court had no facts in relation to the existence or otherwise of a public interest in the protection or recognition of a right to life of the unborn in the majority Contracting States which permit abortion on broader grounds than in Ireland. Unless there exists in each Contracting State an analogous public interest in the protection of the right to life of the unborn to that in Ireland, it is difficult to understand how the Contracting States could be engaged in striking an analogous balance to that required to be struck by the Irish State. The consensus to be relevant must be on the striking of the balance which in turn, on the facts of these cases, depends on the existence in each Contracting State of a public interest in the protection of the right to life of the unborn. No such public interests were identified.

10. Accordingly, it appears to me that it follows from the existing case law of the Court, (and using consensus in the sense used therein) that the consensus identified in the judgment amongst a majority of Contracting States on abortion legislation is not a relevant consensus with the potentiality to narrow the breadth of the margin of appreciation to be accorded to the Irish State in striking a balance between the competing interests. If however, contrary to the views expressed, the consensus is relevant, then I agree with the subsequent reasoning and conclusion of the Court that it does not narrow the broad margin of appreciation to be accorded to the Irish State.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS,
TULKENS, FURA, HIRVELÄ, MALINVERNI AND POALELUNGI

2. [L]et us make clear, from the outset, that the Court was not called upon in this case to answer the difficult question of "when life begins." This was not

the issue before the Court, and undoubtedly the Court is not well equipped to deal effectively with it. The issue before the Court was whether, regardless of when life begins—before birth or not—the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: there is an undeniably strong consensus among European States—and we will come back to this below—to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus. . . .

5. [A]ccording to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that that consensus decisively narrows the margin of appreciation which might otherwise exist if no such consensus were demonstrated. This approach is commensurate with the “harmonising” role of the Convention’s case-law: indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence. The harmonising role, however, has limits. One of them is the following: in situations where it is clear that on a certain aspect of human rights protection, European States differ considerably in the way that they protect (or do not protect) individuals against conduct by the State, and the alleged violation of the Convention concerns a relative right which can be balanced—in accordance with the Convention—against other rights or interests also worthy of protection in a democratic society, the Court may consider that States, owing to the absence of a European consensus, have a (not unlimited) margin of appreciation to themselves balance the rights and interests at stake. Hence, in those circumstances the Court refrains from playing its harmonising role, preferring not to become the first European body to “legislate” on a matter still undecided at European level.

6. Yet in the case before us a European consensus (and, indeed, a strong one) exists. We believe that this will be one of the rare times in the Court’s case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned; the argument used is that the fact that the applicants had the right “to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland” suffices to justify the prohibition of abortion in the country for health and well-being reasons,

“based as it is on the profound moral views of the Irish people as to the nature of life.”

7. We strongly disagree with this finding. Quite apart from the fact, as we have emphasised above, that such an approach shifts the focus of this case away from the core issue, which is the balancing of the right to life of the foetus against the right to health and well-being of the mother, and not the question of when life begins or the margin of appreciation afforded to States on the latter issue, the majority bases its reasoning on two disputable premises: first, that the fact that Irish law allows abortion for those who can travel abroad suffices to satisfy the requirements of the Convention concerning applicants’ right to respect for their private life; and, second, that the fact that the Irish people have profound moral views as to the nature of life impacts on the European consensus and overrides it, allowing the State to enjoy a wide margin of appreciation.

8. On the first premise, the Court’s argument seems to be circular. The applicants’ complaints concern their inability to have an abortion in their country of residence and they consider, rightly, that travelling abroad to have an abortion is a process which is not only financially costly but also entails a number of practical difficulties well illustrated in their observations. Hence, the position taken by the Court on the matter does not truly address the real issue of unjustified interference in the applicants’ private life as a result of the prohibition of abortion in Ireland.

9. As to the second premise, it is the first time that the Court has disregarded the existence of a European consensus on the basis of “profound moral views.” Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court’s case-law. A case-law which to date has not distinguished between moral and other beliefs when determining the margin of appreciation which can be afforded to States in situations where a European consensus is at hand.

10. Finally, a word on the sanctions which can be imposed for abortions performed in Ireland in situations going beyond the permissible limits laid down by Irish (case-)law. Although the applicants were not themselves subjected to the severe sanctions provided for by Irish law—since they went abroad to have an abortion—the fact remains that the severity of the (rather archaic) law is striking; this might also be seen as an element to be taken into account when applying the proportionality test in this case.

11. From the foregoing analysis it is clear that in the circumstances of the case there has been a violation of Article 8 with regard to the first two applicants.

Return to the puzzle presented by *Hirst* and *A, B and C* about member state variation and Convention rights. How does one explain the Court's judgment in *A, B and C*, given the Court's finding "that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law," that at least thirty states in Europe allow "abortion on request," that forty states allow abortion on "health and well-being grounds," that only three states have more restrictive access to abortion services than Ireland?

Is *A, B and C* to be read as abortion exceptionalism? As Ireland exceptionalism? When thinking about these issues, review the excerpts below. Siegel charts the development and continuing evolution of constitutional law governing women's access to abortions, while Mullally details the development and evolution of Ireland's positions on abortion. Observe the dynamic dimensions of each. What gaps and silences in *A, B and C* do these accounts illuminate?

Reva B. Siegel
*The Constitutionalization of Abortion**

This chapter . . . asks how abortion was constitutionalized. . . .

Constitutional decisions on abortion began in an era when a transnational women's movement was beginning to contest the terms of women's citizenship, eliciting diverse forms of reaction, both supportive and resisting. As I show, the woman question haunts the abortion decisions, where it is initially addressed by indirection, and over time comes to occupy a more visible role, whether as an express concern of doctrine, *or* as a problematic nested inside of the growing body of law articulating a constitutional obligation to protect unborn life.

*Excerpted from Reva B. Siegel, *The Constitutionalization of Abortion*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld & András Sajó eds., 2012).

The body of constitutional law on abortion that has grown up since the 1970s is concerned with the propriety, necessity, and feasibility of controlling women's agency in decisions concerning motherhood. Some courts have insisted that government should respect women's decisions about motherhood, while many others have insisted that protecting unborn life requires government to control women's decisions about motherhood. Over the decades a growing number of courts have allowed government to protect life by persuading (rather than coercing) women to assume the role of motherhood. Across Europe, a growing number of jurisdictions are now giving women the final word in decisions about abortion—on the constitutional ground that it is the best way to protect unborn life. These remarkable developments suggest deep conflict about whether law should and can control women's agency in decisions about motherhood. . . .

[S]ome jurisdictions require government to respect women's dignity in making decisions about abortion, and consequently require legislators to provide women control, for all or some period of pregnancy, over the decision whether to become a mother. Many jurisdictions require constitutional protection for unborn life, criminalizing abortion while permitting exceptions on an indications basis to protect women's physical or emotional welfare, but not their autonomy. Yet other jurisdictions protect unborn life through counseling regimes that are result-open; these jurisdictions begin by recognizing women's autonomy for the putatively instrumental reason that it is the best method of managing the modern female citizen, and then come to embrace protecting women's dignity as a concurrent constitutional aim of depenalizing abortion. . . .

[Of these three models, the first to emerge] constitutionalizes the regulation of abortion with attention to women's autonomy and welfare. It is associated with periodic legislation which coordinates values of decisional autonomy and protecting life by giving women control over the abortion decision for an initial period of the pregnancy only, thereafter allowing restrictions on abortion except on limited indications (*e.g.* for life or health). . . .

[O]ther jurisdictions follow the German tradition in constitutionalizing a duty to protect life; these jurisdictions require action in furtherance of the duty to protect, and typically require or authorize legislatures to criminalize abortion with certain exceptions or indications determined by a committee of doctors or some decision maker other than the pregnant woman. . . . Constitutionalization in this form has tended to incorporate gender-conventional, role-based views of women's citizenship—for example that the burdens of pregnancy are naturally assumed by women, or by women who have consented to sex, except when such burdens

exceed what is normally to be expected of women, at which point women may be exempt from penal sanction for aborting a pregnancy. . . .

Yet other jurisdictions begin from a constitutional duty to protect [unborn] life, and, like Germany, have begun to explore approaches for vindicating the duty to protect life that do not involve the threat of criminal prosecution. These jurisdictions constitutionally justify depenalization of abortion, coupled with abortion-dissuasive, result-open counseling, as more effective in protecting the unborn than the threat of criminal punishment. The justifications for life-protective counseling, as well as its form, are evolving over time, in ways that progressively incorporate values of women's autonomy. At a minimum, these jurisdictions recognize women as the type of modern citizens who possess autonomy of a kind that law must take into consideration if it hopes to affect their conduct; some go further and are beginning to embrace protecting women's dignity as a concurrent constitutional aim. . . .

[A]fter decades of conflict, a constitutional framework is emerging in Europe that allows legislators to vindicate the duty to protect unborn life by providing women dissuasive counseling and the ability to make their own decisions about abortion. Constitutionalization in this form values women as mothers first, yet addresses women as the kind of citizens who are autonomous in making decisions about motherhood, and may even warrant respect as such. The spread of constitutionalization in this form attests to passionate conflict over abortion and women's family roles; it also suggests increasing acceptance of claims the women's movement has advanced in the last forty years, however controverted they remain. Jurisdictions that permit result-open counseling in satisfaction of the duty to protect unborn life express evolving understandings of women as citizens, in terms that reflect community ambivalence and assuage community division, while continuing to engender change.

Siobhán Mullally
*Debating Reproductive Rights in Ireland**

Women's reproductive rights in Ireland have long been a contested terrain. As in many postcolonial states, the demarcation of gender roles in Ireland has always been intertwined with debates on national identity. . . . The overwhelming

*Excerpted from Siobhán Mullally, *Debating Reproductive Rights in Ireland*, 27 HUM. RTS. Q. 78 (2005).

push to define Ireland as “not-England” led to a search for distinguishing marks of identity. The Roman Catholic religion, adhered to by a majority of the Irish people, became one of these distinguishing identity markers. . . . When abortion came to the forefront as a political issue in the early 1980s, it was debated less on its own terms and more in terms of the consequences that freedom of choice would have for Ireland’s inherited religious-cultural traditions. The Catholic Right in Ireland, concerned with preserving the conservative ethos that permeates the Irish Constitution, has portrayed feminism and human rights discourse not only as a threat to Ireland’s “pro-life” and “pro-family” traditions, but also as a threat to Ireland’s sovereignty. . . .

[I]n 1983, the Irish Constitution was amended to recognize, under Article 40(3)(3), the “right to life of the unborn.” Under the 1861 Offences Against the Person Act, abortion was a criminal offense. However, prior to 1983, there was no explicit constitutional prohibition on abortion. The move to introduce a constitutional amendment banning abortion followed the Supreme Court’s . . . *McGee v. Attorney General* (1973) [that] concluded that the right to have access to contraceptives was protected as part of the personal right to marital privacy. Anti-abortion activists feared that a right to privacy, broadly interpreted, might be invoked by Irish courts to strike down legislation criminalizing abortion. For example, the *Roe v. Wade* (1973) decision in the United States was preceded by *Griswold v. Connecticut* (1965), a case similar to *McGee v. Attorney General*. To guard against a comparable development in Ireland, the Pro-Life Amendment Campaign (PLAC) was launched in 1981.

[T]he amendment campaign and the bitter debates that ensued have been described as a “second partitioning” of the state. Although PLAC was careful to employ secular language in its campaign, it clearly drew on a conservative Catholic ethos to support its claim of the absolute inviolability of fetal life. Recognizing this, each of Ireland’s Protestant Churches issued statements opposing the proposal for a “pro-life” amendment. The anti-amendment campaign argued that an absolute constitutional prohibition on abortion would deny non-Catholics equal rights to citizenship in Ireland and would perpetuate politics of exclusion. PLAC, however, continued to represent abortion as a “violent colonial tool” threatening the integrity of the Irish nation. Ultimately, the pro-life campaign prevailed. Significantly, however, the enacted amendment does recognize the need for “due regard to the equal right to life of the mother.” . . .

In *S.P.U.C. v. Grogan and Others* (1989), the Society for the Protection of the Unborn Child (SPUC) applied to the High Court for an injunction to prevent student groups from distributing information on abortion services available in the UK. The High Court requested a ruling from the European Court of Justice (ECJ)

as to: (a) whether abortion was a “service” within the meaning of the Treaty of Rome and; (b) whether student groups have a right under Community law to distribute information concerning abortion services available in other member states. At the ECJ, Advocate General Van Gerven concluded that in the absence of a uniform European conception of morals, state authorities were better placed to assess the requirements of public morals than were European institutions. . . .

The ECJ departed from [that] Opinion The ECJ defined abortion, “solely in terms of the possible commerce and profit resulting from it.” Questions relating to fundamental rights were dismissed as raising nonjusticiable moral rather than legal arguments. The ECJ concluded that the termination of a pregnancy in accordance with the law of the state in which it was carried out constituted a service within the meaning of the Treaty of Rome. However, the ruling was only a partial victory. Although the Court was willing to address concerns relating to trade in services, it refused to address reproductive health as a question of human rights. . . .

Although the ECJ’s ruling in the *Grogan* case was limited in scope, its potentially liberalizing impact on Ireland’s abortion law complicated national debates regarding European integration. As a constitutional referendum on the Treaty of the European Union (the Maastricht Treaty) loomed, the abortion debate became further entwined with debates on national sovereignty. The ECJ’s ruling in the *Grogan* case coincided with ongoing negotiations on the Maastricht Treaty. Concerned with the possibility of a backlash from anti-abortion groups, the Irish government added a protocol to the Maastricht Treaty, without consulting Parliament. The Protocol (No. 17) sought to protect Ireland’s constitutional prohibition on abortion from any change that might be required as a result of European Union membership.

Before the constitutional referendum on the Maastricht Treaty was to take place, however, a young woman’s body became the subject of further contestation between pro-choice and anti-abortion groups. In *Attorney General v. X* (1992), the Supreme Court of Ireland recognized a limited right to reproductive health. This case involved a fourteen year old girl who became pregnant as a result of a rape. The Attorney General, acting on information provided by the Director of Public Prosecutions secured an injunction restraining X from leaving Ireland for a period of nine months. Effectively, X was imprisoned within the state. The *X* case provoked a huge outcry at national and international levels. . . . The international media reported Ireland to be “backward,” “barbarous,” “punitive,” “priest-ridden” Embarrassed by this potentially damaging attention, the government undertook to pay all legal expenses arising from X’s appeal to the Supreme Court. The Supreme Court lifted the injunction, reversing the High Court’s ruling on the

substantive question of abortion. Pointing out the state's duty to have "due regard" for the life of the mother, the Supreme Court concluded that abortion was lawful in Ireland where there was a "real and substantial risk" to the life, as distinct from the health, of the mother. . . . In this case, medical evidence had been submitted to show the young woman's suicidal state of mind and the resulting threat to her life. In the Court's view, her right to terminate her pregnancy was therefore protected by the Article 40(3)(3) as amended in the Constitution. At the time that it was adopted, supporters of this amendment intended that it would absolutely prohibit abortion in Ireland. After the Supreme Court's ruling in *Attorney General v. X*, the amendment had been turned on its head to provide equal protection to the life of the mother.

The Supreme Court's judgment on the substantive issue of abortion was welcomed by the women's movement. However, its ruling on the right to travel raised widespread concern. . . .

[B]efore a further referendum on abortion could take place, European human rights law asserted its voice in the national debate. On 29 October 1992, the European Court of Human Rights (ECHR) ruled on the challenge brought against Ireland by the *Open Door Counselling & Dublin Well Woman* centres. Both Centers had been forced to close their nondirective pregnancy counseling services, following injunctions taken against them by SPUC. They now complained that this constraint on the provision of information violated their rights to privacy and to freedom of expression under the European Convention. . . . In a judgment clearly attempting to prevent encroachment upon contracting states' margin of appreciation, the ECHR concluded that Ireland's prohibition on abortion information fell within the scope of permissible restrictions on the right to freedom of expression. The ECHR found that the prohibition was prescribed by law and pursued a legitimate public aim, namely, the protection of public morals. However, the ECHR concluded that Ireland had not satisfied the requirement of proportionality. The absolute nature of the injunction against the applicants proved fatal, and the ECHR ruled that Ireland had violated Article 10 of the European Convention, protecting the right to freedom of expression. . . . [T]he ECHR held that it was unnecessary to consider the scope of the right to privacy. . . .

Less than one month after the ECHR's ruling in *Open Door Counselling and Others v. Ireland*, a further constitutional referendum on abortion was held. On 25 November 1992, the Irish people were asked to vote on three possible constitutional amendments. The first amendment proposed to roll back the Supreme Court's judgment in the *X* case and to prohibit abortion arising from a risk to a woman's life posed by a threatened suicide. The second and third

amendments sought to protect the right to travel and to provide and obtain information on abortion. The first amendment was defeated. The second and third proposed amendments were passed, thereby providing constitutional protection for the right to travel and to information. . . .



Observe how, over the last several decades, Ireland's national position on abortion was forged through transnational interactions, and now, in law and in practice, relies in part on cross-border travel. What difference does this account make for your views of the Court's judgment in *A, B and C*? The Court's reasoning?

Do your views about *A, B and C* have implications for your understanding of *Hirst*?